International Employment Lawyer

Guide to Restructuring a Cross-Border Workforce

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A.Reduction in Workforce

1. Is there a concept of redundancy - based on a shortage of work or other economic reasons - as a justified reason to dismiss employees in your jurisdiction? If so, how is it defined?

Yes. Employees may not be terminated unless this is objectively justified based on circumstances relating to the undertaking, the employer, or the employee. A termination due to reorganisation or downsizing is not objectively justified if the employer has other suitable work in the undertaking to offer the employee. When deciding whether a termination is objectively justified, the needs of the undertaking shall be weighed against the disadvantage caused by the termination of the individual employee. Objective grounds for redundancy may typically be financial considerations, strategic assessments, etc. The strategic direction is decided by the business at its own discretion, but a thorough assessment of needs is required for this to constitute a basis for a termination.

2. In brief, what is the required process for making someone redundant?

Minimum procedural requirements for a downsizing process are set out in the Norwegian Working Environment Act. Management (or the company's board) should assess and decide the process. The process primarily takes the form of disclosure and consultation requirements, both generally in relation to the employee representatives (if applicable) and individually in relation to the affected employees. Generally, a termination decision will trigger a requirement for prior consultation, typically referred to as an individual consultation meeting. In addition, companies that regularly employ at least 50 employees shall consult the employee representatives on issues of importance to the employees' working conditions, including decisions that may result in considerable changes in the organisation of work or the employees' working conditions. Many collective bargaining agreements further expand these obligations.

3. Does this process change where there is a "collective redundancy"? If so, what is the employee number threshold that triggers a collective redundancy?

Mass redundancies, ie, where the employer is contemplating a termination of at least ten employees within a period of 30 days, are subject to special provisions. In these cases, the employer is subject to more extensive disclosure and consultation obligations. This includes, inter alia, a requirement for the employee representatives to receive written information on a number of issues, including the reasons for any redundancies, the number of employees who may potentially be made redundant, proposed selection criteria, and proposed criteria for calculation of extraordinary severance pay (if applicable). Corresponding notification shall also be given to the Norwegian Labour and Welfare Service.

4. Do employers need to consult with unions or employee representatives at any stage of the redundancy process? If there is a requirement to consult, does agreement need to be reached with the union/employee representatives at the end of the consultation?

The employer is obliged to consult the employee representatives if the employer is contemplating conducting mass redundancies (see question 3 above). The aim of the consultation shall, according to the Norwegian Working Environment Act, be to reach an agreement to avoid mass redundancies or to reduce the number of redundant employees. However, there is no requirement to reach such agreement with the employee representatives at the end of the consultation. Consequently, the employer may unilaterally take the decision if no agreement is reached.

In addition, companies that regularly employ at least 50 employees shall consult the employee representatives on issues of importance for the employees' working conditions (see question 2).

5. If agreement is not reached, can the restructure be delayed or prevented? If so, by whom?

No. There will be no delay and there is no requirement to reach an agreement with the union or employee representatives at the end of the consultation (see question 4).

6. What does any required consultation process involve (ie, when should it commence, how long should it last, what needs to be covered)? If an employer fails to comply with its consultation obligations, what remedies are available?

The consultation shall be held "as early as possible" and needs to cover information such as proposed selection criteria and proposed criteria for calculation of extraordinary severance pay (see question 3). The consultation shall also include possible social measures that could reduce the disadvantages of the redundancy, eg, grant for relocation or retraining of the terminated employees. How long the consultation lasts will depend on the complexity of the reorganisation and downsizing.

To reduce the risk of employees challenging the terminations, it is important that they are included in the process prior to the company's decisions.

7. Do employers need to present an economic business rationale as part of the consultation with unions/employee representatives? If so, can this be challenged and how would such a challenge normally be made?

In case of a mass redundancy, the employer must provide the employee representatives with written information on the grounds for the redundancy, which may include an economic business rationale.

8. Is there a requirement or is it best practice to consult employees individually (whether or not the employer is also legally required to collectively consult employees)?

There is a legal requirement to hold an individual consultation meeting with each of the employees who, after a preliminary assessment, are selected as redundant. The consultation meetings shall be held before the employer makes a final decision on terminations.

