ALLEN & OVERY

Employment Reorganisation Roadmap

United Kingdom

1 April 2021

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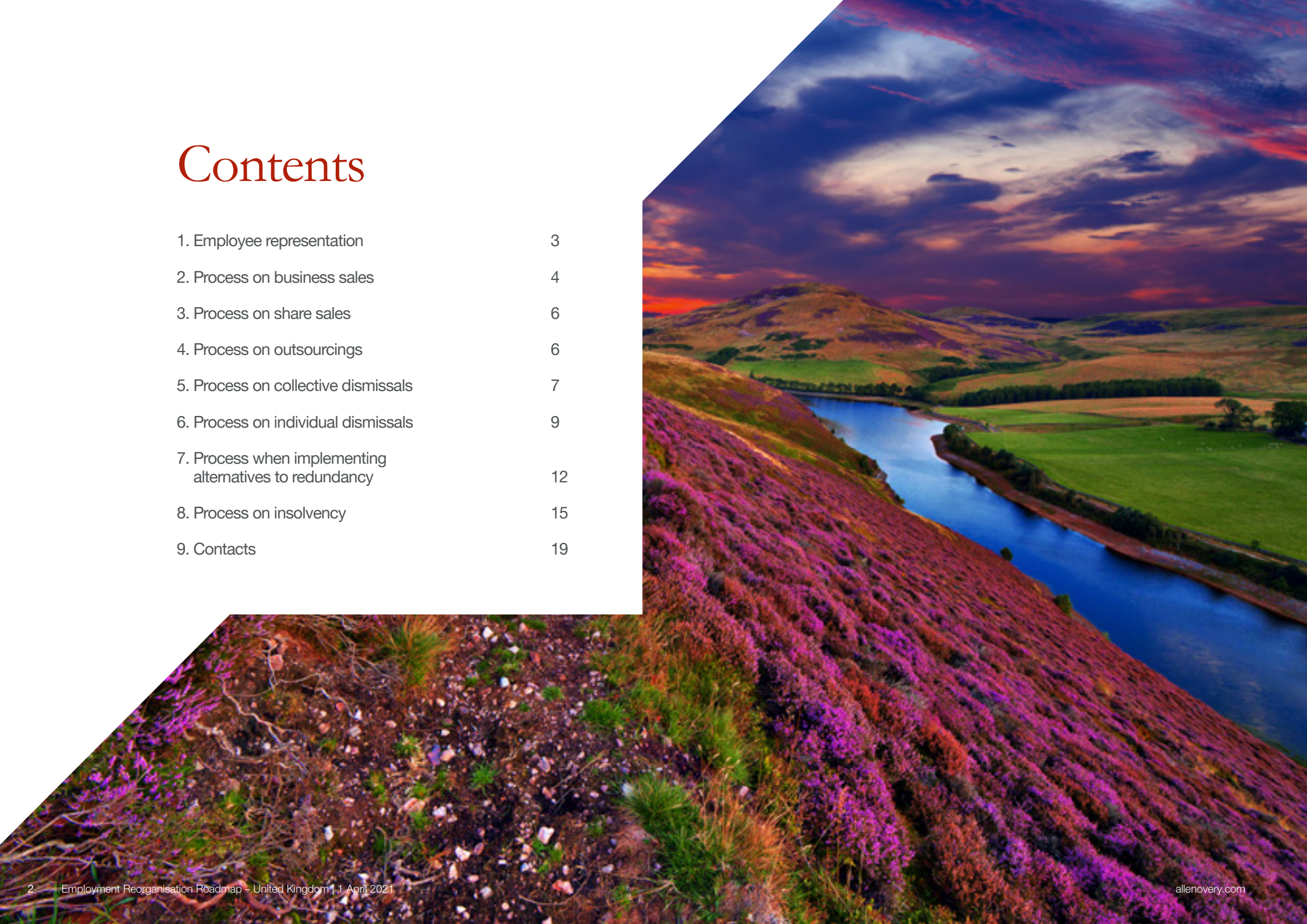
Contents



1. Employee representation

1.1 What are the main forms of employee representation involved in restructurings, in order of priority?

The main forms of employee representation involved in restructurings are:

– trade union representatives

or, if there is no recognised trade union, one of the following:

– employee representatives directly elected by affected employees for the purpose of being informed and consulted about a proposed business sale or dismissals, or

– a standing body of representatives previously elected by affected employees with sufficient authority to be informed and consulted on those issues.

