



Beyond lockdown in Northern Ireland

Preserving organisations: Redundancies and restructuring in a virtual world

21 May 2020

As employers, trade unions, industry bodies, public health authorities, the Executive and the government work together to safeguard communities, ease the lockdown and reopen workplaces, it is clear that leadership, trust and careful planning will play a vital role in this critical next phase of COVID-19. An incremental approach will be necessary as we transition to a new way of living and working.

To guide employers as they prepare to address the challenges ahead, we are publishing a four part series of briefings and webinars, as follows:

1. reopening workplaces: returning to work safely
2. preserving organisations: redundancies in a virtual world
3. new ways of working: adapting the workplace and changing terms and conditions
4. dealing with the fallout from the pandemic: rescuing businesses and disputes

This is the second briefing in the series. Subsequent briefings and webinar recordings will be published weekly.

Part 2: Preserving organisations: redundancies and restructuring in a virtual world

The UK's Coronavirus Job Retention Scheme ("CJRS") (which reimburses employers for 80% of wages, subject to a cap, whilst eligible employees are temporarily laid off) has now been extended to the end of October, with changes to the way in which it is funded coming into play from August. These announcements have been made to avoid the 'cliff-edge' end to the scheme which had been feared.

Employers are considering how their markets have been, and may continue to be, impacted by the pandemic once the CJRS has ended. While they are seeking to avoid redundancies, and notwithstanding such government support, the ongoing impact of the pandemic will inevitably leave some with no alternative but to consider whether redundancies may be necessary to preserve and safeguard the overall business. In so doing, they will encounter a number of new practical challenges, including how to inform and consult furloughed employees or those working remotely.

We have set out in section one below some key issues relating to redundancy consultation in Northern Ireland in the context of COVID-19 and section two contains a summary reminder of the requirements for employers when making redundancies. One of the key things to keep in mind in the length of the collective consultation requirements in Northern Ireland – at least 90 days if 100+ redundancies are proposed – employers need to be assessing the shape of their business in the short to medium term now.

1. Some key COVID-19-related redundancy considerations for employers in Northern Ireland:

Question	Points to note
How can employers prepare, if they are contemplating redundancies in the current circumstances?	Assuming there is a redundancy situation (see further below), ensuring a fair redundancy procedure (both on an individual and collective basis, where applicable) will present a particular challenge to employers where employees are working remotely, furloughed, sick or caring for others. For example, some practical and legal issues requiring careful review and planning include: balancing legal obligations to inform and consult with, potentially, a high degree of uncertainty resulting from the exceptional circumstances; preparing for longer timescales reflecting the practicalities of a remote consultation; ensuring confidential personal and business data are safeguarded where representatives and affected employees are at home; checking eligibility to recover wage costs from the CJRS Scheme; considering whether pre-existing redundancy selection criteria meet the needs of a changed, post-COVID-19 organisation; conducting effective 1:1 and collective consultation digitally; electing employee representatives and supporting them in their role when all employees are furloughed or working remotely, and more. We examine some of these issues below.
Can furloughed employees be made redundant?	The CJRS Guidance states that employees on furlough can be made redundant but grants cannot be used to substitute redundancy payments. However, given reputational considerations, continued use of the furlough scheme once redundancy proposals are made will require careful review.
Can furloughed employees participate in collective and individual consultation without breaking the period of furlough?	Updated Guidance clarifies that trade union or other employee representatives participating in collective and individual consultation will not break their furlough as long as they do not undertake revenue generating activities for their employer. However, the Guidance does not specifically address the position of furloughed "at risk" employees themselves - only their representatives. As such, advice should be taken on the extent to which those employees can be informed and consulted without breaching furlough status.
If the CJRS ends on 30 June 2020, when do employers need to start consultation about proposed redundancies?	This will depend on the number of redundancies that may need to be considered. Before commencing collective consultation (if applicable) employers must have in place the appropriate employee representatives. If not, an employer may need to factor in a further one or two week period in order to elect and train employee representatives prior to commencing the 30 or 90 day collective consultation process. In addition, there needs to be a period of individual consultation which normally takes two to three weeks to complete. In short, if employers believe that they may need to make collective redundancies from 1 July 2020, they would need to commence the process immediately.
How should employers undertake remote collective and individual consultation?	Planning will differ according to whether collective, as well as individual, consultation is triggered and whether appropriate representatives are already in place: <u>Individual consultation</u> : for remote and furloughed employees, establishing from the outset how to communicate with them effectively and reliably (possibly necessitating new digital communication platforms and equipment to be made available) and preparing comprehensive comms for managers,

to facilitate meaningful consultation, will be key. Communication to all employees, including those not affected, will also be critical in maintaining trust and morale at a time when employees are potentially feeling isolated.

