**Protective Awards for failure to consult on collective redundancies**

Sections 188 to 192 of the [Trade Union and Labour Relations (Consolidations) Act 1992](http://www.legislation.gov.uk/ukpga/1992/52/contents) are designed to ensure that employers consult adequately with employees before making collective redundancies, and to provide compensation for employees where there is inadequate consultation.

If an employer is considering making 20 or more employees redundant they must first consult, in good time, with any Trade Union which is recognised for collective bargaining or, if no Trade Union is recognised, with elected representatives of the workforce (if there are no such representatives, elections must take place).

Where an employer proposes to make 100 or more employees redundant the employer must consult for no less than 45 days. Where there are to be between 20 and 99 redundancies, the consultation period must be for no less than 30 days.

The proposals must be for at least 20 redundancies from one “establishment” which means one administrative centre. An employee can be regionalised with a number of different “establishments”. The phrase “45 days or less” (or 30 days or less) means that a sequence of redundancies of a few employees can often be grouped together for the purposes of consultation requirements.

The obligation of the employers is to consult for at least 45 days before the first of the dismissals (if there are planned to be 100 or more) or at least 30 days in advance (if the total number of dismissals is expected to be between 20 and 99).

The employer must consult with any Trade Union which is recognised (formally or informally) by the employer for the purpose of collective bargaining relative to the type of employees it is intended to be dismissed. If there is no recognised Union the employer must consult with elected representatives or (if there are none) with the affected employees themselves.

There is a special defence available to employers who can sometimes argue that there were “special circumstances” which made it not reasonably practicable for them to consult fully (or even at all). This defence is often raised in the case of insolvent employers where liquidators, receivers or administrators come in at short notice and immediately make a large number of employees redundant.

This defence can be difficult to establish even in the case of an insolvent employer. For example, in a recent claim against a Company in Administration, the Administrators argued there were special circumstances entitling them to carry out minimal consultation. This argument was rejected by the Tribunal having heard all the evidence.

If the employer fails to consult properly before making at least 20 employees from one establishment redundant within a 45 day period, claims can be submitted to the Employment Tribunal. Firstly an application is made for a declaration by the Tribunal that the employers failed properly to consult and asking the Tribunal to make a “Protective Award” in favour of the affected employees of up to a 90 day maximum period (one day of the period equalling one day’s pay for employees). Usually this application will be made by the trade union recognised by the employer for collective bargaining.

If that declaration is made by the Tribunal, the employees claim the number of days net pay due from the Employers (and if possible the Redundancy Payments Office – see below).  If payment is not forthcoming, the employees then present a claim to the Employment Tribunal for their own unpaid protective award sum. The Tribunal should then issue a judgment for the compensation sum properly due to the particular employees which can then be enforced by them in the same way as any Tribunal or Court Judgment.

The Redundancy Payments Office (RPO) can make payments of protective award sums due to employees where the employer has failed properly to consult on collective redundancies and where the employer does not have funds to pay out the claims. These awards are however classified as  “Arrears of Pay” and grouped with unpaid wages.  As the maximum payment of the RPO is 8 weeks arrears of pay, it can sometimes be difficult for employees dismissed (particularly by an insolvent employer) to recover the full sums due to them under protective awards from either the employer or the RPO.

**90 day protective award imposed for failing to consult over redundancies**

The EAT’s decision in [E Ivor Hughes Educational Foundation v Morris & Ors](http://www.bailii.org/uk/cases/UKEAT/2015/0023_15_1906.html) demonstrates just how expensive the penalty can be when an employer breaches the obligation to consult collectively about redundancies and that saving money is not an excuse for failing to consult, nor is ignorance of the law.

The numbers of pupils attending the School had declined by nearly 20% in 6 years. At a meeting on 27 February 2013, the Governors decided to close the School unless numbers increased. The final decision to close was taken on 25 April 2013 when pupil numbers for the 2013 to 2014 indicated a further decline and an operating deficit of £250,000. The Governors decided to close the School at the end of the summer term of 2013. Because staff were entitled to a term's notice, in order to save an extra term's salary, the Governors gave the staff notice of dismissal by reason of redundancy on the 29 April 2013 so that their contracts would end on 31 August 2013. No consultation took place with the staff prior to dismissal as required under S.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), as it appeared the Governors did not know that they had a legal obligation to consult and did not seek legal advice. 24 staff claimed that the School was in breach of its obligations under S.188 TULRCA.

The EAT held the tribunal was entitled to conclude that the obligation to consult prior to dismissing staff as redundant under S.188 TULRCA arose on 27 February 2013. The decision on that date to close the School, unless numbers increased, which was considered to be unlikely, was either a fixed, clear, albeit provisional intention to close the School or amounted to a strategic decision on changes compelling the employer to contemplate or plan for collective redundancies. On either analysis, the duty to consult arose on that date. The tribunal was also entitled to reject the employer’s argument that the need to serve notice in April in order to avoid giving an extra term's notice to the staff were special circumstances which made it not reasonably practicable to consult and that a protective award of 90 days gross pay was appropriate, particularly given that there had been no consultation and the failure to consult resulted from the reckless failure to consult legal experts on the employment implications of the closure.