SQUIRE SANDERS

COLLECTIVE REDUNDANCIES

– when is the duty to consult triggered?

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Here's a question for you: Business A is planning to close one of its sites. This will almost inevitably result in large-scale redundancies. When is the duty to consult appropriate representatives triggered? Is it:

a. when the employer is still thinking about closing the site but before finally deciding to do so?;

b. only once it has decided to close the site and is planning to proceed with the consequential redundancies?; or

c. don't know.

You would be forgiven for saying (c), as this was the answer recently given by the Court of Appeal when asked a similar question in ***United States of America v Nolan***. It took the "phone a friend" approach and promptly referred the matter to the ECJ. This is not the first time the ECJ has been asked to consider this issue. It was asked the same question a few years ago, but the Court of Appeal found its answer so "unclear" that it decided to request further clarification on the point.

We now have the Advocate General's Opinion – the first stage in the European judicial process before the ECJ formally rules. According to him the answer should be "None of the above". In his view neither (a) nor (b) is correct. He said that (a) was wrong because it would be too early to commence consultation if the employer has not yet made a "strategic or operational decision" to close the site. Equally, (b) was also wrong because it would be too late to commence consultation if the employer has already decided to proceed with the resulting redundancies. He points out that the duty to consult collectively must arise at a time "when there is still a possibility of preserving the effectiveness of such consultations, in particular the possibility of avoiding or reducing collective redundancies or, at least, mitigating the consequences".

The answer, according to the Advocate General, is therefore that the duty to consult with appropriate representatives is triggered once the employer has made a strategic or commercial decision which compels it to contemplate or to plan for collective redundancies, i.e. somewhere between (a) and (b). In the scenario outlined above this would seem to suggest that the employer is required to commence collective consultation after it has made the decision to close the site but before it has made a final decision to proceed with the consequential redundancies. This is attractive in theory but of course that line is a very thin one where a site closure necessarily entails job losses to such an extent that in practical terms the decision to shut the site is tantamount to declaring the redundancies also.

What if the decision to close the site had been taken by a body or entity which controls the employer, e.g. its parent company? The Advocate General said that in this scenario the employer's duty to consult would be triggered once the parent company had taken the strategic or commercial decision to close the site which compels the employer to contemplate or to plan for collective redundancies.

This is not quite the end of the story. Ultimately the decision that counts is that of the ECJ, but if it adopts a similar stance (which seems likely) it would be good news for employers. It should mean that we are back to the position where employers are allowed to present the circumstances leading up to redundancies pretty much as a given, and then move straight on to the consequences of that decision for the jobs of its workforce. In effect, "I have decided to shut the site – now let us consult about what that means for you", as opposed to "I am thinking about shutting the site and there are very likely to be job losses if I do – now let us consult about the possible closure".

The ECJ should give its final ruling later this year.

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