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COLLECTIVE REDUNDANCIES: EMPLOYERS' DUTY TO NOTIFY THE SECRETARY OF STATE

Response to consultation

SEPTEMBER 2006

Contents

Executive Summary

The Government issued a consultation document in March 2006 in which it proposed to make a minor change to the law on collective redundancies following the European Court of Justice judgment in the case of Junk v Kuhnel (C-188/03).

The consultation presented some draft regulations intended to effect the change. They make it clear that the notification to the Secretary of State of proposed redundancies should take place before a notice of dismissal has been issued. This is in addition to the existing requirements that an employer proposing to dismiss as redundant 100 or more employees, or between 20 and 99 employees, at one establishment should notify the Secretary of State ninety days and thirty days respectively prior to any of those dismissals taking effect.

23 responses were received which were generally supportive of the Government's specific proposal. The Government therefore intends to proceed with it's proposed change, bringing it into effect on 1 October 2006.

Some respondents were concerned about other elements of the legislation on collective redundancies, in particular that the existing legislation relating to the requirement to carry out consultation in "good time" may lack clarity as it did not explicitly state that such consultation should be completed before any notices of redundancy have been issued. Whilst the Government maintains that existing legislation can be interpreted as consistent with the Directive and that there is therefore no need for a legislative amendment, it acknowledges the request for greater coherence. Therefore, DTI will shortly publish revised guidance which will set out in more detail how the Government believes existing legislation should be interpreted, in the light of the judgment.

Respondents also raised a number of additional matters which were outside of the scope of the consultation and have not been considered at this juncture. The DTI will consider these matters for possible inclusion in the review of the statutory redundancy scheme.

CHAPTER 1

Introduction

1.1 The DTI issued a consultation paper in March 2006 seeking views on making a minor amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act") as a result of the European Court of Justice decision in Junk v Kuhnel (the "Junk" decision).

1.2 The closing date was 9 June 2006. 23 responses were received in total. These included employers groups, trade unions, lawyers and individuals.

1.3 A list of all respondents is attached at Annex A. Copies of the original responses are available on request. Please contact Steven Greenwell on 020 7215 5056 or via email at steven.greenwell@dti.gsi.gov.uk for further information.

1.4 The breakdown of 23 responses received is as follows:

Employers' Organisations	6
Trade Unions	9
Lawyers	5
Government Agency	1
Other (including private individuals)	2

1.5 The DTI is grateful to respondents for their time and thought. Views expressed have been carefully analysed.

CHAPTER 2

Background

2.1 Under existing legislation, employers are required to notify the Secretary of State when they are proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days. In cases where the employer proposes to dismiss 100 or more employees as redundant, the Secretary of State must be given at least 90 days' notice before the first of those dismissals take effect (at least 30 days where between 20 – 99 redundancies are proposed).

2.2 The Junk decision made clear that notifications should be made before any notice of dismissal has been issued. The Government considers that the proposed change is necessary in order to correctly implement the EC Collective Redundancies Directive following the Junk decision.

2.3 The Junk decision also refers to consultation with employee representatives. It stated that such consultation should be completed before notices of dismissal have been issued. The Government stated in the consultation paper that it considers that existing legislation is capable of being read in a manner that is consistent with the Junk decision and therefore no legislative amendment is proposed in respect of that element of the Court's decision.

2.4 The consultation specifically posed four questions for respondents to answer. The responses to these four questions are summarised in section 3. In their replies to these questions, respondents also referred to matters relating to wider redundancy law, including the requirement to consult employee representatives. These comments are discussed separately in section 4.

CHAPTER 3

Responses by Question

Question 1. Do consultees agree that this change to the law [on notifying redundancies to the Secretary of State] is required, following the Junk judgment? If not please explain your reasons and any alternative approach you may favour.

