

SCOTTISH TRADES UNION CONGRESS

DTI: Public Consultation on High Performance Workplaces: Informing and Consulting Employees

Purpose of paper

The purpose of this paper is to present to the General Council a briefing paper on the DTI response to the Public Consultation on *High Performance Workplaces: Informing and Consulting Employees*.

Background

The STUC responded to the DTI's original consultation on *High Performance Workplaces: Informing and Consulting Employees* in November 2003. The current document relates the DTI's response to the public consultation.

The STUC Response

The STUC did not receive any responses from affiliates to this consultation and has therefore not responded at this time.

Given that a further opportunity to respond to the key issues will be presented when the DTI consults on draft guidance for implementation, a short briefing on the DTI response is provided. The briefing identifies the areas in which the DTI proposes to modify or clarify the original proposals in light of the public consultation.

Attached below is also a copy of the TUC response to the consultation which the STUC fully supports.

DM.GC.11.04

Summary of DTI Response to Public Consultation on High Performance Workplaces: Informing and Consulting Employees

Guidance

1. DTI has drafted guidance on the regulations to serve as an explanation of the law and it will cover amongst other issues: requirements for pre existing agreements, arrangements that cover groups of undertakings or provide for different arrangements in different establishments, the DTI's view of the meaning of terms such as "undertaking", "consultation", "substantial changes to work organisation or contractual relations", and "relevant level of management" and the frequency and timing of information and consultation. This draft guidance, which it is publishing for consultation, will be another opportunity for the STUC to return to this subject.
2. ACAS will be publishing good practise guidance focussing on how to set up and operate effective information and consultation arrangements.

Modifications to the Regulations

1. Draft Regulation 9 has been added to allow an employer who has a pre existing agreement covering more than one undertaking to hold a single ballot across all the undertakings to ascertain whether a workforce endorses an employee request.
2. Draft Regulation 14 has been modified to allow employers and representatives of employees to negotiate an agreement covering more than one undertaking.

Relationship to existing statutory information and consultation requirements

1. The I&C regulations have been amended to the effect that consultation on a collective redundancy or TUPE transfer would only be required to take place with one consultation body at one time.

Relationship to collective agreements with unions

1. Government view is that there is no need to make special provision for collective agreements or for trade union representatives under the I&C legislation.

2. The definition of a pre-existing agreement in Regulation 2 has been amended to state that the agreement may be made with the employees or their representatives. Will also be covered in the draft guidance.
3. Clarification of the distinction between collective bargaining and consultation with a view to reaching agreement is provided in Para 45 of the draft guidance.

Other issues

1. *Time limit for employee requests*. Regulation 7(2) has been amended so that a request that falls short of 10% threshold will only be valid for 6 months.
2. *Start of Negotiations*. Extended from one to three months to allow preparation time (reg 14(3))
3. *Endorsement Ballot*. The ballot has been made subject to a majority of those who vote in it, as well as 40% of the employees of the undertaking.
4. *Pre-existing agreements*. The definition in reg 2 now excludes European Works Council agreements.
5. *Anonymous employee requests*. This option has been removed and all such requests would in the first instance be referred to the CAC.
6. *Complaints*. Individual employees will be able to bring a complaint even if there are employee representatives.
7. *Negotiating Representatives*. A provision has been added in regulation 15 allowing employees to challenge the identity of negotiating representatives.
8. *Employer failure to respond to employee request*. Standard rules will now apply after 6 months and not the 15 months previously allowed.

Enforcement

A number of modifications have been made

1. The restriction on the effect of CAC orders makes it clear that pending acts or agreements are covered
2. An “exclusivity of remedy” provision has been added so that voluntary agreements would not be enforceable through the courts unless the employer agreed.
3. CAC order will be enforceable through the courts and not via the Employment Appeals Tribunal.
4. Three month time limit for bringing a complaint under negotiated agreement or the standard rules has been added.
5. The possibility of a complaint being brought against an I&C representative or another employee has been excluded.

Application to the public sector

1. The draft guidance seeks to shed further light on the subject, but acknowledges that more case law is needed.
2. Discussions taking place with Civil Service Unions to develop code of practise.

Local Authorities would not be formally covered by the code of practise but would be expected to adhere to its principles.

