

New information and consultation rules from April 2005

New, EU inspired, information and consultation regulations come into effect on 1 April 2005. Robert O'Donovan considers the dawn of a new era and whether there is scope for pre-emptive action to mitigate the effect of the new regulations.

The new regulations will allow employees (or the employer if it so wishes) to initiate procedures under which employee representatives are informed and/or consulted in certain areas. For firms and companies of over 150 staff, the regulations apply from 1 April 2005. The regime will then be extended to smaller undertakings by April 2008. Undertakings of less than 50 staff, however, will be exempt.

Unless you are positively enthusiastic about informing and consulting staff, the initiative is likely to come from staff. The support of 10% of the workforce is needed to initiate the process, but there is a minimum number of individuals involved of 15 which means that, for a company of, say, 60 staff, those instigating the process will need the support of 25% of the workforce, which arguably makes the initiation of the process slightly more difficult in smaller entities.

There is then a period during which staff representatives and management may negotiate their own information and consultation procedures. If, however, they fail to do so, then the statutory procedures operate which means that staff are unlikely to accept negotiated procedures offering much less than the statute by way of information and consultation.

As an underpin, therefore, management should expect that there will be a need to provide information on:-

- (a) the undertaking's economic situation;
- (b) employment, in particular, where there is a threat to employment within the undertaking; and
- (c) with certain exceptions, decisions likely to lead to substantial changes in work organisation or in contractual relations.

In addition, there is a requirement for consultation on items (b) and (c).

The requirements are not particularly well defined, but DTI guidance indicates that the emphasis is on employment levels and practices rather than more general financial issues.

Is there any advantage in taking action now? The answer will depend on your own circumstances. If you already have information and consultation procedures in place and they work well, then there is probably an advantage in reviewing them, recording them and, if necessary, adapting them. If this is done correctly, then the regulations make it difficult for a disgruntled minority of employees to change the way you operate now.

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Therefore, our suggested immediate action is to ensure that your policies reflect the new statutory procedures, or that you adopt disciplinary and grievance procedures for the first time. If you have detailed disciplinary and grievance procedures, there is probably little to do in that area. However, most employers will have to reconsider non-disciplinary dismissal procedures.

Consequences of non-compliance

When it comes to implementing the procedures, there are, in effect, penalties. If the employer fails to follow a procedure, then the award of compensation may be increased at the Tribunal's discretion by between 10-50%. But at least the legislation is fair in that, if the employee fails to comply with the procedures, then an award of compensation may be reduced by between 10-50%.

Finally, failure to follow the procedures to the letter immediately creates an unfair dismissal. One can imagine that there will be many an occasion where an employer forgets to notify the employee of the right to appeal, thus triggering an automatic unfair dismissal. In these circumstances, the claim before the Tribunal will then turn entirely on the matter of compensation and, while the employer would still have the defence that there would have been a dismissal even if the procedure had been properly followed, the balance will undoubtedly have swung in favour of the employee.

Conversely, if the employee fails to take the appropriate steps in raising a grievance before submitting a claim to the Employment Tribunal, the employee may be prevented from continuing with the claim.

If you have any questions on this article or would like new procedures drafted, or your current procedures checked, please contact Kerry Scott-Patel on 020-7227-7235.

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If you do not have consultation procedures in effect at the moment, there is likely to be little advantage in setting up new procedures now on the basis that staff will be aware of the statutory minimum which will apply if agreement is not reached and that will be their starting point.

Therefore, unless you are particularly enthusiastic, it probably makes sense to wait and see if staff do decide to initiate the process.

If you have any questions regarding employee consultation, please contact Robert O'Donovan on 020-7227-7278 or robert.o'donovan@rlb-law.com.

Stop Press

Employers beware of the "without prejudice" communications

The Employment Appeal Tribunal has recently considered whether an employee could rely on what was said at a "without prejudice" meeting to enable her to establish her claim of sex discrimination and victimisation. The Employment Appeal Tribunal allowed her to rely on the contents of the meeting. This is an extremely important decision for employers who commonly try to avoid complicated disciplinary or capability proceedings by holding a without prejudice meeting and inviting the employee to resign. We will be covering this topic in our next update but, in the meantime, employers beware and, if you want your meeting to be "off the record", contact Lara Crane on 020-7227-7478



Where's REG?

REG has gone on holiday. He is very upset, both because we decided to extend our "Meet the Team" series and because no-one wrote to him in August. So if you have any general employment law questions, do still contact him at Reg@rlb-law.com and he'll be back



Meet the Team (up North)

We are fortunate to be able to combine the resources of our London and Leeds offices, adding depth by sharing our experience. Kate Williams is a partner in our Leeds office and this week it is her turn to be quizzed by Robert O'Donovan.

R: Why did you become a lawyer?

K: My first job after graduating was in publishing – it was the fashionable thing to do. My salary was £3,500 (in London) and, because of my good work on an audio-visual handbook, I was then offered the Company's prize publication to edit – The Oil and Gas Yearbook. Thrilling though this was I decided to look for a career with broader horizons and better pay.

R: What attracts you to Employment Law?

K: Mostly the human drama that every case reflects. But also the ingenuity and detail of the legal reasoning applied to reported cases.

R: What do you do to relax after a hard day's work?

K: When I get home, I immediately have a glass of wine. Then I persuade my two little girls upstairs to the bathroom and thence to bed with a story or two. I find the negotiating skills acquired in my professional life are standing me in good stead domestically. And, equally, my professional skills are sharpened daily by my domestic experiences. So, I would like to think, my life is in perfect harmony!

R: Best moment of my career?

K: I started out at Linklaters in the 80's. They acted for British Airways in the litigation brought by Freddie Laker (who owned Laker Airways). This led to my being told one day to turn up at Heathrow Airport the next and accompany the BA Chief Executive to New York on Concord. He took me into the cockpit, where I could see the sun over the rim of the earth.

R: Worst moment of my career?

K: While on the same US trip, I attended a directions hearing in the Laker case. I was sitting on the side-lines watching proceedings. It seemed a jolly sociable affair and, turning to the man sitting next to me, I observed that there were no fewer than 26 lawyers in the room. "Yes" he said. "It makes you think". Then he said, "Especially when I'm paying for it all". It gradually dawned on me: this was Freddie Laker!

R: Any hobbies?

K: At the risk of appearing a crusty old blue stocking, I will admit that every week a small group of faded, middle-aged people meet at my house to read Latin or Greek poetry together. If I tell you its great fun, I know you will understand!

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Workshop/Seminar News

The annual seminar takes place on 11th November. Hot topics this year are consultation (due to bite next April); the perils of agency workers and (amazingly) some good news on data protection. If you have not received an invitation, please contact Julia Worton on 020-7227-7476

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

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Readers should take professional advice before taking any action based on this bulletin.