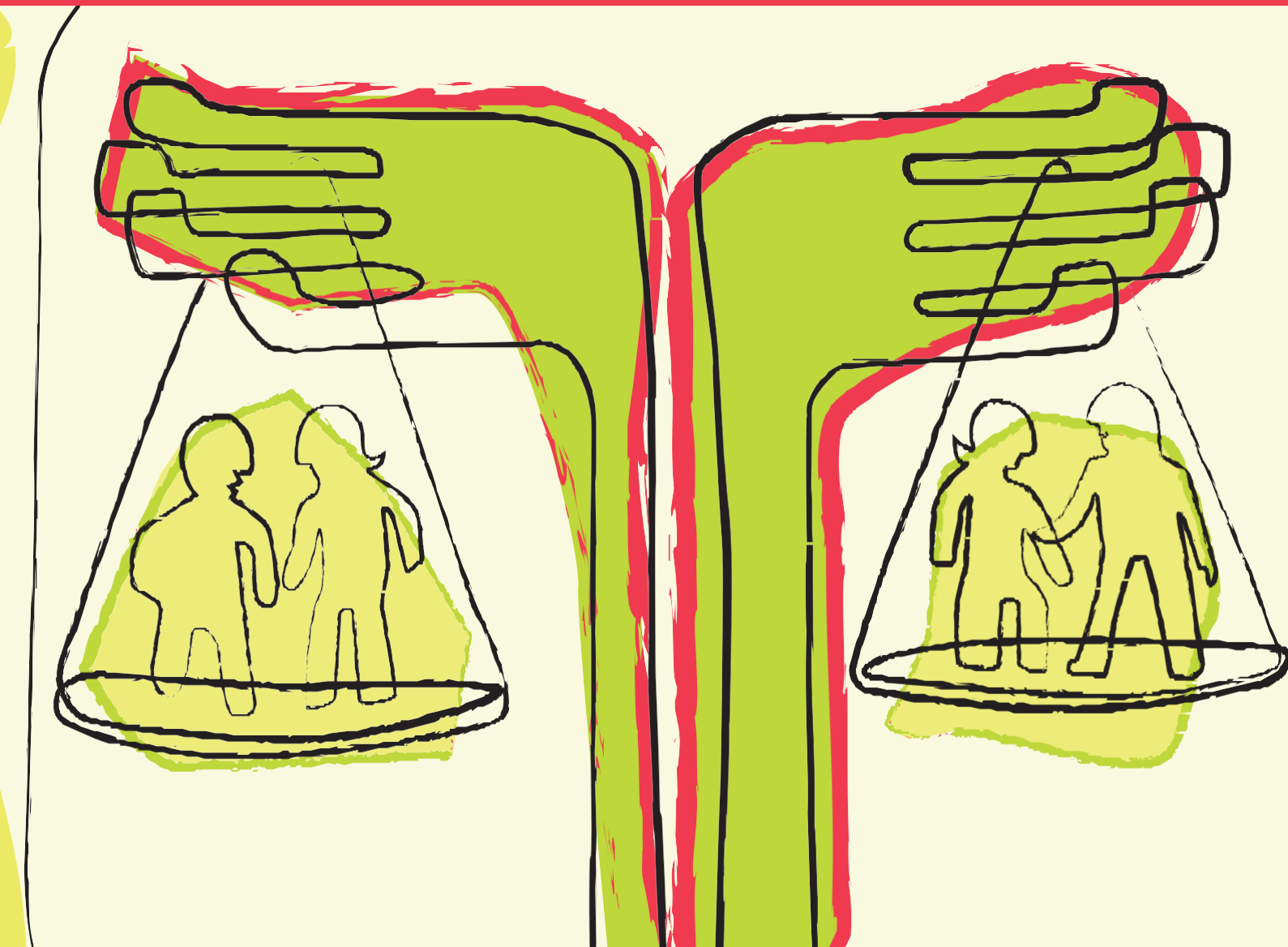


HOW TO GUIDE

Collective Redundancy Consultation



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Employment Law Solicitors



1. Legal Background

Under the Trade Union and Labour Regulations (Consolidation) Act 1992 (TULRCA) an employer which proposes to dismiss

- by reason of **redundancy**
- **20** or more employees
- at **one establishment**
- within a **90 day period**

must carry out **collective consultation** with **employee representatives**.