Information and Consultation: Government
consultation on legal guidance

Regulations on Information and Consultation: TUC response to legal guidance

Introduction

3.1 The TUC welcomes the opportunity to submit comments as part of the Government's consultation on the guidance to the Information and Consultation Regulations. The TUC represents 70 unions with a total of over 6.7 million members. The TUC affiliates range greatly in size and cover a wide variety of industries and occupations.

3.2 The TUC welcomed the decision of the Government to initiate a dialogue between the TUC, the CBI and themselves on how to implement the EU Directive. This was the first occasion on which the social partners in the UK had engaged in formal negotiations on an EU Directive and produced an agreed framework for the transposition regulations. The TUC believes that the process was successful and encourages the Government and the CBI to repeat the process on other EU Directives.

3.3 The TUC respects the process of negotiating a framework agreement of this kind and although there were some points where we disagreed with the CBI, and the outcome was not what we would have chosen, the same applied to the CBI on other issues. Overall, the framework agreement represents a desire for a smooth transposition, with flexibility to accommodate existing systems where employees are satisfied with them but also with room to make a formal challenge where a sufficient number of employees are not satisfied, or where there is no formal system for information and consultation and employees want to initiate one. All parties agreed that challenges from fewer than 15 disgruntled employees should not be allowed to proceed, partly because they would not indicate majority dissatisfaction, partly because you would be unlikely to produce a viable system out of such challenge and partly because it would be disruptive for no real purpose. The framework agreement should also ensure that employers cannot unilaterally impose systems without serious risk of a challenge.

3.4 The TUC remains concerned about the lack of any effective redress for employees when their employer is in breach of the provisions of the Regulations. Our firm belief is that there should be a "status quo ante" provision to allow the courts to order the employer to cease an activity or proposed activity until proper consultation takes place. We also firmly believe that the upper limit of £75,000 on the penalty for non-compliance is far too low and will not deliver an "effective, proportionate and dissuasive" remedy as required in the Directive.

3.5 One issue which was not covered by the Social Partner agreement was the inclusion of training as a matter on which consultation must take place. Although it was agreed that pensions were a matter for consultation, and that is now reflected in the Pensions Bill, the CBI refused to discuss training at that stage and in the interests of getting agreement on key procedural issues such as the enforcement body within the timescale the TUC accepted that training could be discussed outside the context of the official negotiations. In the event the CBI subsequently said that they were firmly opposed to the inclusion of training and would not discuss the matter further. The Government said that they did not want to be prescriptive about the specific issues on which consultation must take place. Nonetheless the TUC remains firmly of the view that training should be included and has written to the Secretary of State twice on this specific matter, as well as to the Secretary of State for Education and Skills.

3.6 The TUC would also ask the DTI to note the commitment made by the Labour Party at their Policy Forum in Warwick to ensure that where a company became insolvent or ceased to trade, there would still be an obligation on the part of receivers, or the transferor company, to consult on issues affecting the future employment prospects of the employees of the former company.

General Points

Scope

4.1 The scope of the Regulations is unclear. The TUC does not agree with the advice in the draft guidance that parts of local government are excluded; this is not borne out by the current case law on TUPE. The TUC urges the Government to provide a wide definition specifically including local government and the NHS. We accept that parts of the central civil service are not likely to be covered and we are pleased that negotiations have been taking place between the Government and the civil service unions to reach an agreement on information and consultation provision in the central civil service.

Part time employees

5.1 The TUC was deeply disappointed that there was a provision in the draft Regulations which allowed employers to count part time employees as “half people” for the purposes of calculating the threshold and assessing support for the trigger mechanism. We therefore welcome the decision, reflected in this guidance, that for the purposes of assessing support for the trigger, part time employees must be counted as whole people. We remain deeply

disappointed that the option to count part time employees as “half people” is to be retained for the purposes of the calculation of the threshold. We believe that this is likely to be in breach of both the Sex Discrimination Act (as part time employees are more likely to be women) and the Part Time Work Regulations, as well as being unfair and unwarranted. In addition, it makes this aspect of the Regulations horrendously complex and potentially confusing. The TUC is not convinced that it would satisfy the criteria of the Government’s Better Regulation Task Force, which are that Regulations should be “transparent, accountable, proportionate, consistent or targeted”.