Elections for employee representatives: The employer must take reasonably practicable steps to make sure the election is fair. Some larger scale or complex redundancies may benefit from election services provided by third party providers, such as those offering secure cloud-based digital voting products. Whatever method is chosen, the election should be conducted to ensure that, so far as is reasonably practical, voting is in secret and that the votes given at the election are accurately counted.

Conduct of collective consultation meetings: Ensure that all participants in virtual meetings have access to suitable equipment (laptops etc), which they are trained to use. Agree with the union and employee representatives protocols for conducting virtual meetings, covering: the provision of information in advance; the security of that information, including privacy and confidentiality obligations; and the conduct of the meetings, such as how to manage break out conversations. Implement arrangements to enable union and employee representatives to liaise effectively and confidentially with their members/colleagues so that they can canvass views when responding to the employer's proposals. Employers may need to involve IT support to help deliver the virtual elements.

Will legal obligations be relaxed for employers making redundancies, given the exceptional circumstances?

No. The CJRS Guidance makes it clear that employees retain their ongoing employment law rights. In order to reduce risk, employers should continue to evidence genuine attempts to undertake meaningful individual and collective (if applicable) consultation and should take all steps towards a fair procedure as are reasonably practicable in the circumstances. While any future redundancy tribunal claims would review the exceptional circumstances, this is without precedent and the employer would still need to demonstrate that it did its best, not simply abandoning a fair procedure and/or its collective consultation duties.

2. An overview of key issues for employers in Northern Ireland when making redundancies:

Question	Points to note
What does redundancy mean?	In broad terms, a redundancy is typically a dismissal attributable to a business or a workplace closing or to a reduced need for employees to carry out work of a particular kind. Employees in Northern Ireland with at least one year's service have the right not to be unfairly dismissed and a genuine redundancy is one of the potentially fair reasons for dismissal, provided the employer acts fairly (see below).
Are there procedures to follow before making employees redundant?	Yes. Even if redundancy is the reason for dismissal, whether it is a fair or unfair dismissal depends on the employer acting fairly and reasonably in the circumstances (exceptions apply for special categories of employees – below). In Northern Ireland, an employer is expected, as a minimum, to warn and consult employees individually, adopt fair selection procedures and consider alternative employment for those affected. In addition, larger scale redundancies may trigger collective consultation obligations (see below). The LRA procedural guidance is.
What additional obligations arise in collective redundancies (where a larger number of employees are	An employer must inform, and consult with, appropriate representatives of the affected employees in the event of a collective redundancy situation. Collective redundancy obligations apply where the employer proposes to dismiss 20

dismissed within a certain timescale) and what triggers such obligations in terms of numbers and timescales?

or more employees at one establishment within a 90 day period. Where 100 or more redundancies are proposed, consultation must begin in good time and at least 90 days before the first dismissal takes effect. Similarly, for 20 to 99 redundancies, the consultation must begin in good time and at least 30 days before the first dismissal takes effect. Given that the duty is triggered by numbers at one establishment, employers with dispersed workforces and multiple sites should exercise care when identifying the appropriate establishment. It is also important to bear in mind that the 90 day consultation requirement in Northern Ireland where more than 100 redundancies are proposed is longer than the 45 day requirement in the rest of Great Britain.

What are the likely costs arising from employee redundancies?

The notice and statutory redundancy pay for affected employees can be calculated using statutory rates (an online calculator is available [here](#)), adding any outstanding holiday pay and enhanced by any additional redundancy pay. In Northern Ireland, a redundant employee with at least two years' service is entitled to a statutory redundancy payment and the amount is based on the employee's age, salary and length of service up to a maximum of £16,800. Limited exceptions apply, for example, an employee is ineligible if he/she unreasonably refuses an offer of suitable alternative employment.

