LEWIS SILKIN

Getting redundancy right in Northern Ireland – Part 2: Navigating collective redundancies with care

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Redundancies in Northern Ireland are reaching their highest level in almost five years. Getting a collective redundancy process right has never been more important.

With the rising cost of living, higher National Minimum Wage rates and increased employer National Insurance costs, many Northern Ireland businesses are feeling the squeeze. For some, this means large-scale redundancies, requiring a process that must be handled carefully to ensure compliance and protect the business.

In this second part of our series on "Getting Redundancy Right", we break down the legal requirements of collective consultation and set out practical steps to help you navigate a larger-scale redundancy process with confidence. If you are proposing to make fewer than 20 employees redundant, see Part one of our series, **handling individual redundancies with care**.

Navigating collective redundancies with confidence

Where you propose to make 20 or more employees at a single establishment redundant within a period of 90 days or less, there are certain legal obligations regarding the consultation process that must be met to avoid one of the most significant liabilities that an employer may face by way of employment law claims, separate from unfair dismissal or discrimination. These obligations are additional to the general principles applicable to a redundancy situation as set out in Part one of our series, here.

Employers are also required by law to notify the Department for the Economy of any proposal to make large scale redundancies at a single establishment. More details below.

What is collective redundancy consultation?

Collective redundancy consultation is a formal process by which an employer collectively discusses the redundancy situation with employee representatives, with a view to reaching agreement on the way forward. It's designed to ensure employees are properly informed, consulted and given a genuine chance to influence the outcome of the process as a whole, and takes place within a specified timeframe before the individual consultation process begins.

When does the duty to collectively consult arise?

- When you are proposing to dismiss 20 or more employees
- At one establishment (usually a unit/workplace to which the redundant workers are deployed to do their work)
- Within a period of 90 days or less

The duty to consult is triggered when you have "proposals" to dismiss. This means you must have formulated a plan that is likely to result in dismissals. It is extremely important that consultation begins before any final decisions have been taken. If you don't start consultation when your proposals are still fairly tentative, there is a risk that you will be unable to hold meaningful discussions with the employees.

The definition of redundancy for the purpose of collective consultation is wider than for individual redundancies and includes a dismissal for any reason not related to the individual employee. For example, a requirement to inform and collectively consult could arise if you are proposing to dismiss a large number of employees and rehire them in the context of changing their terms and conditions of employment.

In NI, dismissals occurring on the expiry of a fixed-term contract are included in the definition of dismissals.

If you are proposing more than 20 redundancies across a number of workplaces, but less than 20 at any single location, you must consider whether the workplaces should be treated as a single "establishment" so as to trigger your duty to collectively consult. This will depend on factors such as whether:

- The unit performs specific tasks; and
- It has facilities such as a workforce and an organisational structure, to enable it to perform those tasks.

Who should I inform and consult?

Employee Representatives

The legal duty on employers is to inform and consult *appropriate representatives* of the *affected employees*.

"Affected employees" includes employees who are at risk of dismissal, and any other employees who are affected, for example because their job duties may change as a result of restructuring.

If a trade union is recognised by the affected employees, the collective consultation must be held with authorised trade union official(s). If a union represents only some of the affected employees, representatives will need to be elected for the remaining staff.

Informing the Department for the Economy NI

Where the duty to inform and consult arises, you must also notify the Department for the Economy of the proposed redundancies, by completing and submitting an HR1 Form, which must be submitted at least:

- **30 days** before the first redundancy where there are **20 – 99 proposed redundancies**, and before the individuals have received personal notice of termination; or
- **90 days** before the first redundancy where there are **100 or more proposed redundancies**, and before the individuals have received personal notice of termination.

The HR1 Form can be submitted before the election of employee representatives and updated once the employee representatives are confirmed. Employee representatives should also be given a copy of the form and any amended versions.

Electing employee representatives

The affected employees should be provided with nomination forms following the initial "town hall" meeting (or announcement of the redundancy process) and, where there are more employees nominated than needed as representatives, there will need to be an election.

There are specific statutory rules to govern elections, such as voting taking place in secret, and a duty on you as the employer to ensure the election is fair. It is also necessary that the elected representatives reflect the different functions of the business in which the affected employees work (for example, HR, sales etc.) or different sites.