Supervision of ballots

6.1 In our response to the consultation on the draft Regulations, the TUC pressed for a provision that all the ballots specified in the Regulations, that is, on whether 40 per cent of the workforce supports a challenge to an existing system or where an agreement is negotiated following a successful trigger process, should be supervised by a Qualified Independent Person, as specified in law for recognition, industrial action and union Executive elections. We understand that the Government thinks it would be inappropriate to split the costs of paying for such a person between the employer and the employees as, unlike recognition where the union is a party, the employees are not an entity capable of paying. The TUC agrees with this but we suggest that the Government should meet the costs. It would be a price worth paying to ensure that such ballots were supervised in an objective and fair way. It is unlikely that the number of such ballots would be very high, certainly after the first few years of operation of the new Regulations.

Structure of the Guidance

7.1 There is a fair amount of repetition of the main text in the boxes. Some judicious editing would be helpful. The boxes work well on-line but less well when printed; it would be helpful if there could be some indication at the beginning as to what is covered in the main text and what is covered via the box links. Perhaps the boxes should be confined to good practice guidance, with those providing interpretation being included in the main text.

Specific Points

Introduction

8.1 In paragraph 2, second sentence, the word “undertakings” should be used rather than “firms”. In paragraph 5, the fifth sentence is remarkably casual for Government guidance; employers cannot do “whatever ... they want” because of various

legal constraints on them. A re-wording would be appropriate. Again, “liable to a fine” in the penultimate sentence is too casual: “may be liable to a financial penalty” would be more accurate.

8.2 In paragraph 6, where exempted categories of workers are suggested, it is at the very least arguable that all sub-contractors would always be excluded (cf, *Lane v Shire Roofing Company Ltd* (1995, IRLR 493 CA)).

The Process for Setting up consultation arrangements

9.1 Paragraph 10 is not clear. It gives the impression that the employer has complete discretion whether to hold a ballot or not. It is a discretion to hold a ballot or to give effect to the employees’ request. There is not a right to do nothing or retain the pre-existing agreement.

9.2 It should be made clear in paragraph 13 that in practice an application could be made on behalf of a group of workers by a trade union acting with their approval and on their behalf.

Pre- existing agreements Covering more than one undertaking, or covering different establishments

10.1 Paragraph 23, penultimate sentence: “or their representatives” should be added in after “employees”.

Applicability of the Standard Provisions

11.1 Paragraph 34 should be expanded to add that the standard provisions may also apply if the parties agree that they should. In paragraph 35, the relevant level of management may be functional rather than geographical. It should at any rate be made clear that whoever is doing the consulting should have a mandate to consult properly and should have the authority to consult with a view to reaching an agreement.

Information

12.1 Paragraph 43 suggests that the information that must be given in (a) must relate to (b) and (c). There is surely a duty to give the information under (a) even though there are no anticipated decisions affecting employment, etc. Could the final sentence in paragraph 45 be omitted? It undermines the objective, which is to get agreement as far as possible and gives the impression that employers and employees do not really have to try. This contradicts existing case law on consultation and is therefore not good advice.

Overlap with legislation on collective redundancies and business transfers

14.1 Could a sentence be added to paragraph 48 encouraging employers to provide facilities for I&C representatives.

Compliance and Enforcement

15.1 The final sentence in paragraph 50 may be misleading. A pre-existing agreement may be legally enforceable even though the parties have not expressly agreed that it should be legally binding. Following existing case law it will depend on whether there is an intention to create legal relations. This may be deduced from the circumstances in the absence of a clear express term of the agreement.

Exclusivity of Remedy

16.1 Paragraph 57 may also be misleading. It does not follow that any agreement concluded as a result of information and consultation regulations would not be enforceable in the courts, in the same way that the terms of a collective agreement are enforceable through the contract of employment.

Rights and Protections for I&C Representatives and Employees

17.1 Paragraph 60 should make reference to facilities for representatives. It is a matter of good practice, even if not specified in the Directive, that representatives may need some time to prepare for consultation if they are to do their job effectively and to meet each other before meeting their employer. Reference should also be made to their possible need for external advice and assistance and time to consult with external advisers.

Boxes: application in the Public Sector (page 28)

18.1 There is too much emphasis on “commercial activity”. The Regulations make it clear that they apply to “economic activity”, which is not the same, and that they apply to activities “whether or not operating for gain” (reg.2).

Requests for Data on Employee Numbers

19.1 In paragraph 3, insert after “employer”, “either directly or through their representative”.

Employees to Negotiate an I&C Agreement

20.1 In paragraph 2, the sentence beginning “The names of the employer...” should begin “Except in the case of anonymous

requests, the names.....”. This reflects the provision that names may be submitted directly to the CAC. In paragraph 4 it should be made clear that people recruited after the first request is submitted can also make a request before the six months expires. In paragraph 5 it should be made clear that an anonymous request can be submitted by a trade union acting on behalf of the employees who have signed the request.

