



Redundant employees win pay-outs after company fails to consult them properly

Employers must follow letter of the law on collective redundancy consultation to avoid similar claims

USDAW, the trade union whose members are mostly retail workers, recently celebrated a second victory for former Barratts' Shoes employees who were not properly consulted before being made redundant. The case highlights the need for businesses to carry out the correct redundancy consultation exercise before making redundancies, as failure to do so can lead to a tribunal awarding affected employees up to 90 days' gross pay.

Awards

14 employees who had worked at Barratts' head office, warehouse and distribution centre brought claims for protective awards following their employer's failure to carry out the required redundancy consultations. According to a news report, Leeds Employment Tribunal awarded the workers up to £4,000 each. This decision follows another made in February 2014 in favour of around 60 former Barratts' employees.

Legal background

The Trade Union and Labour Relations Consolidation Act (TULRCA) states that employers are under a duty to consult collectively when they propose to dismiss as redundant 20 or more employees at one establishment within a 90 day period. However, the EAT in *USDAW v WW Realisation 1* found that the words "at one establishment" should be deleted to give effect to the EU Collective Redundancies Directive.

We are currently awaiting the outcome of a Court of Appeal referral to the Court of Justice of the European Union (CJEU) on the correct interpretation of "establishment" under the directive. For the time being, employers should - subject to legal advice - consult collectively if they intend to make 20 or more employees redundant in the business as a whole, regardless of whether these employees are based in different sites. This means that many more employers are now likely to find themselves in a position where they must enter into collective consultations.

Key points

- Employers should bear the following points in mind when carrying out a collective consultation.
- Start early. TULRCA requires employers to start consulting with employees prior to the first dismissal taking place, and no later than 30 days before the first dismissal or 45 days where employers intend to make more than 100 employees redundant within a 90 day period.
- Notify the Secretary of State on form HR1 at least 30 days before the first dismissal takes effect, if dismissing between 20-99 employees within a 90 day period from one establishment, or 45 days before the first dismissal if dismissing 100 or more employees.
- Ensure that you are consulting with the correct people. Employers are required to consult with appropriate representatives of the employees who may be affected by the proposed

dismissals or by any measures taken in connection with the dismissals. Consider whether an independent trade union is recognised by the affected employees or whether employee representatives need to be elected.

- Provide all the information you are required to disclose under TULRCA to employee representatives in writing. This must include the reasons why you are proposing to make redundancies, the pool of employees and the proposed selection criteria.
- Ensure that your consultation process is genuine – and not a “tick box” exercise. That means entering into the process with an open mind, seriously considering the employee/union representatives’ proposals and reporting back to appropriate representatives. Consultations must cover ways of avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. To reduce the risk of employees bringing claims for protective awards, it is important that they perceive the business as genuinely engaged in the consultation exercise.
- Do not neglect individual consultation, even if you are also consulting with employee or trade union representatives. Failure to undertake individual consultation may result in a tribunal finding that an affected employee has been unfairly dismissed. This is a potentially more expensive liability for employers, as a tribunal can award a successful employee up to 12 months’ gross pay capped at £76,574 if the employee’s 12 month gross pay exceeds that sum.
- Seek legal advice if you are contemplating redundancies.

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