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation.

2. Process on business sales

2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

Employees may be automatically transferred on the sale of a business or undertaking (or part of one) to a buyer where there is a transfer of a stable economic entity that retains its identity after the transfer. Whether this test is met is determined by reference to various factors, in particular whether customers, assets and employees have transferred, and the degree of similarity of activities before and after the transfer.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees employed by the seller immediately before the transfer and who are assigned to the business or undertaking (or part) will transfer to the buyer. Whether an employee is "assigned" is a question of fact, having regard to factors such as the percentage of time they spend working in the business or undertaking, the strength of their connection with it, and whether they work for it only temporarily.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Yes. Contracts of employees who object to the transfer terminate by operation of law on the transfer date. There is no dismissal or entitlement to severance.

However, an employee who resigns on account of a "substantial change in their working conditions to their detriment" will be treated as dismissed and will be able to bring a claim.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

Yes. Certain information must be provided to employee representatives early enough to enable consultation on any envisaged "measures" to take place. An obligation to consult (rather than simply to provide employee representatives with that information) arises when the employer is considering taking "measures" (covering any actions, steps or arrangements in connection with the transfer) that will impact employees. There is no prescribed time period for consultation. This must be undertaken prior to a business transfer over an appropriate period (which will depend on the significance of the measures) and "with a view to reaching an agreement" with employee representatives.

It is not possible to avoid the information/consultation process unless the employer can show "special circumstances" which mean it is not reasonably practicable to provide information/consult prior to the transfer. In order to invoke this defence, the employer must show that special circumstances exist and that it has taken all such steps to inform and consult as are reasonably practicable in the circumstances. This defence has been narrowly construed and is unlikely to cover, for example, the simple need to preserve confidentiality.

There is a separate duty for the seller to provide certain employee liability information to the buyer at least 28 days prior to the transfer or, if special circumstances mean this is not reasonably practicable, as soon as reasonably practicable after that.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

Failure to inform/consult can result in joint and several liability for the buyer and seller. Compensation may be awarded to each affected employee of up to 13 weeks' (uncapped) pay. An employment tribunal will decide how to apportion compensation between the parties. If the seller fails to provide employee liability information, an employment tribunal can award compensation to the buyer of a minimum of GBP500 per employee for whom information was not provided or was defective (unless it considers it just and equitable to award a lesser sum).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie, on the sale of the company itself)?

There is no obligation to inform/consult employee representatives on a direct share sale. However, if the seller/buyer has a standing body of representatives (established under the Information and Consultation of Employees Regulations 2004), it must inform that body about a proposed share sale, and possibly also consult any where measures would affect a significant number of employees.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employee representatives on an indirect share sale.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees may be automatically transferred on a service provision change in any of these scenarios where certain conditions are met. The change of service provider must involve "an organised grouping of employees... which has as its principal purpose the carrying out of the activities concerned on behalf of the client" and the activities carried on after the change must be "fundamentally or essentially the same" as those carried on before it.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Obligations to inform/consult apply in relation to a service provision change as they do on a business sale (see **section 2 – Process on business sales**).

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A collective dismissal arises where 20 or more dismissals are proposed at one establishment within a 90-day period.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

An employer must consult employee representatives when the dismissals are "proposed" (see answer to **5.4**), and consultation must begin "in good time". If 100 or more dismissals are proposed, consultation must begin at least 45 days before the first dismissal takes effect or, if 20-99 dismissals are proposed, at least 30 days before the first dismissal takes effect. The consultation process must include consultation "with a view to reaching an agreement" with representatives on ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the effects of the dismissals. Prescribed information must be provided in the course of consultation.