Requirements for Endorsement Ballots

21.1 It might be helpful to have some guidance here on how to conduct a ballot and some indication of the matters to be taken into account in ensuring fairness. For example, the location and timing of the ballot, security of the ballot box, as well as the distribution of the ballot papers. If the employer declines the suggestion that a Qualified Independent Person be used, could there be some joint role for employee representatives in supervising or scrutinising the ballot and the count with the employer. It would be helpful to indicate in the guidance whether or not collection of signatures by electronic means is permissible.

Pre-existing agreements

22.1 Under the sub-heading Methods of I&C, there should be a point about facilities being made available to representatives including an opportunity for them to meet together during working time. Under the sub-heading I&C there should be points on time allowed for workers to give their response, reporting to the employees the outcome of the employer’s consideration of their views and reference to the desirability of seeking an agreement. A new third point could read “conscientious consideration of the employees’ views by the employer”.

Complaint about Validity of Pre-existing agreements

23.1 Paragraph 2, 2nd bullet point could draw attention to the fact that the terms of the agreement need not be the same; there may be collective agreements for some workers and other forms of agreement for areas of the workforce where there is no collective agreement. After the 3rd bullet point, could there be a reference to the fact that an agreement signed by trade union representatives could in itself constitute approval by the workforce where the representatives are acting on behalf of their members?

Date of Employee Request

25.1 It should be made clear in the first sentence of the first paragraph that the appropriate date in the case of an anonymous request is the date on which the CAC informs the employer.

Employer Notifications

26.1 After paragraph 2 a sentence should be added saying that where an employer recognises a trade union it would be good practice for the employer to notify the trade union as well.

Restrictions on Employee Requests and Employer Notifications

27.1 Paragraph 4: another example would be where there had been an expansion or a contraction in the business leading to changing numbers of employees, or where there had been a high turnover of staff.

Negotiating Representatives

28.1 In paragraph 1, negotiating representatives will also want to ensure that arrangements make provision for facilities for I&C representatives. In Paragraph 5, managers should only be negotiating representatives to the extent that is proportionate to their numbers within the staff as a whole, otherwise management could be consulting with management. In paragraph 10 it should be made clear that the officials of a non-recognised union may in some circumstances be appropriate as representatives; there is nothing in the legislation that prevents a representative of a non recognised union from being a negotiating representative. On paragraph 13, it should be made clear that long haul crew does not include airline staff.

Suggestions for Content of Negotiated Agreements

29.1 As this section is, in effect, extending legislation on I&C agreements, it is important that it includes matters such as facilities for employee representatives. There should be a separate paragraph on that. The employer will need to consider how much time off will be permitted for preparation for meetings and whether any other resources, such as professional advice paid for by the employer, are to be made available.

29.2 Under the heading Information and Consultation there should be a new bullet point on the time the employer will allow for the employees to give their response. The third bullet point should read “conscientious consideration of the employees’ views” by the employer. There should be an additional point on the employer reporting to the employees the outcome of her/his consideration of

their views. Reference should also be made to the desirability of reaching an agreement between the two sides. It would be helpful to cross-refer to the paragraphs dealing with the standard rules for ease of reference.

Negotiated Agreements Covering more than one Undertaking

30.1 In paragraph 3, penultimate sentence it should be made clear that this does not mean a majority in each undertaking.

Negotiated Agreements Providing for Separate Arrangements in Different Parts of an Undertaking

31.1 In paragraph 2 there should be a reference that provision should be made to enable representatives from different parts of an undertaking to meet each other in a formal capacity during working time to discuss such matters. In paragraph 5 there should be a sentence drawing attention to the constructive role that trade unions can play in negotiating flexible agreements where separate arrangements are to be made for different parts of an undertaking.

Election of I&C Representatives under the Standard Provisions

32.1 In paragraph 2 it would be helpful to add a sentence following the second sentence: "But in the event of a negotiated agreement the parties may wish to adopt similar arrangements". In paragraph 2 bullet 1, add a sentence to say: "The employer should not consult in a way that may be seen to favour one of the candidates in the election". In paragraph 2 bullet 4, add a sentence to say: "The employer should consult the negotiating representatives about the supervisor, who should be someone unconnected with the business".

