How to make the workers council a positive experience

Viv Du Feu

Introduction

On 7 July 2003, the Government published its long awaited Consultation Paper on the Implementation of the Information and Consultation Directive in the UK . As part of that Consultation Paper, the Government also published Draft Regulations containing the fine legal detail of the proposed Regulations. The new law will be known as the **Information and Consultation of Employees Regulations** 2005.

It is clear from what is in the Consultation Paper that there has been considerable debate behind the scenes between the CBI on behalf of the employers, the TUC on behalf of the trade union movement and the Government as to how the Directive should be implemented in the UK . Although the July document is

described as a "Consultation Paper", the reality is that the majority of implementation issues have now been settled and therefore the reality is that the Draft Regulations are likely to become law in due course, subject to some fairly minor amendments. It is therefore well worthwhile looking carefully at the Draft Regulations. In our view there is likely to be little change between the Draft and the final Regulations. I would draw your attention to the flow chart with this presentation which attempts to summarise the key stages of the Information and Consultation regime from an employer's perspective. The numbers shown in the various boxes of the flow chart refer, for ease of reference to the numbers of the Draft Regulations.

Once the law is effective (March 2005 for businesses employing more than 150 people) then employees may at any time trigger the legal regime by making a request to the employer. A request must be made by 10% of the employees in the undertaking. It should be noted that, in contrast to the trade union recognition regime where a union needs a membership base of only 10% of the claimed bargaining unit in relation to information and consultation for a claim to be lodged, 10% of the entire number of employees must sign a request which is likely to mean in reality signing a petition. Although the law is expressed in terms of employees making a request it is likely in the majority of cases that it may be the trade union that would organise such an employee petition. The request via such a petition can be made either directly to the employer or the petition can be sent to the CAC or to a number of qualified independent persons (which tend to be the independent balloting company).

Once a request has been made the employer can challenge the request, for example, by arguing that the numbers are wrong or that the law does not apply to the employer until after 2005 - by virtue of the size of the workforce. Whilst it is possible to challenge a request it is anticipated in the vast majority of cases that the numbers will be right and therefore such requests will fail. A further

complication in this respect is that unlike the situation under trade union recognition law where a trade union is not entitled to know the number of employees within a particular claimed bargaining unit, under the Information and Consultation of Employees Regulations employees can ask the employer to provide the number of employees currently employed in the undertaking and know precisely therefore how many signatures would be needed to attain the requisite 10%.

On the basis that the request is valid, what happens next depends upon whether the employer wants to argue that it has existing information and

consultation arrangements which comply with the new law in place. If the employer decides that an existing works council is in place which complies with the new law, then the employer can organise an employee ballot in support of the existing arrangements. For the existing arrangements to be overturned, more than 40% of employees must vote to endorse the original request. The ballot must be:

- fairly run
- with all employees entitled to

  vote
- secret

Note here again that all employees will be entitled to vote.

The law contains a number of stringent tests that existing arrangements must pass in order to be legally valid as current existing arrangements. To qualify as an existing arrangement the agreement for information and consultation must:

- be in writing
- cover all employees of the undertaking
- have been approved by the employee; and
- set how the employer is to give information to the employees or their representatives and to seek their opinions on such information

In terms of employee approval, whilst this point is not expressly defined in the Draft Regulations, the Government elsewhere in its consultation document indicates that approval probably

demonstrated either by a ballot of the workforce or by a petition showing majority support or by the agreement of the employee representatives.

The employer decides to hold a ballot to endorse the existing arrangements, the employee representatives can challenge whether or not the existing arrangement

does in fact meet the requirements (set out above). Further, employee representatives can challenge the employer's balloting arrangements. Where existing arrangements are successfully challenged the employer is then obliged to put representatives in place and start negotiations. Where a ballot result is successfully challenged, the employer is then obliged to rerun the ballot.

The great advantage for an employer who holds a ballot in such circumstance and goes on to win that ballot is that no further challenge to the existing arrangements are possible within three years.

In the alternative situation where no existing arrangements are in place (or where the employees have successfully challenged the validity of an existing arrangement and therefore have deprived the employer of the opportunity of holding a ballot) then the law goes on to make clear that the employer must elect or appoint negotiating representatives and then initiate negotiations within one month with those representatives with a view to reaching an agreement on an information and consultation structure for the particular business.

There is a period of six months for agreement to be reached, or longer by agreement. Where agreement is reached, then the employees must approve the agreement. Employee approval in these circumstances means at least 50% of the employees must approve the arrangements in writing or there must be a ballot showing approval. Additionally, the agreement must be signed by a majority of negotiating representatives.

Where, after six months, agreement cannot be reached, an employer must elect what are called Information and Consultation representatives. In such a situation these are highly likely to be the negotiation representatives which were put in place six months earlier. The employer must then go on negotiating with these people for a further six months unless agreement is reached earlier. Where agreement is reached in the second six month period then employee approval must be obtained in the same way as it must during the first six month period. Where agreement is not reached at the end of the second six month period then default Information and Consultation Provisions apply.

