The Insolvency Service

Response Form

Collective Redundancy Consultation for Employers facing Insolvency

Deadline for Responses: 12 June 2015

How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: policy.unit@insolvency.gsi.gov.uk, or post to:

Pabitar Powar
The Insolvency Service
4 Abbey Orchard Street
London
SW1P 2HT

General Information

What is your name, or the name of the organisation you represent?

Insolvency Practitioners Association, Corporate Consultation Committee

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	and regulatory body
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe):	

2.1. Employer's Understanding

Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

The primary consideration for an advising Insolvency Practitioner is the likely impact on the realisable value of the business in the event that a consultation is commenced. The value of the business may be substantially diminished if the employee base is not stable and consultation risks key employees simply leaving.

Insolvency Practitioners are under a duty to maximise returns to the body of creditors generally, and to do so, they may need to preserve the value of the business, as well as its assets. The break-up value of the assets will generally be lower than their value within a functional business. Employees are one of a number of interested parties with potentially competing interests and the practitioner is required to balance these as best as circumstances permit. They may reasonably believe that commencing a consultation with employees will conflict with their responsibility to the creditors as a whole. It is by no means clear which, if any, of these obligations takes priority in circumstances where they conflict or how such conflicts should be resolved.

The level of available funding for ongoing trading and/or cash flow may impact upon the viability of retaining employees and may, therefore, be the determining factor in where redundancies are inevitable.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

Meaningful consultation may be possible in a long term restructuring plan. However, in a fast-paced insolvency scenario, it does not work.

Whilst the Insolvency Practitioner can be open, honest and transparent with employees, in many cases this dialogue will not have any impact upon the inevitable outcome. By the time that a formal insolvency process has started, the company has run out of alternatives and the eventual outcome is usually known – i.e. an immediate close-down, a short period of trading followed by a close-down or a quick sale of the business.

Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?

Where options other than the cessation of trading exist (namely, where there is the possibility of a rescue of all or part of the business), then consultation may be of benefit. It can assist in retaining employee loyalty. However, these situations are relatively rare.

Consultation is more relevant in the context of turnaround (e.g. Honda). In formal insolvency, consultation has little meaningful benefit once cessation is an inevitability. It can be counter-productive and create additional uncertainty.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

Employees and employee representatives can provide useful information and may even be the source of introduction to possible buyers. Representatives can facilitate earlier consultation and mitigate the inherent risk of consulting to the value of the business. They can also assist with preparedness within the entity to accept the change that a major restructuring may necessitate.

However, late on in a process, once formal insolvency is inevitable, their involvement does not add significant value to the process and may be a hindrance.

2.2. Facilitators and Inhibitors

Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

An existing representative structure within the organisation assists communication. However, for consultation to be meaningful, dialogue with representatives needs to commence much earlier on in the decline curve.

Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

Where insolvency is a serious threat, but avoidable, consulting can make the difference in tipping the business towards insolvency, for instance, where key individuals leave (potentially taking customer relationships and know-how with them) or if employees seeking alternative employment opportunities make customers or suppliers aware of the insolvency risk.

Other inhibitors to starting consultation when an employer is imminently facing, or has moved into, an insolvency process are: a lack of options on which to consult, lack of time and a shortage of funds.

By this stage, other options for the company have been explored and exhausted. It is difficult to see how consultation can then consist of anything more than communication of information. Decisions have to be taken quickly and there may be no time to consult – particularly if there were no employee representatives in place before the insolvency and a nomination and election process has to be carried out before consultation can take place.

Finally, employees have to be paid while consultation takes place (between 30-45 days). This can be a significant expense, which is difficult to justify to the creditors who will ultimately bear the cost, particularly if consultation will not affect the outcome for the company.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

The lack of alternative outcomes is the primary factor in an insolvency context. "Consultation" implies there may be alternatives open for discussion, and there very often are no such alternatives to be considered, rendering the process artificial and of limited value.

Where job losses are unavoidable, relationships with employees will be strained and hostile and there are not always existing representatives with whom to liaise. Key staff will often have left the business in advance of its ultimate demise.

2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

Insolvency Practitioners certainly make directors aware of their obligations and the reaction of those directors will vary. We cannot comment in respect of other advisors.

