

EXPLANATORY MEMORANDUM TO
THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION)
ACT 1992 (AMENDMENT) ORDER 2013

2013 No. 763

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills (The Department) and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (“the Order”) amends provisions relating to collective redundancies in the Trade Union and Labour Relations (Consolidation) Act 1992 (“the Act”).

2.2 In cases where an employer proposes to dismiss 100 or more employees as redundant within a period of 90 days or less (a ‘large scale collective redundancy’), the Order reduces the minimum period of time which must elapse before the first dismissal can take effect from 90 to 45 days. It also makes a corresponding reduction to the minimum period of notice which the employer in such cases must give to the Secretary of State before the first dismissal can take effect.

2.3 The Order also excludes the expiry of fixed term contracts from the provisions dealing with collective redundancies in the 1992 Act. This exclusion does not apply where the employer is proposing to dismiss the employee as redundant and the dismissal will take effect before the point at which it was agreed in the contract that it would expire.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1. The Order will come into force on 6th April 2013. Article 2 provides that the changes will apply to proposals to make large scale redundancies which are made on or after 6th April 2013. This means that the changes will not apply to consultations which have already begun and are still ongoing on 6th April.

3.2. The amendment to section 188(1A) which is set out in article 3(2) of the Order is to be made using the power in section 197(1)(a) of the 1992 Act. It provides that secondary legislation can amend the minimum time period in “section 188(2)” but should refer to “section 188(1A)”. The reason for this is that a consequential amendment was missed when the legislation was last amended by S.I. 1995/2587. That instrument re-numbered section 188(2) as section 188(1A) but the consequential amendment to section 197(1)(a) was missed.

3.3. The Department considers that the Interpretation Act 1978 can be relied upon so as to read section 197(1)(a) as referring to section 188(1A). This is on the grounds that section 188(1A) amounts to a re-enactment with modification of section 188(2). Section 17(2)(a) of the Interpretation Act, when read with section 23, provides that

where an instrument (in this case S.I. 1995/2587) repeals and re-enacts a previous provision with or without modification then unless the contrary intention appears any reference in any other enactment to the repealed provision is to be read as a reference to the provision re-enacted. The Department considers that there is no contrary intention here; indeed section 197 expressly refers to the minimum time periods so it is clear that section 197(1)(a) refers to the minimum time period in what is now section 188(1A).

3.4. Therefore, the Department considers that the power in section 197(1)(a) can be relied upon to amend the minimum time period set out in section 188(1A) by order. An alternative option was to rely on section 2(2) of the European Communities Act 1972 to make this change by secondary legislation. The amendment can be said to relate to implementation of the Collective Redundancies Directive and so in principle section 2(2) is available. However, there is a more specific power available in section 197(1)(a) and the Department has decided to use that power.

4. Legislative Context

4.1 The Order implements the government's decision, following consultation, to make two changes to the legislation which applies in collective redundancy situations. Firstly, it reduces the minimum period which must elapse before the first dismissal can take effect from 90 to 45 days in cases involving proposals to make 100 or more redundancies. Secondly, it excludes the expiry of fixed term contracts from the provisions dealing with collective redundancies. This exclusion does not apply where the employer proposes to terminate the contract early on grounds of redundancy.

4.2 The Order changes provisions in the Act which implement Council Directive 1998/59/EC ("the European Directive") on the approximation of the laws of the Member States relating to collective redundancies.

4.3 The proposed changes are permitted under the Directive.

5. Territorial Extent and Application

5.1 This instrument applies to all of Great Britain.

6. European Convention on Human Rights

The Minister for Employment Relations, Consumer and Postal Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 is compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 There are over 29 million people employed in the UK and around 150,000 individual redundancies per quarter, with approximately 96,770 a year resulting from large scale collective redundancies. In the last 10 years, the top three sectors most affected by large scale redundancies are manufacturing, financial services and public administration. The rules on collective redundancy consultation affect *all* employees which may potentially be made redundant, not just any employees actually made redundant following consultation. The pool of employees involved in consultation is

therefore often considerably larger than the number of employees that are later made redundant.

7.2 In 2010, the Government committed to review the rules on collective redundancies as part of a wider review of employment law. The reviews are intended to ensure there are no unnecessary barriers to business success by ensuring that the rules are fit for the UK's modern and flexible labour market. The current rules have been in place, largely unchanged, since 1975. The UK labour market is now more flexible and advances in information and communications technologies have made consultation easier and faster to carry out. GB law also currently goes significantly further than the European law governing this area, as for large scale collective redundancies, GB law requires a minimum of 90 days before the first dismissal can take effect, rather than the minimum of 30 days set out in the European Directive.