For this purpose, dismissal by reason of redundancy is defined as;

“Dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.”

Note: This definition is different from and much broader than the definition of redundancy for other legal purposes. It covers not only situations where jobs are disappearing because of closure of workplaces or reduced staffing needs but also situations where dismissals are part of a reorganisation where there is no reduction in overall numbers. For example, an employer may wish to change the contracts of 20 or more employees. If the employer decides to terminate the contracts and issue new ones these dismissals would be classed as redundancy for the purpose of collective redundancy, and would trigger the statutory consultation procedure.

2. The meaning of “at one establishment”

The meaning of “at one establishment” is not defined within TULRCA. Earlier cases suggested that any unit which was geographically and organisationally separate from another of an employer’s units was “one establishment”. But in 2012 the case of *USDAW v Ethel Austin Ltd 2012*, also known as ‘The Woolworths Case’ held that, due to the fact that TULRCA is incompatible with the European Directive on which it is based, the words “at one establishment” must be disregarded for the purposes of any collective redundancy exercise involving 20 or more employees. This meant that employers with multiple branches must treat all of their branches as “one establishment.” After a reference to the Court of Justice of the European Union, the Court of Appeal held that “establishment” is the entity or “unit” and that each branch was a separate “establishment.”

3. What is required by law when consulting – When does the duty arise?

When making 20 or more redundancies at one establishment within a 90 day period, the employer **must** do the following:

- Consult with any recognised trade union or, if none,

with other elected representatives;

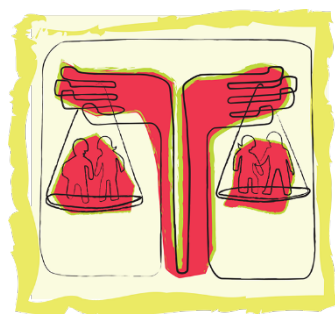
- Start the consultation **in good time** – at **least 30–45 days** before the first dismissal takes effect, depending on the overall number of redundancies; (20–99 redundancies = 30 days, 100+ redundancies = 45 days). Remember, no dismissals can take effect until consultation is complete and the minimum period of 30 or 45 days have elapsed;
- Consult on ways of avoiding dismissals, reducing the numbers to be made redundant and mitigating the effect of the dismissals;
- Disclose in writing to the appropriate representatives certain information concerning the proposed dismissals;
- Notify the Secretary of State for the Department of Business, Innovation and Skills at least (30 or 45) days in advance of the first dismissal taking effect.

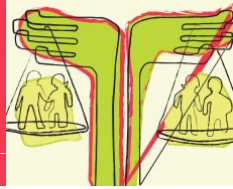
4. Whom to Inform and Consult

The obligation on the employer is to consult “appropriate representatives” of the “affected employees.” The employer must therefore first identify the affected employees and then their appropriate representatives. “Affected employees” are those who may be “affected by the proposed dismissals or who may be affected by measures taken in connection with those dismissals.” The term extends beyond those immediately at risk of dismissal to include those affected by measures associated with the redundancies i.e. those that may be expected to take on additional duties.

“Appropriate representatives” covers three separate potential categories of representatives:

- Representatives of a recognised trade union: where an independent trade union is recognised by the employer that must be consulted;
- A standing body of elected or appointed representatives who, although not specifically elected or appointed for the purpose of redundancy consultation, can properly be taken to have authority from the employees to receive information and to be consulted about the proposed dismissals on their behalf;
- Representatives directly elected by employees affected by a specific redundancy proposal for the purpose of consultation on that proposal: in the absence of a recognised trade union or a suitable standing body of elected or appointed representatives the employer must invite affected employees to elect representatives for this purpose.





5. Direct elections

It is the employer's responsibility to organise any necessary election, settling the number and constituencies of any representatives, inviting nominations and, if necessary because there are more nominations than vacancies, conducting secret ballots. Candidates must be affected employees and no affected employee must unreasonably be excluded from standing for election. All affected employees must be entitled to vote in any ballot.

Top Tip: There is no prescribed procedure for the secret ballot. This can be a physical box with paper slips, or can be conducted by email, often to an email address set up for the purpose.