However, there remains the need for directors to balance the requirements to consult with the detrimental effect that doing so may have on the prospects for the business' ultimate survival, and the other statutory duties directors have not to unnecessarily harm the creditors of the company more generally. These requirements potentially conflict in a similar manner as they do for Insolvency Practitioners.

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

Anecdotally, directors have seldom commenced formal consultation prior to instructing an Insolvency Practitioner.

Having representative structures in place might facilitate an earlier and more meaningful dialogue.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Again, anecdotally, experience suggests that many businesses do not have representative structures in place. Where such representation is in place in the form of Union representation, this is typically a complication factor as it necessitates determining who has been a part of the consultation and who hasn't (based on membership of the Union). Where representative structures are not already in place, a significant practical issue in appointing employee representatives is that employees often don't want to take on the role.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

This is entirely dependent on the circumstances of the case. Unless there is a need to dismiss employees on day 1, the Insolvency Practitioner will assume this function once formally appointed. Consultation has rarely, if ever, commenced prior to their appointment. The level of assistance requested / received from directors will be entirely variable.

2.4. Ensuring Effective Consultation and Notification

Process for Notification and Consultation

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

We would suggest the following:

- A protocol for information sharing to facilitate a more open dialogue
- Named points of contact at the RPO
- Simplified forms
- Pre-submission advice

13) Could the process requirements for consultation be further clarified or improved?

Yes, particularly with a view to encouraging directors to commence consultation with representatives at an earlier stage. It would assist in managing the expectations of employees if the dialogue with them began at a point when there were still alternatives to be meaningfully considered. Once an IP is appointed, the concept of consultation is fictitious and flawed and fails to manage the expectations of employees as it implies a dialogue in circumstances when the outcome is inevitable.

In the context of Protective Awards, formal insolvency should be acknowledged in law as a special circumstance, particularly where there are no realistic prospects retaining employees.

Guidance

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

See questions 12 - 13.

Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

We do not consider it possible in the majority of insolvency cases to incentivise compliance with a 30 (or 45) day consultation period on the part of the Insolvency Practitioner as there will simply not be funding available to trade for the prescribed period and/or to do so would be to the detriment of the general body of creditors. Practitioners are therefore placed in the invidious position of being obliged to comply with the impossible.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

Prior education and training for representatives and mandatory representative structures within organisations may assist. Additionally, employees need to be schooled away from the idea that many now have concerning protective awards; which are coming to be viewed as an automatic entitlement.

If the intention of these provisions is to adequately compensate employees affected by redundancy, then we would advocate an increase in the amounts and/or categories of preferential employee entitlement. This would be preferable to the uncertainty created by a consultation regime which is impossible to achieve with an insolvency context, given that there is little more that can be done once a company is in a formal insolvency process.

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

No. The experiences reported are exclusively negative.

Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

Directors have seldom consulted in advance of instructing an Insolvency Practitioner, which would suggest that the sanctions are not effective and/or they are either not dissuaded by them or are unaware of them.

They equally ineffective once an Insolvency Practitioner has been appointed, as the outcome is inevitable and the consultation period often simply not capable of being met.

Furthermore, we have experienced an increasing culture of “entitlement” towards protective awards, often fuelled by claims handlers. There is an emerging assumption that a 90 day claim can be made in all cases.

We suggest increasing the preferential amounts paid to employees to limit the development of this culture.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

It is largely irrelevant what sanctions are applied when there is no funding with which to continue to trade, therefore, the sanctions are not capable of being either effective or dissuasive.

Equally, it is not appropriate to impose a sanction in circumstances which are unavoidable.

When considering sanctions, we believe that the Employment Appeals Tribunal would benefit from specialist knowledge and training in the field of insolvency (similar to the 2 year training requirement which applies to those panels considering discrimination cases). Insolvency practice is a specialist and highly regulated activity and it would seem appropriate that the reasonableness of the actions of a duly appointed insolvency office holders are scrutinised by parties with a suitable foundation in insolvency law and practice.

Memorandum of Understanding

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

We are not aware of any specific concerns being expressed by Insolvency Practitioners and are not aware of any breaches of confidentiality. The system would, therefore, appear to be working acceptably. Its existence does not, however, obviate the problems encountered by practitioners with the consultation process generally.