ARNOLD & PORTER (UK) LLP

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HOW ARE UK BUSINESSES CUTTING EMPLOYMENT COSTS IN THE CREDIT CRUNCH?

If you are a US company with UK and European operations, then you are probably coming to terms with the complexity of UK and EU employment laws. Reductions in force in Europe operate according to very different rules from those that apply in the US. Getting the process wrong can land US companies with very expensive claims. A poorly worded communication to US staff can be picked up by your European employees as evidence that the company was never serious about "consultation," which is at the heart of the UK/European approach. Simply terminating European employees in accordance with their contracts of employment exposes companies to litigation if they are not conversant with the proper procedures that need to be adopted prior to termination. In this client advisory, we focus on the UK and seek to give US parent companies a heads-up as to the general principles which apply, and steps you can take to limit the prospect of legal claims.

ARE THERE ALTERNATIVES TO REDUNDANCY?

Most companies will consider at an early stage whether there are alternatives to eliminating jobs (redundancies). These might include cutting, or at least freezing, salaries or employer pension contributions; enforced vacations at times when the UK business is traditionally quiet; reducing working hours; closing down the UK office and having UK staff work from home; or allowing staff to take unpaid sabbaticals.

Unless the company has appropriate flexibility clauses built into its employment contracts, in most of these situations, the employer will need to secure employee consent to the variations. Simply announcing changes, such as pay cuts, without further ado, would allow employees to resign and treat themselves as having been constructively dismissed. That, in turn, would expose the company to claims for notice pay (there being no employment at will in the UK) and unfair dismissal. Those employees would then, by law, be in a position to walk free from any non-competes or non-solicitation clauses to which they were previously subject. Whilst the risk of staff leaving is admittedly reduced in a climate when staff are only too pleased if they still have a job, disgruntled employees could adopt the alternative tack of staying in post and reclaiming any pay cuts as unlawful deductions from pay.

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In these situations, the UK approach is to consult first. This means presenting the measures as "proposals" about which the employer wishes to obtain feedback. If agreement can be obtained, it should be properly documented. If a minority of staff refuse to go along with the proposed changes, it may be necessary for the employer to threaten to terminate their employment and to offer re-engagement on the changed terms. However this is a strategy of last resort and any termination should only be carried out after going through a fair dismissal process.

WHAT ABOUT OUTSOURCING?

It may also be possible to avoid redundancies by outsourcing certain functions within your UK business. If you go down this route in the EU, bear in mind that you are likely to trigger local regulations designed to give effect to the EU Acquired Rights Directive. The relevant legislation in the UK, The Transfer of Undertakings (Protection of Employment) Regulations 2006, known as "TUPE," is designed to protect jobs. Whilst a detailed analysis of TUPE falls outside the scope of this advisory, bear in mind that adopting the US approach of simply terminating unwanted employees is probably the most dangerous, and potentially costly step you can take.

In most cases, your employees will transfer automatically to the vendor on their current terms of employment. If the vendor does not need so many employees, it is usually simpler for the vendor to carry out the required reduction in force, arriving at an agreement with you as to how the severance costs should be split up. The vendor will need certain information from you about the employees whom it is inheriting under TUPE. Here, you need to be mindful of EU regulations on data privacy, particularly if you are transferring the data outside the EU.

The TUPE Regulations will also require you to inform and, in most cases, consult with the elected representatives of your employees about the planned outsourcing. This even applies if you do not recognise a union. Heavy penalties can be imposed for a failure to comply.

REDUNDANCIES—THE COMMUNICATION STRATEGY

Assuming that alternatives to redundancy have not worked, or are simply insufficient to address the economic situation, employers will generally consider conducting a reduction in force.

As consultation is absolutely critical to the UK process, you need to be very careful about what you say to your US employees if they are likewise impacted. Whilst you may have no legal requirement to consult in the US, if you make statements that suggest that all key decisions as regards UK employees have already been taken, this could rebound badly. UK employees could seize on those statements to demonstrate that any UK consultations are a "sham" and that the resulting dismissals are unfair. Therefore it pays to finesse the wording of any US, or company-wide announcement, with your UK legal team.

UNIQUE ROLES

If your proposals involve the termination of individuals in unique roles—for example, the one UK-based Vice President of Marketing—then the UK termination process is straightforward. Indeed, if the employee has been employed by you for less than 51 weeks by the time he or she leaves, no particular procedure is required at all.

The basic termination process for longer serving staff involves writing to the employees to advise them that you are contemplating eliminating their roles, setting out the reasons behind the proposal, and inviting them to a consultation meeting to discuss the position. The employees should be given a reasonable opportunity to prepare their case in advance of the meeting. No time frame is mandated for these consultations, although in practice, one or two meetings is usually sufficient. If you proceed to terminate, the employees should be given a chance to appeal your decision. Few usually take up this opportunity.

RELEASES

In all the cases discussed in this overview, it is possible to negotiate settlement agreements with employees to avoid having to go through due process. However, care must be exercised in how the message is communicated, so that if you are unable to reach terms, you are still able to continue the consultation process and terminate fairly.

US release documentation will not provide a binding settlement in the UK. Instead, you need to use UK Compromise Agreements. It is a key condition of such

agreements that the employee has actually received independent legal advice before signing the agreement.

SELECTION POOLS

Where you are selecting between employees who do broadly the same sort of work, you cannot simply approach those you perceive to be the poorest performers and terminate them. That would give rise to unfair dismissal claims. Instead, you would be expected to develop objective selection criteria to help you make a fair assessment of which employees should be dismissed. You should first consult the affected employees about your "proposed" criteria. Next, having scored all those in the pool, you would invite the lowest scorers back for individual consultation before a final decision is taken as to whether to terminate their employment.

GETTING THE DOCUMENTATION RIGHT

To many US companies the UK consultation process appears to be a charade, but it is important to "play the game" if you wish to successfully defend claims. This includes ensuring that your documentation of the process refers to "redundancy proposals," rather than using language which indicates all key decisions have already been taken. Bear in mind that these documents are likely to be discloseable in any future litigation in the UK.

THE NUMBERS GAME

If you are proposing to terminate 20 or more employees at one establishment within a 90-day time frame, you will, in addition, trigger UK rules on collective redundancy. This has a number of key consequences:

- Alongside consultations with individuals, you will also be required to consult their representatives. If your company does not recognise a union in the UK, employees will need to be given the opportunity to elect representatives.
- Consultations with those representatives must continue for a mandatory period of 30 days if 20-99 employees are facing redundancy, and 90 days if you are proposing to dismiss 100 or more employees.
- You will be required to lodge a notification, known as an "HR1," with a government department, setting out details of your proposals, and to provide a copy of the notification to the elected representatives. It is a criminal offence to fail to lodge the notice.

CONCLUSION—ALL IS NOT LOST!

Although at first blush the UK system appears alien and overly convoluted compared with the US, most problems can in fact be avoided with advance planning. Unlike some EU jurisdictions, there are ways to move swiftly through some of the loopholes and releases can be secured. The US companies that end up in litigation tend to be those that try to manage their UK reduction in force (or any alternatives to redundancy), as if the law mirrored the US.

Arnold & Porter (UK) LLP's employment team, based in our London office, has extensive experience of helping US companies navigate the processes in both the UK and wider afield in Europe.

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