3.1 Respondents were supportive of the Government's plans to amend s193 of the Act. There were 20 responses to this question, 19 of which supported the proposal as a sensible and appropriate way of dealing with the notification of the public authorities aspect of the judgment. For example, the TUC felt that the change is necessary, represents good practice and should enable the Government to respond more rapidly and the Employment Lawyers' Association agreed with the conclusions reached in the consultation paper in this respect.

3.2 Thompsons Solicitors said that under the proposed change, an employer could technically send out the dismissal notices one day after notifying the Secretary of State. One respondent, Prospect, commented on the situation in other states where there is a requirement for an employer to seek approval from a public authority before making redundancies. The North Western Local Authorities' Employers' Organisation felt that this amendment would have the effect of significantly lengthening the consultation process and in some cases may increase it to at least 174 days.

3.3 The Government notes that a large majority of respondents agree that the proposed change to the law is required following the judgement. The Government maintains that s193, as currently drafted, allows notification to the Secretary of State by an employer after he has issued notices of dismissal. This is not permissible following the Junk decision and therefore the amendment is required.

3.4 The Government does not consider that the proposed amendment on notifications would, of itself, significantly prolong the process of making redundancies. However, the Government recognises that the Junk judgment (rather than the proposed amendment to s193) may have the effect of prolonging the procedure for handling collective redundancies as previously some employers may have issued notices of dismissal before the consultation process had finished. That effect can be mitigated if employers approach the consultation process seriously and urgently, and thereby ensure the employee concerns and questions about the proposed redundancies are expeditiously addressed.

3.5 The Government considers there is no implication in the Junk judgment to oblige the Secretary of State to approve redundancies after he is notified.

As the Government made clear in the consultation document, the sole focus of the proposed amendment is to ensure that UK law faithfully implements the EC Directive in the light of the Junk judgment.

3.6 **The Government therefore reaffirms its commitment to make the change**.

Question 2. Do you have any comments on the detailed drafting of the proposed changes to the law? If so, please specify.

3.7 This question asked consultees to consider whether there were any technical consequences of the detailed drafting of the proposal. There were a number of comments in this section which concerned aspects of the judgment which were outside of the scope of this consultation and which are discussed at section 4.

3.8 Aside from these comments, the majority of respondents felt that the drafting was satisfactory. The Law Reform Committee of the Bar Council described it as "clear and concise", whilst Prospect felt that the drafting was "fine".

3.9 One consultee, Thompsons Solicitors, felt that the current wording of s193(1) and (2) ("at least" 30/90 days before the first dismissal takes effect) could be interpreted as to give the impression that dismissal notices could post date notification to the Secretary of State.

3.10 The Government notes that the overwhelming majority of respondents either did not comment on the detailed drafting, or felt that the drafting achieved it's stated purpose. The Government notes the concerns Thompsons has in this respect but does not consider that this interpretation is at all likely.

3.11 **On this basis, the Government proposes to lay the Regulation in the form that it was set out in the consultation document.**

Question 3. Are there any other consequences of these Regulations, which the Government has not anticipated? Please specify.

3.12 There were 5 respondents to this question, 3 of whom did not foresee any unanticipated consequences.

3.13 Two respondents suggested that the Government should revise the Regulations to make it clear that employers should notify employee representatives *at the same time* as they make notifications to the Secretary of State. The POA for example said that it could envisage employers notifying employee representatives after notifying the Secretary of State, and that cannot be an intended consequence of the amendment.

3.14 The Government notes that the majority of respondents did not foresee any further consequences of the proposed amendment. The proposed change is minor and it was not anticipated that there would be any further consequences.

3.15 The Government notes the view that some respondents would like the notification to the Secretary of State to be simultaneously copied to the employee representatives. Currently, the law simply requires the employer to copy the notification to each of the employee representatives. No evidence has been presented by respondents suggesting that there is a significant gap between the sending of the notification to the Secretary of State and the copying of that notification to employee representatives. Indeed, as consultation will generally have begun before the notification is sent to the Secretary of State, the employee representatives in many cases will already be aware of the information contained in the notification. The Government does not consider that it is necessary to make the additional change about the timing of the copying of the notification to employee representatives.