What are the penalties for breaching collective consultation duties and for an unfair dismissal?

A failure to consult trade union or employee representatives in accordance with collective consultation duties can lead to costly fines (up to 90 days' pay in respect of each employee – known as a protective award) and may expose the employer to other ER risks and claims. The maximum financial liability for unfair dismissal is a basic award up to £16,800 and a compensatory award up to £88,693. In redundancy cases, the basic award is replaced by the amount of any statutory redundancy payment.

Is there any defence of urgency or ability to short-circuit collective consultation that can be relied upon?

There is the "special circumstances" defence which potentially applies to certain failures to undertake adequate/any collective consultation. However, it ordinarily only applies in exceptional circumstances, such as a sudden, unforeseen catastrophic impact on the employer (unlikely to apply to the ending of the CJRS Scheme, given advance notice), and the employer must still show that they have taken all such steps towards compliance as were reasonably practicable in those circumstances.

With whom should the employer inform and consult in the event of a collective redundancy dismissal?

Where the employees are represented by recognised trade unions, the employer must consult with the trade union. In the absence of a recognised trade union, the employer has the choice of consulting with directly elected representatives (elected by employees affected for the purpose of this consultation) or an appropriate, pre-existing body of elected or appointed representatives. Employers should exercise caution where a pre-existing body is chosen, to ensure that it has authority to engage in such consultation.

What, in summary, are the key elements of the information and consultation process?

Certain information, prescribed by law, must be provided to the representatives in writing, such as the reasons for the proposed dismissals, how many, the descriptions of employees affected and the proposed selection method as well as the number of agency workers at the establishment. Once the information is provided, consultation must be with a view to reaching agreement on avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals.

Is there any state involvement with collective redundancies?

Employers must notify the Department for Communities of the proposed dismissals, using the [form HR1](#), according to prescribed timescales. Failure to do so is a criminal offence and subject to a fine (which is uncapped).

What is required in relation to individual consultation?

Whether or not the employer has a requirement to collectively consult with employee representatives or recognised trade unions, there is an additional requirement to enter into a consultation process with affected employees on an individual basis. This should normally follow the completion of any collective consultation process in order to consult on issues including the reasons for their selection and alternative employment.

Do any groups of employees have special protection in a redundancy/collective redundancy situation?

Employees must not be selected for redundancy based on certain protected grounds (e.g. pregnancy, maternity, trade union membership, health and safety reason, whistleblowing and others) and, in such cases, they may claim unfair dismissal without a qualifying period of employment. Employees on maternity leave have preferential right to alternative employment.

Coronavirus - a checklist to support employers in Northern Ireland when planning redundancies in current circumstances

We have outlined some of the key considerations for employers in Northern Ireland below:

- getting employee communication right will be critical given that they may be dispersed and anxious – how is communication being handled currently and what works well/what can be improved?
- be prepared for delays to normal redundancy timescales, given the inevitable practical issues that may cause slippage where employees are either furloughed or working remotely
- where employee representatives must be elected, this may add at least a week to the planning
- ensure that data privacy and business confidentiality is protected during remote consultation: training, protocols, rules, IT security will all need revisiting to safeguard employees and the organisation
- managers and employee representatives will require additional guidance and support reflecting the extraordinary circumstances
- take advice on how the CJRS Scheme interacts with an employer’s redundancy proposals to reduce the risk of falling outside the Scheme’s eligibility requirements
- when faced with COVID-19-related challenges, employers should avoid abandoning a fair redundancy procedure altogether (including individual and collective consultation) – instead, do everything that is reasonably practicable in those circumstances. This is particularly relevant given the potential scale of the protective award liability and that the burden of proof is on the employer
- ensure the notice to the department (if applicable), on form HR1, is correctly submitted and at the right time
- consider other support available for employees to mitigate impact in the current circumstances, for example, will the employer provide outplacement assistance over a longer time period?

Note this alert covers Northern Ireland. There are a number of employment law differences that apply in Scotland, England and Wales.

For further information, please contact:



Lisa Bryson
Partner, Employment & Immigration

+44 28 9526 2020
LisaBryson
@eversheds-sutherland.ie



Amy Collins
Solicitor, Employment & Immigration

+44 28 9526 2021
AmyCollins
@eversheds-sutherland.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.