Elections typically take at least a week to complete, and longer where the numbers of affected employees are high. The results of the election should be communicated to the affected employees and the elected employee representatives should be 'introduced' to them.

Any employee who is affected by the proposed redundancies can stand for election as an employee representative. Employees standing for or voting in the election, and those elected as representatives, are protected against detrimental treatment. This doesn't mean that they cannot be selected for redundancy, but they must not be disadvantaged because they stood for or voted in the election, or were elected as a representative.

When should consultation begin?

Collective consultation begins with the provision of information on your proposals to the appropriate representatives. Consultation must begin in good time and within specific timeframes depending on the scale of the redundancies proposed. At the very least, consultation must begin:

- **30 days** before the first person is made redundant, if **20 to 99** employees are to be made redundant at one establishment over a period of 90 days or less; or
- **90 days** before the first person is made redundant, if **100 or more** employees are to be made redundant at one establishment over a period of 90 days or less.

N.B. these timeframes differ in GB, where the requirements are 30 days and 45 days respectively.

Prior to commencing the consultation process, you should:

- Consider the rationale for the redundancies, general numbers and areas of redundancies
- Establish constituencies and consider the number of employee representatives required
- Be aware of any absentees to be included (e.g. those on maternity leave, sick leave, etc.).

The consultation process must have finished before you give any employees notice of termination, so you should be mindful of those employees with longer notice periods and be prepared for the process taking several months to complete.

What happens if I don't consult properly?

Consultation should be a two-way process: it will help you to gather information to assist in the decision-making process and gives employees the opportunity to ask questions, make suggestions and have their say via the employee representatives.

As a minimum, consultation must be undertaken with a view to reaching agreement on ways and means of:

- Avoiding the redundancies altogether;
- Reducing the number of dismissals; and

- Mitigating their consequences.

It is not enough to simply explain your proposals and listen to any counter-proposals. This duty applies even if the employees to be made redundant are volunteers.

Collective consultation does not eliminate the need for individual consultation, and affected employees should still be consulted with at an individual level over the reason for the proposed redundancies, the selection criteria and how it will apply to them personally, and the existence of alternative employment. For a reminder of the individual consultation process, see Part 1 of our series, here.

Failure to comply with any of the rules on providing information or consultation, or on the election of representatives, can lead to a **protective award** being made by an industrial tribunal of up to 90 days' gross pay for each affected employee.

There is no cap on the calculation of a week's pay for the purposes of a protective award. The award is not based on loss of earnings or intended to be compensation for the employee. Rather, it is intended as a punishment for the employer and is based on the seriousness of their default. The tribunal will decide what is just and equitable in all the circumstances.

In addition, late notification or failure to provide the DfE with the requisite information via the HR1 form is a **criminal offence** and you may be liable to a fine of up to £5,000.

The collective consultation process

Step 1: Town hall meeting to announce redundancy situation

Similar to where individual redundancies are under consideration, you should have a "town hall" type meeting with affected employee groups and announce that:

- redundancies are being considered, together with the rationale
- collective consultation will take place regarding possible redundancies
- an election of appropriate representatives will be organised

This should be followed up in writing to employees in affected employee groups, including all those who are temporarily away from work. Your letter should confirm the information announced in the general meeting, explain in more detail the role of employee representatives and what they will be consulted on, and provide nomination forms. Employees should be advised when nomination forms are to be returned in order to be considered.

Step 2: Submit HR1

The HR1 Form can be submitted following the initial redundancy announcement and updated as necessary thereafter.

Step 3: Election/confirmation of employee representatives

Having reviewed the nomination forms, you should confirm the outcome of the nominations and inform affected employees if election(s) are needed. If an election is to take place, you must circulate the election rules, following which the voting process may commence.

Once voting has closed, you must review and notify employees of the names of the elected representatives.

It is recommended that elected representatives are provided with training on their duties and briefed regarding the redundancy process generally.

The employee representatives should also be provided with a copy of the up-to-date HR1 Form.

Step 4: First collective consultation meeting

N.B. the required 30/90-day consultation period runs from the date of the first collective consultation meeting. It is also the last day for the submission of the HR1 form, which must identify the employee representatives and specify the date when consultation began.