In relation to the default Information and Consultation Provisions what the Government has done is simply copy the relevant parts of the Directive so the employer is under generic obligations to consult with Information and Consultation representatives on:

- the reason and probable development of the undertaking's activities and economic situation;

- the situation structure and probable development of employment within the undertaking and the anticipatory measures envisaged, in particular where there is a threat to employment within the undertaking; and decisions likely to leave to substantial changes in the work organisation or in contractual relations including decisions covered by legislation on collective redundancies and transfer of undertakings.

Having copied out the provisions of the directive, the Government says in its Consultation Paper it will be providing practical guidance on how organisations will comply in terms of setting up structures to meet the obligations outlined above.

Question: Jim Brown, Falkirk Could you just clarify, my company is part of a European group of companies, in the UK we have three separate operating companies, they have a common sales force but each company operates totally independently making very different products and individually none of the companies would come up to the numbers you are talking about but they may do so collectively if you take into account everybody the production operators, the sales men, the research people, everybody, is it the total of the three companies or is it the individual companies ?

Answer:- It really will depend on what the corporate structure

is because if they are genuinely separate corporate legal entities and you can put a separate box round each of them then my view would probably be that they would be separate entities, if however, there's a kind of holding company and these are really divisional organisational structures then I think its probably time to pull your wagons into a circle.

Jim Brown - Okay they are divisions but it would be very difficult to have a workers council that would cover the three companies, we would therefore need workers councils in each factory.

That illustrates my point, which is if you are on the front foot doing some proactive strategic thinking you might take the view that you would rather have three consultative bodies that everybody would be comfortable with which you could organise, structure and work as you would want to rather than risk having the trigger mechanism pulled and being forced into a regime which might not suit you. That may just be a very nice example for me of getting it done first if it were and making it a positive experience.

David Tomlinson, Bolton

Could you tell me who will police this legislation and what will be the implications for not doing it ?

Answer:- That is one of the areas of debate at the moment in relation to whether it will be policed by the appointment of tribunals or by the CAC (Central Arbitration Committee). At the moment the proposition is that matters of dispute would get sent to the CAC who would adjudicate but the fines that might be imposed may be imposed by the Employment Appeal Tribunal. That's one of the areas which is open for debate at the moment but there will be sanctions for noncompliance and the CAC will be able to direct you to do certain things to comply with the regulations.

Question: Ross Warburton

You mentioned the issue of confidentiality and as a plc Chairman I have enough problems keeping six board directors mouths shut and I have no idea Lucy manages with all of Tesco, they probably have better discipline than we have, but it just concerns me that the listing authority sort of compliance that you referred to is a bit like the stable door and the real problem is actually what are the things that you would suggest in managing confidentiality and particularly for many of those who aren't involved with listed companies but involved with private businesses where confidentiality has just as high a profile.

Answer: I think that the way to approach it is that if you are in this process and people are putting themselves forward to be elected it would be on the basis, if you cast your mind back to the last few slides I ran with the publicity campaign and the interest generation, that you would make it absolutely clear up front that this is a very serious matter, that there will be confidential

information and if you are considering standing for election be aware that you will be required to undertake quite rigorous confidentiality obligations and if you are not up

for that then you ought not to stand. Once you've got people bought into the fact that this is a positive obligation I don't see any reason why you wouldn't seek to impose the same kind of level of confidentiality that you would in your director service agreements, I think these are very stringent, there are sensitive issues potentially to be dealt with here and I think you would be perfectly entitled to require your employees to sign up to that. It goes back to the point I made on governors, if you are ahead of the game and you are designing your own mechanisms, your own structure, your own corporate governance, that's one of the things you could clearly do, you would be in a position to set your own standards as to what you thought was appropriate levels on confidentiality, information etc without having a model imposed. So I think you could be fairly vigorous about the way in which you would want to see that policed and as far as the stock exchange is concerned provided you've got the document signed if these things leak as they sometimes do you should be in a position to say that you did all you could reasonably have been expected to do. If you do find somebody in the situation that leaks it then clearly they are not going to be immune from discipline or from other sanction but you would need to treat that with caution because obviously they will almost become a protected species.

Question: Lucy Neville-Rolfe

Can I ask a follow up question on the compliance rules, you remember marks & Spencer closed shops in

France and got into trouble becausf they hadn't done the necessarl things, does that mean if you don's go down this road and do the propej information consultation whai you've done is stopped, you've talked about fines and tribunals al of which sounds long and legalistic can you actually stop the business decisions that are subject tc consultations over, if a factory has tc be closed for example in sac circumstances, can that then b, stopped ?

Answer:- Let me see if I can dea with that in two ways, let: assume that you have ar organisation which is about tc take some decision, maybe about a closure and its got more than 150 employees, the trigger mechanism has not been operated and therefore there is no forum, no workers council in place, there would not be an issue falling under the terms of the Informational Consultation directive but you would probably be caught by the consultation requirements on redundancy and your obligation to consult at the earliest possible opportunity, so that would be that style. If on the other hand you were north of a 150 people and you had your forum in place then you would not be in a position to take that step or make that closure without having gone through the consultation. If you failed to do so then you would be open to a challenge whereby they would say that there had been a failure to consult and on the example that you gave that would be a pretty blatant failure and I think you wouldn't expect too much sympathy.