The employer cannot avoid the information/consultation process unless it can show "special circumstances" which mean it is not reasonably practicable to provide information/consult. To invoke this defence, the employer must show that special circumstances exist and that it has taken all such steps to inform and consult as are reasonably practicable in the circumstances. This defence has been narrowly construed and is unlikely to cover, for example, the simple need to preserve confidentiality.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

The employer must notify the Secretary of State (Department of Business Innovation and Skills) of a collective dismissal using the HR1 form. The timescales are the same as for collective consultation, so this can be done at the same time as starting that process. A copy of the notification must also be sent to employee representatives.

5.4. When are these obligations triggered?

The obligation to consult for collective dismissals/notify the authorities arises when dismissals are "proposed". A "proposal to dismiss" means more than just contemplating the possibility of dismissals, but it must occur before any decision to dismiss is taken.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Compensation may be awarded to each affected employee of up to 90 days' (uncapped) pay. There is an increased exposure to a finding of unfair dismissal (please see answer to **6.5** on unfair dismissal penalties).

Failure to notify the authorities may result in criminal proceedings and/or an unlimited fine (but prosecutions are rare).

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

There are no such obligations, but an employer must consult employees individually about the proposed dismissals (see **section 6 – Process on individual dismissals**).

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

There is no duty on the employer to reach agreement with employee representatives.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The minimum statutory notice entitlement depends on length of service and ranges from one to 12 weeks.

Notice is commonly enhanced in the employment contract.

A payment in lieu of notice can be made if provided for in the employment contract.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

In order for a redundancy dismissal to be fair, an employer must show that the dismissal is genuinely on redundancy grounds (as defined by the Employment Rights Act 1996 (ERA)), and that it has acted reasonably in implementing the dismissal.

There is a genuine redundancy situation for the purposes of the ERA if the dismissal is due to a workplace closure or due to reduced requirements for an employee to carry out work of a particular kind or in a particular place (whether the closure or reduced requirements, as the case may be, are actual or expected).

The principles governing procedural fairness are those established by case law. In order to ensure that a redundancy is fairly implemented, an employer should follow certain steps, notably:

– **Fair selection**: This involves identifying the correct pool from which to select potentially redundant employees, and applying appropriate non-discriminatory selection criteria fairly and objectively.

– **Warning and consultation**: This involves warnings and consulting individual employees (and, where appropriate, their representatives) about the proposed redundancy. Consultation must be at a formative stage, and employees must be given the chance to respond on the reasons for the redundancies, the pools, the criteria and their scores where they are to be selected from a pool, suitable alternative roles, and other ways of avoiding or mitigating the effects of the redundancy. The employer must keep an open mind about the matters under consultation and conscientiously consider the employees' responses. There is no prescribed timescale for this process, but a period of at least two weeks should be allowed.

– **Alternative employment**: The employer should consider alternative employment opportunities both within its own business and in other group companies.

It is also advisable for employers to allow employees to be accompanied at consultation meetings, and to offer employees the right to appeal the decision to make them redundant, to avoid a dismissal being procedurally unfair.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

Dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer itself. However, if an employer can establish an "economic, technical or organisational reason entailing changes in the workforce" (an "ETO reason") for the dismissal, which would include a genuine redundancy, the dismissal is potentially fair, subject to the usual requirements of procedural fairness (see answer to **6.2** as to procedural fairness).

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

The minimum statutory redundancy payment for employees with two or more years' service is based on a formula:

– one and a half weeks' pay per year of service over age 41

– one week's pay per year of service from age 22 to 40, and

– half a week's pay per year of service from age 18 to 21.

This is subject to a maximum of 20 years' service and weekly pay at a current rate of GBP544 (for dismissals occurring from 6 April 2021 to 5 April 2022). The maximum redundancy payment is currently GBP16,320. Some employers may also offer contractual/discretionary enhancements to statutory redundancy payments.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

If the employer fails to observe individual dismissal requirements, an Employment Tribunal may find the dismissal to be unfair in the case of an employee with two or more years' service. Compensation for a successful claim of unfair dismissal comprises:

– a basic award (which equates to a statutory redundancy payment), and

– a compensatory award capped at the lower of GBP89,493 (for dismissals occurring from 6 April 2021 to 5 April 2022) or 52 weeks' pay (based on uncapped gross pay).

