



### Redundancy by insolvent businesses - how much is enough?

In a victory for common sense, the Employment Appeal Tribunal ('EAT') has held that an insolvent company was not expected to continue to trade, potentially fraudulently, to give it time to comply with its obligation to consult with employees for 90 days regarding collective redundancies.

#### Consultation obligations

If an employer proposes to dismiss as redundant 20 or more employees at one establishment within a 90 day period, it is obliged to provide certain information to and consult with appropriate employee representatives.

Until recently, if 100 or more redundancies were proposed, consultation needed to begin at least 90 days before the first dismissal took effect (this has been reduced to 45 days where the redundancy proposal arose after 06 April 2013).

Failing to comply with this obligation to inform and consult can lead to a 'protective award' of up to 90 days' uncapped pay per employee.

#### What if the business is insolvent?

In this case (*AEI Cables v GMB*), AEI was in financial difficulties and was advised by its accountants that it was at risk of trading whilst insolvent, unless it reduced costs. That could lead to directors facing potential personal liability for obligations assumed by the company during that period and even criminal liability for fraudulent trading, if the company contracted credit whilst insolvent and where it may not have been able to secure repayment.

When AEI was unsuccessful in obtaining an extension to its overdraft, they therefore immediately made 124 employees redundant. The union successfully brought an employment tribunal claim for failure to inform and consult and the maximum protective award of 90 days' pay per employee was awarded.

#### A punishment too far

On appeal, the EAT acknowledged that the purpose of the award is punitive - to encourage employers to comply - and that tribunals should start at 90 day awards when no consultation at all had been carried out.

However, the tribunal had gone too far and had failed to take account of mitigating factors, as they are required to do. The fact that the company had received advice that it could no longer lawfully trade was material to why they had not consulted for 90 days.

Nevertheless, an award of 60 days' pay per employee was still granted, on the basis that AEI could have under taken some consultation in the time available, but had failed to engage at all.

This case shows the importance of taking what steps are possible to consult with a workforce that may be affected by redundancy, but is helpful in establishing the limits of when it is possible and reasonable to do so.

If you would like any further information or would like advice on Employment or Corporate Turnaround Insolvency, please contact either:



**Patrick Cook**  
Corporate Turnaround & Insolvency  
+44(0)117 307 6807  
patrick.cook@burses-salmon.com



**Catharine Cooksley**  
Employment  
+44(0)117 902 7727  
catharine.cooksley@burses-salmon.com