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Criminal liability for failing to register redundancies sends warning to employers

Written by Audrey Williams

Do prosecutions of Sports Direct and City Link directors herald a tougher approach?

HR experts advising executive teams on restructuring, site closures, and reductions in staff, will be all too familiar with implementing the obligatory collective consultation processes.

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 requires employers to consult collectively with employees at risk of redundancy, for a minimum of 30 days before the first dismissal takes effect where redundancies in excess of 20 employees are proposed within a 90-day period, or 45 days where 100 or more employees are affected.

The typical employment tribunal remedy for failing to follow the consultation requirements is a protective award of up to 90 days' actual pay (as opposed to the statutory week's pay used to calculate basic awards) per employee.

The regulations also require employers to notify any unions involved before commencing consultation (commonly described as the s.188 notice) and the Secretary of State via a form called HR1, again within the required time scales.

Those who work across borders, particularly in countries such as France, will know that some breaches of employment law can carry criminal sanctions. This is seldom a concern in the UK (although there are some exceptions, such as immigration and employment checks, and health and safety obligations).

Indeed, many employers would have regarded the filing of an HR1 form as just necessary red tape. It comes as a surprise, therefore, that the Insolvency Service has decided to take criminal proceedings against Sports Direct chief executive David Forsey, and also apparently three former directors of City Link.

The criminal charges concern not the failure to consult but the failure to file the form HR1. Section 193 requires the HR1 form to be filed against the same timescales as for collective consultation, and often the notifications to the trade union/employees representatives and Secretary of State go hand in hand, forming part of the planning process.

But the penalty for failure of the latter, historically, has not been used. The sting in the tail is contained in s.194 of the regulations, which provides that where an employer fails to give the notice, the organisation commits an offence that, on conviction, can result in a fine which (since 12 March 2015) is uncapped.

Perhaps even more surprising, s.194 (3) says that an offence under this section if "committed with the consent or connivance of, or…attributable to neglect on the part of,

any director, manager, secretary or other similar officer" can result in an individual being charged and made personally liable.

There is a defence available, if an organisation or individual can show it was not reasonably practicable to file an HR1 form because of "special circumstances".

However the same defence applies to a failure to consult collectively and case law has shown it is difficult to succeed with such an argument, and courts have rejected the suggestion that it should apply as a matter of course where a company is in administration.

The Insolvency Service's actions must be seen in context. While it is not likely to be a common approach in future, it is a warning.

The USC fashion chain and the Sports Direct group have been under scrutiny. It is also important to bear in mind that it is common for redundancy and notice payments to staff (and other elements of pay) to be picked up by the state's insolvency fund if the employer in administration has insufficient funds.

In March, in addition to increasing the standard level of fines, the Insolvency Service asked for evidence about how directors and insolvency practitioners were complying with their consultation obligations.

The call for evidence closed in June 2015 and we have yet to hear what conclusions have been arrived at as a result of that feedback. The foreword to that consultation makes clear that "notifying the Secretary of State helps to mitigate the effects of redundancies where they occur by ensuring that government agencies that support employees facing redundancy are able to give timely and effective advice and training which can help individuals return to employment and reduce stress and uncertainty".

These prosecutions may signal a change in direction and a more proactive approach by the Secretary of State.

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