EUGENE F COLLINS

Employment & Employee Benefit

Closure of a Business - Information and Consultation with Employees

Published: Tue 31 Jan 2012

Closure of a Business - Information and Consultation with Employees

Published: Tue 31 Jan 2012

A number of recent sit-ins (such as that staged by Vita Cortex workers in Cork and La Senza employees in Dublin) have attracted significant media attention where employees were informed without prior consultation that operations were to cease. Workers of Lagan Brick in Co. Cavan, Vita Cortex in Cork, and La Senza employees took industrial action and refused to leave the premises in protest against their treatment by their employer.

An administrator of a company or the equivalent officers under Irish law, a liquidator, a receiver or an examiner, seem increasingly likely to face instances of industrial action and worker occupation of a premises in efforts to accelerate the satisfaction of employee entitlements. In a liquidation situation, employees rank as preferential creditors in the company. In reality, the process whereby employees receive their entitlements during the winding up of an insolvent company may be a protracted one. Staging a sit-in may seem to be a favourable course of action to employees in a liquidation situation if the employer or its group is perceived to have any reliable assets. This type of industrial action has an undeniable impact on the processes of the liquidator or receiver; be it in the collection of stock or attempted sale of the premises and yet as the above examples illustrate, it is becoming a more common occurrence. It seems likely that an administrator or liquidator may find themselves in circumstances where they are obliged to negotiate with trade unions representing the employees where an employer has failed to inform and consult with the workforce in advance of any closure.

In a situation of collective redundancies, the Protection of Employment Acts 1977 to 2007 (the "1977 Act") apply in conjunction with the Redundancy Payments Acts 1967 to 2007 (the "Redundancy Acts"). The Redundancy Acts requires employers to consult in advance of, and in relation to the timeframe of redundancies of groups of employees forming a substantial proportion of the staff of the employer. The employer contemplating collective redundancies must, with a view to reaching an agreement, consult with the representatives of the employees affected at least 30 days before the notice of dismissal is given. Representatives of employees means a trade union, staff association or excepted body, or in the absence of same, a person or persons chosen by employees to represent them in negotiations with their employer. An employer is defined as the person with whom the employee has entered into or for whom the employee works under a contract of employment, subject to the qualification that the person who is liable to pay the remuneration of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer.

Section 14(3) of the 1977 Act provides is a carve-out for liquidators who are relieved of the collective redundancy requirements under the legislation if there are insolvency proceedings. This applies specifically in cases of bankruptcy, winding up proceedings or where a court so decides. Unlike liquidators, receivers are not expressly exempted from the application of the legislation and best practice would require their adherence to the obligations to consult with and inform employees.

UK legislation clearly extends the obligation to consult and inform employees to administrators and receivers of companies. English employers can avail of the defence of "special circumstances," such as a sudden disaster or an unexpected insolvency (as opposed to the gradual running down of the

business to eventual insolvency), for the lack of consultation with employees. In the case of GMB v Rankin and Harrison [1992] IRLR 514 (EAT), the fact that the business could not be sold was regarded as a common incident of insolvency and not a special circumstance. What is important to note in this case is that the respondents were receivers who had been appointed to the company, which subsequently continued to trade. The receivers later made the employees redundant without any advance warning and without complying with the consultation requirements laid down in the UK legislation (the Employment Protection Act 1975). On appeal from a decision of the Industrial Tribunal, the EAT accepted that circumstances may support the assumption that the closure of the business was inevitable from the appointment of the receivers but that nothing about the circumstances could be regarded as special. There is no such defence of "special circumstances" in Ireland.

There is a maximum fine of €5,000 per offence on conviction for failure to provide information to and/or consult with the employee representatives and failure to notify the Minister. However, fines can be up to €250,000 for implementing the redundancies before notifying the Minister. To date there have been no prosecutions under the Redundancy Acts.

Employees or their representatives may also refer the issue of non-consultation to a Rights Commissioner who may award up to four weeks' remuneration as compensation. Taking into consideration the delay normally experienced in having claims heard before a Rights Commissioner, employees may seek to restrain a breach by their employer of its obligations under the Redundancy Acts by applying to the High Court for injunctive relief.

Mandatory Consultation with Employee Representatives

Consultation with the employees' representatives (which must take place at least 30 days before the first notice of dismissal is given) must cover the following points:

1 the reason for the proposed redundancy;

2 the numbers affected;

3 the possibility of avoiding or reducing the proposed redundancies;

4 the method of selecting personnel to be used when implementing redundancies;

5 the period during which it is proposed to affect the proposed redundancies.

The legislation provides that an employer must notify the Minister for Enterprise and Employment of the proposed redundancies.

Notification to the Minister for Enterprise and Employment

Where it is proposed to carry out collective redundancies, the Minister for Trade, Enterprise and Employment must receive written notice at the earliest opportunity and at least 30 days before the first notice of dismissal is given. The proposed collective redundancies must not take effect before the expiry of a period of 30 days beginning on the date of notification to the Minister.

The particulars to be specified in this notification must include each of the following points:

1 the name and address of the employer indicating status in respect of sole trader, a partnership or registered company;

2 the address of the establishment in which the collective redundancies are proposed;

3 the number of persons normally employed;

4 the number and description or categories of employees who are affected by the proposed redundancy;

5 the period during which the collective redundancies are proposed to become effective;

6 the reasons for the proposed redundancies;

7 the names and addresses of the employees representatives who have been consulted about the proposed redundancies;

8 the date on which those consultations commenced and the progress achieved to date of notification.

The employer must also give the Minister copies of all written information supplied to the employee's representatives.

Author: Maura Connolly