At the first collective consultation meeting, the employee representatives should be provided with all necessary information regarding the redundancy situation, including:

- the reasons for your proposals
- the numbers and descriptions of employees you propose to make redundant
- the total number of each category of employees employed at each establishment
- your proposed method of selecting redundant employees
- your proposed method of carrying out the redundancies including their timing
- your proposed method of calculating redundancy pay
- how many agency workers are working temporarily for and under

the supervision and direction of the company, the parts of the business in which they are working and the type of work they are carrying out

You should also explain the purpose of the consultation i.e. ways to avoid redundancies altogether, ways of reducing the numbers, and ways of mitigating the consequences, and invite any feedback or representations on these matters.

Logistics for the process should also be covered, such as:

- how the representatives should report back and engage with their constituents
- what representatives should do if they have issues with their line managers not supporting them in their role
- the facilities available for the representatives to perform their role
- any arrangements for upcoming meetings

All of this information must be confirmed in writing to the employee representatives following the meeting. They should then be given time to communicate the information to employees either via line managers or directly with employees (when the number of affected employees is small) and to gather their feedback ahead of the next collective consultation meeting.

Step 5: Second collective consultation meeting

The second collective consultation meeting is an opportunity for elected representatives to feedback views and suggestions of affected employees and should particularly focus on ideas to avoid or reduce proposed redundancies.

Any questions or representations made during the meeting should be taken away for consideration.

Consultation on issues such as selection criteria/pools/areas affected may be ongoing, and dialogue must remain open until these have been finalised and agreed. Scoring of affected employees for selection cannot be carried out until consultation on these points is completed.

Step 6: Further collective consultation meetings

You may need to hold third, fourth etc. collective consultation meetings with employee representatives and respond to their representations and questions before agreement is reached in respect of pools, selection criteria and numbers of proposed redundancies.

Where you reject any of the suggestions that have been made, you should give reasons for this to demonstrate that proper consideration has been given. Make sure to also consult about ways to mitigate the consequences of redundancies that cannot be avoided.

Once all consultation points have been covered and responded to, it can be helpful to get the representatives to agree that consultation has now finished. At this point, scoring can be carried out and individual consultation should start.

(It is worth noting that it's not necessary for the parties involved to reach agreement on every point for the consultation to be complete. As long as there has been genuine consultation with a view to reaching agreement, you can end the consultation. However, this should only be done if you can clearly demonstrate that you have listened, considered and responded to the views and suggestions raised by the employee representatives. Signed minutes of the collective consultation meetings and other records supporting your internal discussions, may be of assistance in this instance.)

What if an affected employee asks for an individual consultation meeting?

You should consider any request from an affected employee to meet individually to discuss the proposed redundancies before the conclusion of the collective consultation period. However, any such employee should also be encouraged to continue to engage with the collective consultation via their line manager/employee representative in the meantime.

Employees should be given the option to be accompanied at any individual consultation meetings by a colleague, trade union representative or employee representative.

Step 7: Scoring

Once the selection pools, selection criteria and numbers of proposed redundancies have been finalised via the collective consultation meetings, employees can be scored for selection. If feasible, ensure at least two managers separately conduct the scoring, to retain objectivity.

"At risk" letters should be provided to provisionally selected employees to invite them to an individual consultation meeting.

Step 8: Individual consultation meetings and outcome

Collective consultation does not negate the need for individual consultation with affected employees. The purpose of the

individual consultation meetings is to discuss selection, the outcome of the collective consultation and any suitable alternative employment with each employee.

For a reminder of the obligations relating to individual consultation and delivering the outcome of the process, see Part 1 of our series, here.

Non-application of statutory dismissal procedure to collective redundancies

Although the statutory three-step dismissal procedure does not apply to dismissals which are one of a group of redundancies covered by an employer's statutory duty of collective consultation with appropriate representatives, it remains good practice to offer employees who have been made redundant the right to appeal their dismissal. However, the feasibility of this will largely depend on how many dismissals are proposed, timings and whether appeals can be facilitated.

Collective redundancies can be daunting, but with the right approach, employers can manage them fairly and lawfully. But even when the basics are done right, certain situations can still pose unique challenges. In the final part of our series, **Solving tricky redundancy issues**, we'll unpack the more difficult issues and how employers can manage them safely.

For more information, please contact:

Sylvia Rose
Associate

+44 (0)20 7864 1704
Sylvia.Rose@lewissilkin.com

Amanda Espey
Senior Knowledge Lawyer

+44 (0)28 9064 2290
amanda.espey@lewissilkin.com

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