9. Are there rules on the selection of individual employees for redundancy?

Yes, in relation to mass redundancies, the employer needs to assess, discuss or consult, and decide which group of employees the potential redundant employees shall be selected from. The general rule is that the legal entity will be the selection group. Collective bargaining agreements may also contain relevant regulations.

The selection of potential redundant employees within the relevant selection group shall be based on objective grounds. Typical selection criteria are seniority, skills or competence, and social considerations. Selection criteria may also be stipulated in a collective bargaining agreement.

10. Are there any specific categories of employees who an employer is prohibited from making redundant?

There are no specific categories that the employer is prohibited from making redundant, but the selection of redundant employees must be based on objective and relevant criteria.

11. Are there categories of employees with enhanced protection (eg, union officials, employees on sick leave or maternity/parental leave, etc)?

Yes. Employees on sick leave, employees on parental leave, pregnant employees, etc, are subject to special regulations or protection against termination. Employee representatives may also be subject to special regulations if the employer is bound by a collective bargaining agreement.

12. What payments are employees entitled to when made redundant? Do these payments need to be made within a specified period? Are there any other requirements, such as giving contractual notice, payments into a central fund, etc.

A formal written notice of termination containing certain mandatory information shall be delivered to the employee.

There are no statutory payments to be made when an employee is made redundant or their employment is terminated. However, the employer shall, as a minimum, pay the employee salary during the relevant notice period. In Norway, many employment disputes are resolved by entering into a mutual termination agreement.

13. If employees are entitled to redundancy/severance payments, are there eligibility criteria and how is the payment calculated? If this is formula based, please set out the formula.

Employees are only entitled to salary during the notice period (see question 12).

14. Do employers need to notify local/regional/national government and/or regulators before making redundancies? If so, by when and what information needs to be provided?

In case of mass redundancies (see question 3), the employer is obliged to provide the Norwegian Labour and Welfare Administration with all the relevant information in writing. Planned mass redundancies cannot take effect before 30 days after notification has been sent to the Norwegian Labour and Welfare Administration.

15. Is there any obligation on employers to consider alternatives to redundancy, including suitable alternative employment?

A termination due to a downsizing process will not be considered lawful or objectively justified if the employer has other suitable work in the undertaking to offer the employee. Consequently, the employer shall assess and offer any redundant employee any vacant positions that the employee is qualified to do. It should be noted that the obligation to offer the employee "other suitable work" does not mean that the employer is required to create a new job.

16. Do employers need to notify local/regional/national government and/or regulators after making redundancies, eg, immigration department, labour department, pension authority, inland revenue, social security department? If so, by when and what information needs to be provided?

Not applicable.

17. If an employee is not satisfied with the decision to make them redundant, do they have any potential claims against the employer? If so, what are they and in what forum should they be brought, eg, tribunal, arbitration, court? Could a union or employee representative bring a claim on behalf of an employee/employees and if so, what claim/s and where should they be brought?

Following a termination, the employee has the right to dispute the termination and – as a main rule – remain in their position and receive salary until a court of law has rendered its judgment. This right is present regardless of whether the termination is lawful or not. Typically, a court process for the District Court will take between six and eight months after the notice has been given to the employee. The employee is entitled to keep the paid-out salary regardless of the outcome of the court case; ie, the employer will not be in a position to reclaim paid-out salary prior to the judgment.

18. Is it common to use settlement agreements when making employees redundant?

Even though an employer may have "objective grounds" when terminating an employment, the employees normally have a strong position (eg, the right to remain in position; see question 17). Consequently, it is not uncommon that the employer, instead of risking a long-lasting legal process, chooses to offer the redundant employee a severance payment that exceeds the total salary of the notice period.

19. In your experience, how long does it normally take to complete an individual or collective redundancy process?

A redundancy process usually takes from one to four months to complete, depending on the complexity of the reorganisation or redundancy process. Any employee disputes following the notice of termination will come in addition (typically between six and eight months for the District Court).

20. Are there any limitations on operating a business for a period following a redundancy, like a prohibition on hiring or priority for re-hire being given to previous employees?

Yes. An employee who has been terminated based on circumstances related to the employer has a preferential right to new employment or vacant positions in the same undertaking unless they are unqualified for the position. This preferential right has a duration of 12 months from the expiry of the notice period.