There is no two-year service requirement or cap on unfair dismissal compensation if a dismissal is for certain prohibited reasons, including if it is discriminatory.

In addition, or alternatively, employees who are unfairly dismissed can request reinstatement or re-engagement. Orders for reinstatement or re-engagement are relatively rare, particularly in a genuine redundancy situation.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Some categories of employees (such as those with protected characteristics, those on statutory family leave, whistleblowers and employee representatives) may benefit from relaxed unfair dismissal (and other) rights if their dismissal is linked to these grounds. However, employers are not prevented from dismissing any category of employee (regardless of the risk of doing so).

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Changes can be made with express employee consent. Seeking an employee's express consent is recommended for detrimental changes to core terms, such as pay, working hours or job duties.

An employer can rely on an express contractual variation right for minor variations or variations to non-core terms. However, it must not exercise this in a way that undermines the duty of trust and confidence owed to employees. It should therefore:

– establish a sound business reason for the change, and

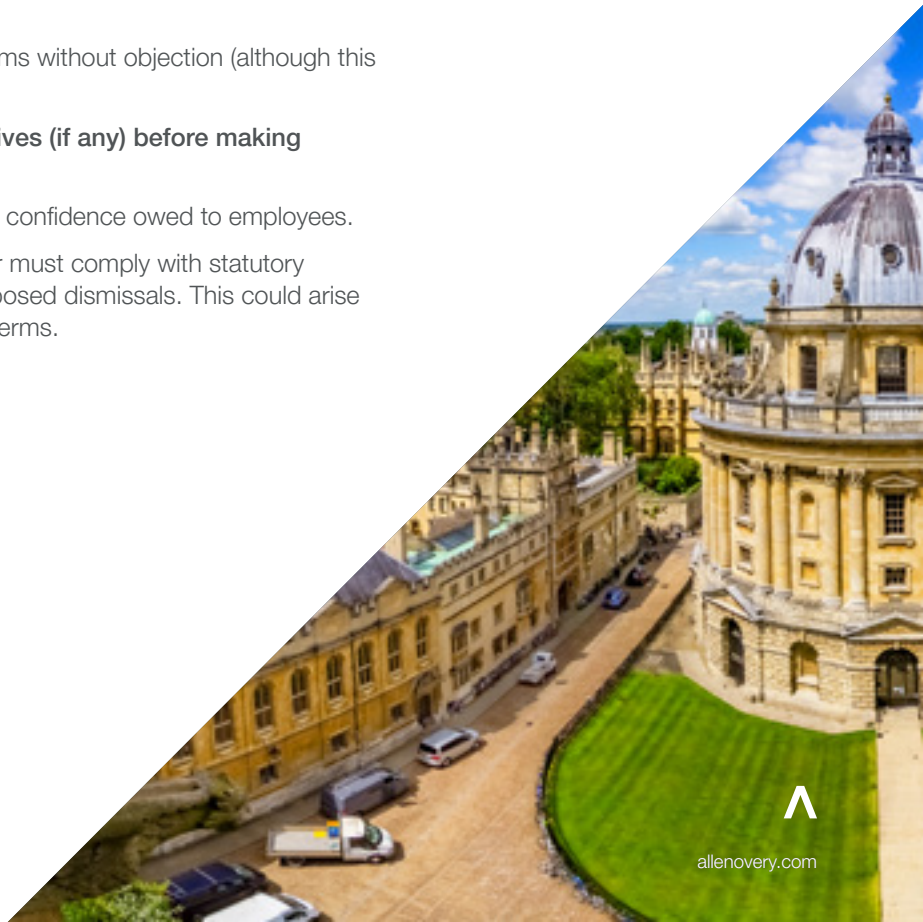
– follow a fair procedure, in particular by consulting employees individually about the change, considering alternatives and giving employees reasonable notice of the change.

The employer could also rely on **implied consent** where an employee continues working under the varied terms without objection (although this may be difficult to establish where changes do not take effect immediately).

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

An employer should consult individually about proposed changes in order to fulfil the implied duty of trust and confidence owed to employees.