Question 4. What will be the impact of these Regulations on employer costs or otherwise? Do you agree with the assessment of the costs and benefits made in the partial Regulatory Impact Assessment? If not, please specify your reasons and provide additional information to assist the assessment.

3.16 There were 11 responses to the question. All those who responded agreed with the Partial Regulatory Impact Assessment's appraisal of the likely costs arising from the proposed change or had no comment to make on it.

3.17 The CBI and the North West Local Authorities' Employers' Organisation felt that the overall costs of the judgement were higher because, in certain circumstances, employers are now required to consult for longer periods of time. The Government notes these observations and discusses them at paragraph 3.4. However, the RIA focuses on the effect of the proposed amendment, and does not seek to assess the costs of existing law in the wake of the Junk judgment.

3.18 The Government notes the agreement with its assessment of costs resulting from the proposed legislative amendment. **The Government re-affirms its view that the amendment of itself will have a minimal regulatory impact and therefore the final RIA has l been drafted accordingly.** The final RIA is available on the DTI website at http://www.dti.gov.uk/consultations/ria/index.html

CHAPTER 4

Additional Comments

4.1 Respondents used the consultation as an opportunity to raise a number of collective redundancy issues that did not concern the proposed change to the law on notifying the Secretary of State. Some of those comments related to the implications of the Junk judgment for other parts of the legal framework, especially the part concerning the obligation on the employer to consult employee representatives. We will firstly address those comments. We will then refer to the other observations about redundancy law, which were, strictly speaking, outside the scope of the consultation.

4.2 20 respondents referred to the impact of the Junk judgment on the requirement to consult, 16 of which considered that this part of the law should also be changed. The TUC, in common with many respondents, argued that the Government should amend s188 to make it explicit that consultation should be completed before any redundancy notices have been issued to workers. Further, they argued that the Government would fail to implement the Directive correctly unless such an amendment were made.

4.3 A number of other respondents, including the Employment Lawyers' Association, felt that whilst the law on collective redundancies does not contain provisions which are inconsistent with the judgment, it would be better if the requirement as to timing of consultation with employee representatives was expressly stated to avoid any ambiguity.

4.4 The CBI felt that the current requirement to consult with employee representatives in "good time", at least 90 days before the redundancies take effect, and to have completed the consultation before the redundancy notices are issued places an onerous burden on employers. They thought that employers would take a risk-averse approach and not issue redundancy notices before the 90-day period had ended even though the consultation with employee representatives had been completed well within that 90 day period. This in turn would mean that, given the existing statutory requirements regarding notices, it could take as long as 174 days in extreme cases between the beginning of consultation and the last of the redundancies taking effect. They therefore proposed that 90-day period should be reduced to 60 days to avoid unnecessary delay in carrying out redundancies.

4.5 The European Studies Group agreed with the consultation paper that there was no need to amend the requirement concerning consultation of employee representatives, although they felt that there was some confusion about how the timescales for notification, consultation and

notices periods operate and stated that further guidance would be welcome. The Newspaper Society also felt that there was confusion amongst employers about when notices of redundancy could be issued.

4.6 A number of consultees, including the TUC, Prospect, NASUWT, ACM and the RMT considered that the Junk judgment had implications for the quality of the consultation with employee representatives. They considered that the current obligation of the employer to undertake those consultations 'with a view to reaching agreement' with the employee representatives does not go far enough because it does not impose an obligation to negotiate' with the representatives. The TUC considered that in addition the DTI's guidance on this matter should be expanded.

