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ECJ provides welcome guidance on collective redundancy consultation

There has long been a debate on whether the UK's rules on collective redundancy consultation accurately reflect European law, but a recent European Court of Justice ruling should reassure employers that the British approach, if tested in Europe, is likely to be legitimate.

The Finnish case of *Akavan Erityisalojen Keskusliitto AEK Ry and others v Fujitsu Siemens Computers Oy* (2009 IRLR 944 ECJ) establishes that the employer's collective consultation duty arises as soon as it takes strategic decisions that compel it to contemplate or plan large-scale job cuts. Under the UK's Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), this duty is triggered when the employer "proposes" collective redundancies within a 90-day period (*see panel, right*).

Employers have tended to view "propose" as more concrete than "contemplate", so they have hitherto assumed that TULRCA requires consultation to start later than it needs to under EU law. The *Akavan* ruling stresses that the aim of the collective redundancies directive is that consultation should start once the employer clearly intends to make the redundancies. So Europe's position is closer to the UK's on this point than had been thought previously.

This might seem a matter of legal semantics, but the issues raised by *Akavan* should prompt employers to check whether their approach to collective consultation reflects what the law expects of them. The directive states that the aim of collective consultation is to avoid the termination of employment contracts, minimise the number of workers affected, and mitigate the consequences of the proposed job cuts.

The first step when proposing job cuts across several sites is to determine "establishments" for consultation purposes. Each site is usually a separate establishment, but an employer might decide that organised groups of staff across different sites (a mobile team, say) would be a more appropriate establishment. This may result in the proposal of fewer than 20 job cuts in that establishment, thereby negating the collective consultation duty. The requirement for individual consultation would still apply, regardless of how many redundancies are proposed.

The ECJ held in *Akavan* that, where redundancies are contemplated in a group of companies, the duty to consult falls on the subsidiary in which the job cuts are proposed, even where the ultimate decision rests with the parent company. But the duty will be triggered only when the parent has identified which subsidiary is affected.

The court also stressed that it would not consider it reasonable for employers to delay consulting because they don't yet have all the information about the planned job cuts. Collective consultation must start as soon as the relevant strategic decision has been taken, regardless of whether all the necessary details are available. Information should be given to representatives throughout the process as it becomes available.

Employers also must not hold up a consultation because they are considering alternatives to redundancy. Even if redundancies aren't the only cost-cutting plan on the table, this won't prevent the triggering of collective consultation obligations.

Crucially, consultation must begin before any final decisions to dismiss are made, leaving adequate time for employee representatives to respond to the proposals and for the employer to consider those responses.

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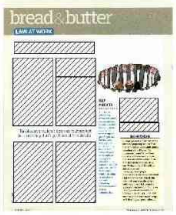
KEY POINTS

- ◆ Collective redundancy consultation must start as soon as a strategic decision that compels an employer to contemplate or plan for job cuts has been taken.
- ◆ The point at which that duty begins is not straightforward.
- ◆ An employer that clearly intends to make redundancies must enter consultation with an open mind on avoiding or reducing job cuts and mitigating the consequences of those redundancies.



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THE BASICS

An employer must consult collectively where it is proposing to make 20 or more employees at one establishment redundant within 90 days. The process must begin "in good time" and at least 90 days before the first dismissal takes effect where 100 or more job cuts are proposed, or at least 30 days before if 20 to 99 job cuts are proposed.

Usually, only employee representatives can bring claims about a failure to consult collectively, but individuals may bring them where workplaces have failed to appoint representatives (see *Mono Car Styling SA (in liquidation) v Odemis and others* (2009 C-12 08 ECJ). Tribunals can make a "protective award" of up to 90 days' pay per person affected.

'Employers shouldn't delay consulting just because they don't yet have all the details'