6. The Process of Consultation

Consultation must begin in good time. There are minimum time periods which apply depending on how many proposed dismissals there are. Where there are between 20 and 99 dismissals to be made, 30 days must elapse before redundancies take effect. Where there are 100 or more dismissals to be made, the minimum time period is 45 days. Consultation begins with the provision of information on the proposals to the representatives. The following information must be given in writing, as detailed in Letter 1:

- The reasons for the proposed dismissals.
- The numbers and descriptions of employees whom it is proposed to dismiss as redundant.
- The total number of employees of any such description employed by the employer at the establishment in question.

Top Tip: Take care to consider in advance what you define as the "establishment" and seek advice if in doubt. The 'Woolworths' case provided some welcome clarity, but other cases contain more detail and there are potentially costly consequences attached to misapplying the definition.

- The proposed method of selecting employees who may be dismissed i.e. selection matrix.
- The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
- The proposed method of calculating the amount of any redundancy payments to be made (including, any amount over and above the statutory redundancy payment) to employees who may be dismissed.
- "Suitable information" about its use of agency workers i.e. how many there are, the work they do and where they work.



Letter 1 - Informing Employee Representatives of proposed collective redundancies:

Letter 1

"Dear [Name]

Proposed redundancies at [location[s]]

Following our previous [discussions OR correspondence], I am writing to confirm that [Name of employer] is proposing to make a number of redundancies at [location[s]]. As you may know, under section 188 of the Trade Union and Labour Relations [Consolidation] Act 1992, [Name of employer] must consult with appropriate representatives of the affected employees where it is proposing to make 20 or more employees redundant within a period of 90 days.

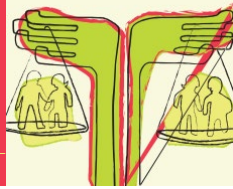
[You have been elected by a ballot of the affected employees to act as their elected employee representatives in relation to this information [and consultation] process OR You are a representative of the [Name] trade union, which [Name of employer] recognises in respect of [describe category of the affected employees]]. [Name of employer] is therefore providing you with the following relevant information:

- It is proposed to make redundancies at [location[s]] because [reasons for the redundancies].
- The proposed redundancies would affect [number and description of affected employees] out of a total of [number and description] employees who are employed at [location[s]].
- It is proposed to select which employees to make redundant on the basis of [details].
- It is proposed to carry out the dismissals of those employees who would be made redundant as follows: [details].
- It is proposed to pay those employees who are made redundant their statutory redundancy payment [calculated in accordance with the attached schedule] together with an additional payment, calculated as follows: [details].
- There are currently [number] agency workers working temporarily for and under the supervision and direction of [Name of employer]. The parts of the undertaking in which they are working, and the types of work they are carrying out, are as follows: [Details].

[Name[s]] and I need to meet with all of the employee representatives to discuss the proposed redundancies and to consult with you over ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. [This consultation will be undertaken by [Name of employer] with a view to reaching an agreement.] I have arranged a meeting for [date/time/location] with all of the employee representatives to commence the consultation process.

Please let me know if you have any queries.

Yours sincerely,
A Manager"



7. More on Consultation

Consultation should be done with a view to reaching agreement on ways of avoiding the dismissals, reducing the number of dismissals and mitigating their consequences. An employer cannot simply explain and then implement its proposals. If counter proposals are made by representatives, the employer must listen and if they are turned down, reasoning needs to be given.

There is no set number or format of consultation meetings with representatives. Sufficient meetings need to be conducted to deal with issues raised. Minutes should be kept, and key points summarised in letters from the employer afterwards.

Where it is not reasonably practicable to consult in good time, or provide the information listed above due to special circumstances, the employer will be excused from complying fully with the duty. However, reasonable steps must be taken towards compliance as is reasonably practicable. Whether circumstances are regarded as "special circumstances" will be judged on the facts of the

case, however case law has shown that the courts have given it a very narrow interpretation. For example, imminent insolvency is unlikely to be a special circumstance.

8. Breach of the Duty

If any of the rules relating to information or consultation, or on the election of representatives are not complied with an employment tribunal has the power to make a **protective award**. The maximum protective award is **90 days' gross pay** for each dismissed employee. In a case where there has been some consultation but a breach of the duty in some respect, the amount of the award is determined by the seriousness of the employer's breach.

It is important to note that although complying with duty to collectively consult is not absolute protection against individual unfair dismissal claims, if collective consultation is carried out properly, the likelihood of success of unfair dismissal claims will be reduced.