4.7 The Government remains of the view that section 188 does not contain provisions which are inconsistent with the decision in Junk. Its provisions closely mirror those of the Collective Redundancies Directive. On the evidence so far available, the Government does not consider that the 90 day period, in combination with the Junk judgment, imposes excessive and costly rigidities. It does not therefore consider that the case to shorten the period to 60 days is persuasive. However, the Government acknowledges that there is scope for further clarification in addition to its earlier amendment to the DTI's guidance. In particular, the guidance should elaborate the possible inter-play between the 90 day period, the completion of consultation and the issuing of redundancy notices. The Government will therefore look again at the way the guidance discusses the process of consultation but it does not accept the argument that the current requirement to consult "with a view to reaching agreement" is inconsistent with the wording of the Junk judgment.

4.8 **Therefore, the Government intends to make further revisions to the DTI Guidance to make clear how existing legislation is to be interpreted in the light of the Junk judgement. The aim is to have the new guidance in place by 1 October this year.**

4.9 Consultees also raised a number of issues which were concerned with wider redundancy law.

(a) Minimum threshold (20 employees)

4.10 A number of respondents including the RMT, TUC and Prospect made comments concerning the fact that employers are only required to consult where they are proposing to make 20 or more employees redundant. They felt that this requirement should be abolished or at least reduced. The ACM felt that the 20 employee figure was an arbitrary one and that it hindered their ability to negotiate on behalf of members in cases where redundancies were introduced in stages of less than 20 employees.

4.11 One respondent, the Forum of Private Business, felt that the current consultative obligations were too onerous on employers, particularly small business, and that the limit should be raised from 20 employees to 50 employees.

(b) Definition of 'Establishment'

4.12 A number of respondents including Prospect and the TUC argued that they would like to see the definition of 'establishment' clarified as they felt that current practice could allow employers to evade consultation duties.

(c) Timing of Consultation

4.13 A significant number of respondents, including the TUC, Thompsons Solicitors and the North Western Local Authorities' Employers' Organisation felt that the requirement of an employer to begin consultations when he is "proposing" redundancies should be replaced with a requirement to begin consulting when redundancies are being "contemplated". Respondents felt that by replacing "proposed" with "contemplated" would allow for consultation with employee representatives to be carried out at a much earlier stage in the process and reflect more accurately a number of recent court decisions. Thompsons suggest that there would be a further advantage in that s188 would then be consistent with paragraph 1(1) of Schedule 2 of the Employment Act 2002 (dismissal and disciplinary procedures). The provision requires the employer to provide written information to an employee about the conduct.... "which lead him to contemplate dismissing or taking disciplinary action".

(d) Enforcement and Remedies

4.14 Prospect and the Association of College Management felt that there needed to be a far more effective penalties regime. They felt that legal provisions are ineffective because they operate after the event and they felt that 13 weeks' pay is not a significant enough deterrent to an employer who decides not to consult effectively.

4.15 These wider points about the law on collective redundancies are outside the scope of the present consultation, as the Government made it clear that it was consulting only on the consequences of the Junk judgment. The Government does not therefore intend to comment on these various suggestions in this response document.

4.16 However the Government is undertaking a review of the statutory redundancy scheme. This autumn, the Government will take stock of the review, and decide its future direction. At that stage, the DTI may consider any representations to widen the scope of that review and the feasibility of embracing some aspects of collective redundancy law. Please contact the DTI via email on Enquiries@dti.gsi.gov.uk for more information on the review of the statutory redundancy scheme.

ANNEX A

Organisations that responded

A list of those who responded publicly to the consultation:

Bar Council

Employment Lawyer's Association

GMB

The Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers

North Western Local Authorities Employment Sector

Forum of Private Business

Public and Commercial Services Union

Thompsons Solicitors

Eversheds LLP

European Studies Group

Confederation of British Industry

Trades Union Congress

The Newspaper Society

Amicus

National Union of Rail, Maritime and Transport Workers

Prospect

National Association of Schoolmasters Union of Women Teachers

Heating and Ventilating Contractors' Association

Law Society

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