THE
NATIONAL LAW REVIEW

Information and Consultation in UK Insolvencies – Who Wins, Really?

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Monday, May 16, 2016

The ***Employment Tribunal*** ruled last month that ex-employees of *Sahaviriya Steel Industries UK Limited (in liquidation) ("SSI")* are entitled to the maximum protective award for a complete failure by SSI to inform and consult with them about their redundancies (90 days' pay for each of the 1100 employees affected).

Because of the insolvency of SSI, the employees will need to look to the Secretary of State's National Insurance Fund for payment of the award. However due to the cap on payments out of the Fund (being a maximum of just £479 per week for 8 weeks) they will not recover anything like the full amount from it. The balance of their claims will be unsecured against SSI but given the levels of debt compared to the value of the assets in that business, they should sadly not expect to recover much – if any – of the extra.

Consultation and insolvency

The SSI case is another example of the stark reality that distressed businesses face when contemplating collective (20+) redundancies.

In many cases, there will simply be insufficient time or resource to comply with these obligations before making redundancies – doing so may put the business in an

even more precarious position that could ultimately result in more people losing their jobs or in its going under altogether. Against that, however, a failure to inform and consult where required to do so will expose the business to potentially significant financial penalties. Of even more concern to directors will be the possibility of criminal charges brought by the Insolvency Service. The case law makes it clear that the "special circumstances" defence is not available merely because the employer is on the brink of insolvency or has already entered formal insolvency proceedings.

There are similar provisions for informing and consulting under TUPE, with similar sanctions for getting it wrong. Often the same (or more) urgency applies where a deal is being sought which seeks to preserve the value of the insolvent business and the jobs of the workforce. Any delay whilst carrying out an information and consultation process might jeopardise the value of the business or even risk the sale completely, leaving employees without the prospect of any job at all. On the other hand if no proper information and consultation process is carried out, the resultant liabilities could transfer to the purchaser under TUPE. That could also jeopardise the sale (affecting employees) or have a significant impact on the purchase price (affecting creditors). We must remember in all of this that the fact or size of any protective award made will not usually be affected by whether the employees suffer any loss or whether that process would have made any difference to the end result. At that level, the information and consultation rules could be said to be a triumph of form over substance.

Much will depend upon the particular circumstances but certainly anything the distressed business or insolvency practitioner can do to mitigate the risk of protective award claims should be carefully considered. To the extent that *some* form of information and consultation can be carried out – even if this clearly falls short of the strict statutory obligations – then this should be done so. At least it may give the business a little moral high-ground, some notion of a defence and/or a reduction in the size of any potential awards. That may involve just a few days' information and consultation or at least some written communications to the workforce. These would set out so far as possible the information which a full process would require to be given to the employee representatives (or to the affected staff direct if there is no time to elect them) and invite comments or queries by return. Such an attempt to do the right thing in difficult circumstances may help mitigate the risk of criminal charges against directors.

Ultimately, the SSI decision is a victory for employees as it reinforces the message that insolvency or difficult trading circumstances will not absolve employers of their statutory obligations. The SSI staff will receive a small proportion of their claims as a result. The decision is unlikely to make businesses or insolvency practitioners change materially how they deal with insolvency situations but probably will simply make it more difficult to promote a rescue culture. That may mean that other businesses which (unlike SSI) could have been saved will not be, with hundreds or thousands of jobs lost as a result. No real winners there.

In March 2015, the Government launched a Call for Evidence on collective consultation for employers facing insolvency. The Call closed in June 2015 and the Government issued its response in November 2015. It confirmed that it would be

“analysing the feedback received” and considering the best way to clarify the requirements on employers in such circumstances. The fact we have not yet received anything perhaps reflects the challenges that the tensions between employment and insolvency law create. Interestingly, in its response the Government suggested it did not feel there was any such conflict whilst at the same time acknowledging that the majority of respondents thought otherwise!