7.3 Government has also found that in practice there is a high degree of confusion about the current rules and overall poor quality consultation. This constrains business flexibility to restructure, and ability to react to changing market conditions. Employers also struggle to retain skilled key employees and experience detrimental impacts on employee morale and productivity. This increases risks that businesses will fail or struggle to succeed in the future, meaning continued uncertainty and risk for employees that remain. Employers and employees will want to implement change as swiftly and efficiently as possible to limit the impact on productivity and morale, and retain key employees. Employees will share the desire for the business to survive and prosper and will have a contribution to make on how that can be achieved.

7.4 The Government has decided to reduce the minimum period before the first dismissal can take effect from 90 to 45 days in cases involving 100 or more redundancies. Government has decided not to go as far as reducing this to 30 days, as it particularly notes the importance of having sufficient time for local Government organisations to respond to potential job losses.

7.5 Government has also decided to exclude the termination of fixed term contracts from the rules on collective redundancies where this is taking place at the agreed end of the contract. Government is not convinced that consultation is necessary for fixed term contracts ending their natural life, and where both parties have agreed that the contract will end at a certain point then it sees no reason to impose additional burdens when the employer seeks to rely on that agreement. This exclusion is also expressly permitted by article 2(a) of the Collective Redundancies Directive.

7.6 These changes will not affect the individual notice periods required to be given by employers, and the qualifying period for employees to claim protective awards will not be changed.

7.7 The outcomes are likely to be of high interest in particular to employers and trade unions acting as employee representatives.

- ***Consolidation***

7.8 The Department has no plans to consolidate the legislation.

8. Consultation outcome

8.1 The Government conducted a Call for Evidence, between November 2011 and January 2012, and consulted on a package of proposals in a 12 week consultation which

ended on 19 September. Both exercises included a number of meetings and focus groups with employers and trade unions.

8.2 Most respondents, from all groups, agreed that there is a problem which needs to be addressed and responses identified a lack of clarity about the purpose of consultation on collective redundancies, and about various elements of the law. Although respondents had different opinions about the cause of the issues identified and how these should be addressed, there was strong support for the need to improve the quality of consultation and guidance.

8.3 100 respondents answered the question relating to the 90 day minimum period before the first dismissal can take effect. 52% favoured a reduction to 30 days, 19% supported 45 days, and 22% stated a desire to retain the existing 90 day period. 9% of respondents were not sure. Employers and independent legal bodies generally supported a reduction to 30 days. Trade unions argued against reducing the current minimum period, and most did not support either of the proposed options, highlighting risks that less responsible employers may treat the time period as a maximum instead of a minimum, and that change may be seen as Government placing less risk on the importance of consultation. Employers however argued that that in practice, meaningful consultation normally only lasts for 30 days, but where needed, is extended, beyond the 90 day minimum period.

8.4 Several respondents linked the minimum period to other issues including the problems around identifying what employers are an ‘establishment’ and the difficulties with the inclusion of fixed term employees in the count for collective redundancies, particularly in the Higher Education sector. A majority of respondents (58%) argued that the issue of how the law applies to fixed term employees should not be left to guidance but instead should be resolved through a change in the law. The Government notes the evidence provided, particularly by the Higher Education sector, of the difficulties that uncertainty, over whether or not to include fixed term employees in collective redundancy consultations, creates.

9. Guidance

9.1 Government has also agreed with the Advisory Conciliation and Arbitration Service (ACAS) that it will produce non-statutory guidance on collective redundancies, to ensure greater clarity about changes to the law and other existing legal protections. This will in particular address the principles and behaviours behind a good quality consultation and when employers need to consult. The guidance will also make clear that Government expects the practice of extending consultation beyond the minimum period, where necessary for an employer to fulfil its obligations, to continue.

10. Impact

10.1 As a result of the minimum period being reduced, we estimate that the impact on business, charities and voluntary organisation will be a saving, from reduced pay and associated wages costs. Savings may however be offset by a reduction in output from those employees made redundant more quickly.

10.2 For businesses employing mostly fixed term employees, it is anticipated there will be limited familiarisation costs associated with the legislative change, which could be offset by the production of clearer guidance. To the extent there is an impact, this measure is expected to mainly be limited to the higher education sector. Government does not have evidence of this being a particular issue for other sectors, however there

could be broader impacts. For the majority of employers going through collective redundancy consultation is a one-off event. Therefore, improving existing guidance is not expected to impose additional familiarisation costs relative to the status quo, and costs should in fact be lowered because of clearer guidance.

10.3 The provisions in the 1992 Act on collective redundancy consultation do not apply to employees who are employed by the Crown.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation only applies where the employer is proposing 20 or redundancies within the specified period. Therefore it does not apply to many small businesses. The change relating to the minimum period will not apply to any businesses employing less than 100 employees.

12. Monitoring & review

12.1 The Government will review the 45 day minimum period when it has had sufficient opportunity to see the effect on the labour market.

13. Contact

Vivien Brighton at the Department for Business, Innovation and Skills - Telephone: 020 7215 2334 or email: vivien.brighton@bis.gsi.gov.uk - can answer any queries regarding the instrument.