Where employees' refusal to accept changes may result in dismissals of 20 or more employees, the employer must comply with statutory collective consultation obligations and inform/consult representatives of affected employees in relation to proposed dismissals. This could arise where an employer proposes to dismiss employees who refuse with a view to re-engaging them on the new terms.



7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

Changes to transferring employees' terms and conditions of employment (including beneficial changes) will be void if they are for the sole or principal reason of the transfer itself and not for an ETO reason.

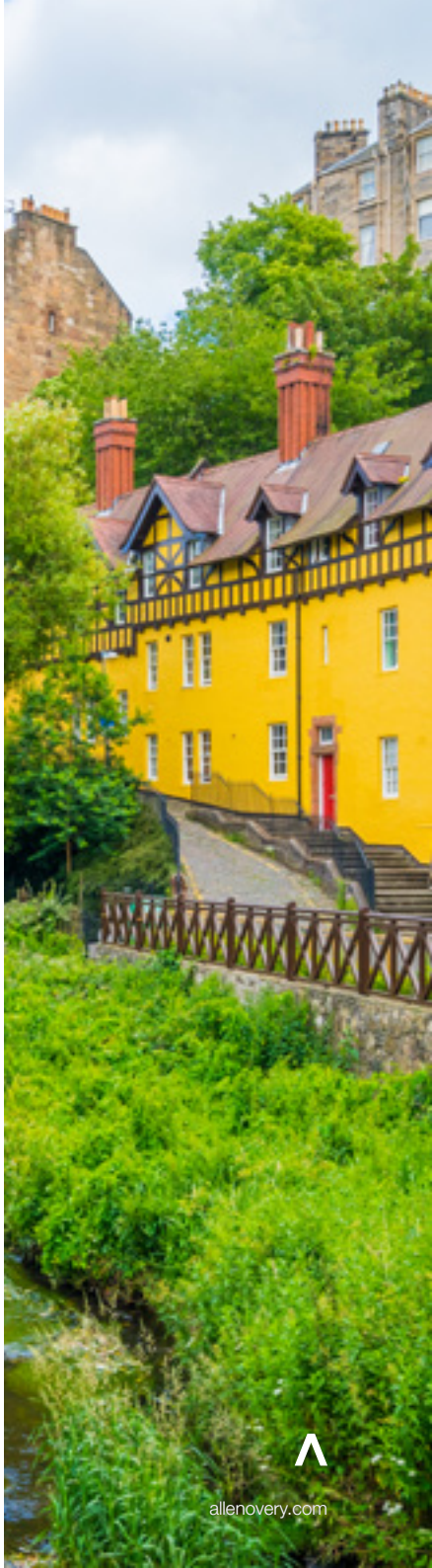
Changes are permitted, however, if they are:

– unconnected to the transfer

– by reason of the transfer but are also for an ETO reason and have been agreed between the employer and employee, or

– permitted to be made by contract.

According to government guidance, ETO reasons are likely to include reasons relating to the transferee's (buyer's) business, for example performance and profitability, management or organisational structure and the nature of equipment or production processes. Changes for the purpose of harmonising transferring employees' terms and conditions are generally not permitted under the Transfer of Undertakings (Protection of Employment) (TUPE) regulations.



7.4. What are the penalties for non-compliance with these procedures?

Employees could bring claims for constructive unfair dismissal, breach of contract and/or unlawful deductions from wages.

In the context of a business transfer, changes will be void if they are for the sole or principal reason of the transfer itself and not for an ETO reason.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

As an emergency measure in response to the Covid-19 pandemic, the government created the Coronavirus Job Retention Scheme which has been extended several times, most recently up to 30 September 2021. The Scheme reimburses employers for 80% of the wage costs of "furloughed employees", although the latest extension of the Scheme provides for a tapering down of government support and for a corresponding employer contribution from July 2021. Furloughed employees are defined broadly as those who have been instructed to cease work due to circumstances resulting from coronavirus or coronavirus disease. They can be furloughed for all or only some of their working hours. Under the Scheme it is sufficient for an oral agreement to be reached that the employee be furloughed and for that to be confirmed in writing by the employer.