Category (a) information

33.1 The TUC is concerned about the third sentence in paragraph one. It is patronising to employees to suggest that they will not understand the information given to them and it is not appropriate for Government guidance to comment on burdens on business – that is a matter for Parliament.

33.2 The TUC is also concerned about the attempt to narrow what information is to be provided in (a) by reference to sections (b) and (c). This qualification appears to limit the scope of the employer's obligations. There are reasons why employees will want to be informed about developments other than those relating to (b) and (c). These include investment decisions, relocation proposals, new

orders, productivity savings, sales, profits or losses, assets, liabilities, allocation of profits, government support and more.

33.3 Paragraph 6 is unhelpful and the TUC proposes deleting it altogether. There is no emphasis on threats to employment and redundancy in category (a) information. In paragraph 9, a sentence should be added saying that it is desirable to have an agreement with I&C representatives about the information to be provided.

Category (b) Information

34.1 The first sentence should refer to possible recruitment, transfer, or redundancy. There should also be a reference to plans for expansion. The 3rd to last sentence should not tell employers that there is no need to reach an agreement; this sentence does not reflect the spirit of the Directive.

Category (c) Information

35.1 Paragraph 2 states that there is “little indication within the EC Directive or its recitals as to what the terms “work organisation” and “contractual relations” are meant to include, etc”. The guidance then goes on to exclude specifically an undertaking’s relations with third parties. However, this could exclude information which could have a major impact on contractual relations. Is it therefore right to say that relations with third parties should be excluded?

35.2 Paragraph 3 should include references to new technology, investment and training. Paragraph 4 should include references to new technology, relocation and the introduction of new equipment. Paragraph 4 should not include references to pay being excluded. There is a distinction between *negotiating* on pay, which is a separate matter outside the scope of these Regulations, and consulting on matters which may affect pay, for example, introducing new shift patterns or reduced hours. To suggest the complete exclusion of pay may lead to some employers excluding such issues on the basis that they cannot discuss pay. This is not the intention of the Directive. We would strongly suggest a re-wording of this part of the paragraph.

35.3 Again, in paragraph 9 the references to employers not having to reach an agreement are unhelpful, particularly in the light of the requirement to consult “with a view to reaching an agreement”, which is in the text of the Directive and the Regulations. Perhaps an explanation of what it does mean rather

than what it does not mean would be more helpful and constructive.

Frequency and Timing of Information and Consultation

36.1 Paragraph 1 should include a reference to regulation 2 which defines consultation to mean, inter alia, the establishment of a dialogue. In paragraph 2, the TUC believes that there should be more than one meeting a year as a minimum. In paragraph 6 there should be a reference to training and facilities for representatives, as well as an opportunity for them to have access to professional advice and to meet with each other.

Consultation

37.1 In paragraph 2 there is reference to *ex-parte Price*. It should be pointed out that the judge in this case adopted the tests set out in *R v Gwent CC, ex parte Bryant (1998) IRLR 19*, where the judge in that case said: "Fair consultation means: a) consultation when the proposals are still at a formative stage; b) adequate information on which to respond; c) adequate time in which to respond; conscientious consideration by an authority of the response to consultation".

37.2 Again in paragraph 2, there is an emphasis on what consultation is not, rather than on what it is.

Penalties

38.1 In paragraph 4 a sentence should be added: "There is no provision for compensating employees where the employer has been found in breach of the obligation to inform and consult". There is likely to be confusion between these provisions and those in the Collective Redundancies and Transfers Regulations, where there is compensation to individual employees.

38.2 The TUC believes that the penalties in the Regulations are insufficient to act as a deterrent. Assuming that they will remain unchanged however, we would suggest that a sentence is added in to say that it would be good practice for employers to desist as far as possible from implementing decisions while a complaint about failure to inform and consult is being considered by the CAC.

Information subject to a Confidentiality Restriction

39.1 In paragraph 1 it should say confidentiality requirement, not restriction. In the footnote to that paragraph, this is an issue that should be referred to at more relevant points in the guidance, not

simply tucked away in a box about confidentiality. The last sentence is unnecessary and should be deleted; how can the employer prevent employees from seeking external advice?

Information withheld on confidentiality grounds

40.1 In paragraph 2 the last five words of the second sentence should be deleted and replaced with “employee representative”.