Employees may be placed on unpaid lay-off or short-time working (with lower pay) (LOST) where there are contractual rights to do so (which is unusual). Those placed on LOST may be entitled to statutory guarantee pay but not to furlough pay.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

Obligations to inform and consult employee representatives still arise on the sale of an insolvent business, and the same penalties apply (see **section 2 – Process on business sales**). This is the position whatever the type of insolvency proceedings. There is a limited exception to the obligation to inform/consult where there are "special circumstances" which mean it is not reasonably practicable and the employer has done its best to comply in the circumstances. However, according to case law (relating to a similar defence available for collective dismissal consultation), insolvency is not of itself a "special circumstance" unless it is sudden and unexpected, and there have been few cases where this has been successfully established.

The separate duty on a seller to provide certain employee liability information to the buyer at least 28 days prior to the transfer (or, if there are special circumstances, as soon as reasonably practicable after that) still applies where the business being transferred is insolvent. There are no obligations to inform/consult where the disposal is by way of a share sale.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

The position depends upon whether the seller is subject to "terminal" or "non-terminal" insolvency proceedings.

"Terminal" insolvency proceedings: These arise where the seller is subject to "bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner". The provisions of TUPE relating to the automatic transfer of employees and accrued liabilities are disapplied for these types of proceedings (ie, the buyer will inherit neither employees nor employee liabilities) (the "Regulation 8(7) exception"). Government guidance confirms that this covers bankruptcies, compulsory liquidations and creditors' voluntary liquidations, but not administrations (where an administrator is appointed to rescue the business as a going concern rather than to liquidate its assets).

There has been conflicting case law as to whether administrations can benefit from the Regulation 8(7) exception, but the position seems to be clear after the Court of Appeal held in *Key2Law* (*Surrey*) *LLP v De'Antiquis* [2011] EWCA Civ 1567 that administrations cannot be "insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" for the purposes of the Regulation 8(7) exception. This means that any buyer of a business in administration, even in a pre-pack situation (where a company is put into administration and its business and/or assets then immediately sold under a sale arranged before the administrators were appointed) will be required to take on employees and employee liabilities. The European Court of Justice also ruled in *Federatie Nederlandse Vakvereniging v Smallsteps BV* (C-126/16) that the automatic transfer of employees under the EU Acquired Rights Directive should apply in the event of a pre-pack sale aimed at rescuing all or part of an insolvent undertaking as a going concern, so that the UK approach is cosistent with retained EU law post-Brexit.

"Non-terminal" insolvency proceedings: These arise where the seller is subject to "relevant insolvency proceedings", meaning proceedings "which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner". Government guidance confirms that this covers administrations (in line with the comments above), administrative receiverships and voluntary arrangements. In effect, it should cover any insolvency proceedings that are not "terminal" insolvency proceedings. The Regulation 8(7) exception does not apply, with the consequence that employees and most employee liabilities transfer to the buyer in "non-terminal" proceedings. There is an exception for debts guaranteed up to certain limits, and subject to certain conditions, by the National Insurance Fund (eg, statutory redundancy payments, arrears of pay and holiday pay); the buyer will inherit liability for amounts in excess of these limits, as well as for other employment liabilities.

The usual restrictions that apply to permitted variations on a business transfer are relaxed in "non-terminal" insolvency proceedings, allowing the seller, the relevant insolvency practitioner or the buyer to agree certain changes to employment terms made with the intention of safeguarding employment to ensure the survival of the business, provided certain conditions are met.

This is a complex area, and you should seek advice if contemplating a sale in an insolvency or potential insolvency situation.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

Obligations to inform and consult employee representatives still arise in relation to collective dismissals in an insolvent business, and the same penalties apply (see **section 5 – Process on collective dismissals**). This is the position whatever the type of insolvency proceedings. There is a limited exception to the obligation to inform/consult where there are "special circumstances" which mean it is not reasonably practicable and the employer has done its best to comply in the circumstances. However, according to case law, insolvency is not of itself a "special circumstance" unless it is sudden and unexpected (there have been few cases where this has been successfully established). Nor is the dismissal of employees to make a business more attractive to potential purchasers a "special circumstance".

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