Restructuring/Re-organisation of the business

21. Is employee consultation or consent required for major transactions (such as business transfer, mergers, acquisitions, disposals or joint ventures)?

Generally, employers that regularly employ at least 50 employees shall consult the employee representatives on issues of importance to the employees' working conditions, including decisions that may result in a transaction.

Furthermore, the Norwegian Working Environment Act contains a specific set of rules regarding a "transfer of undertaking" situation. The Norwegian rules implement an EU directive regarding transfer of undertakings. A transfer of undertakings will be subject to the regulations in the Norwegian Working Environment Act if the following main criteria are fulfilled:

- the transfer must concern a separate economic entity (the entity criteria) of the transferor;
- the business needs to have been transferred pursuant to a contract or through the amalgamation of businesses; and
- the transferred entity needs to "retain its identity" after the transfer (the identity criteria).

A transfer of shares will not be considered as a transfer of undertakings.

If a transaction is considered to fall within the scope of the Norwegian Working Environment Act, the employer has an obligation to consult and inform the employee representatives "as early as possible".

22. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Potentially, lack of compliance with the consultation obligations may lead to the employees requiring a preliminary injunction. However, in most cases, lack of compliance will not have any effect on the transaction timeline.

Collective bargaining agreements may contain separate regulations and remedy systems.

23. Is there any statutory protection of employees on a business transfer? Are employees automatically transferred with the business? Are employees protected against dismissal (before or after the transfer of employment)?

As a general rule, employees who have a sufficient affiliation with the respective entity subject to the transaction have a right to be transferred to the purchaser.

According to Norwegian law, a transfer of undertakings does not constitute a valid cause for termination from the former or new employer. However, it will still be possible for the purchaser to make adjustments in the workforce following closing (eg, due to reorganisation).

24. What is the procedure for a transfer of employment (upon a business transfer or within group companies)?

The procedure for transfer of employees is primarily regulated by the Norwegian Working Environment Act. Applicable collective bargaining agreements may contain additional requirements. A high-level transfer procedure includes the following steps:

1) a board meeting that authorises the administration to prepare a transfer of undertaking and to carry out consultation meetings;
2) a collective consultation meeting with the employee representatives;
3) a potential second board meeting with the board's final resolution;
4) the affected employees shall be given an information letter, 14 days prior to the transfer date at the latest, with information as mentioned in step 2;
5) transfer or closing date;
6) employment agreements to be updated with the new employer;
7) notification shall be sent to the State Register of Employers and Employees; and
8) if applicable: the new employer must notify the trade union no later than three weeks after the transfer, if it does not wish to be bound by the collective bargaining agreement applicable to the former employer.

25. Are there any statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment?

The general rule is that all individual rights and obligations for the employee are transferred to the new employer. This means that the employee will generally retain the same salary, working hours, and other terms and conditions of employment. However, important practical exceptions include, inter alia, rights and obligations arising from collective bargaining agreements, as well as group pension schemes.

Changing Terms and Conditions

26. Can an employer reduce the hours, pay and/or benefits of an employee?

Changes in working hours, as a general rule, fall within the scope of what the employer may unilaterally decide. However, collective bargaining agreements or the individual employment agreement may restrict an employer's ability to make changes of working hours without the agreement of the employee.

27. Can an employer rely on an express contractual provision to vary an employment term?

On a general level, express contractual provisions may entitle the employer to make relevant changes to the terms and conditions. However, the employer cannot unilaterally make "unreasonable" changes.

28. Can an employment term be varied by implied conduct?

Employment terms cannot be varied by implied conduct.

29. If agreement is required to vary an employment term, what are the company's options if employees refuse to agree to the proposed change?

If the employer wishes to make changes that are not within the scope of unilateral decisions, one option may be a termination combined with an offer of suitable alternative employment. Such termination needs to be based on "objective grounds"; for example, in the form of changed manpower needs or restructuring of the company's operations.

30. What are the potential legal consequences if an employer varies an employment term unilaterally?

The employee may initiate a preliminary injunction process or a more traditional court case to claim compensation for the financial difference between the previous and new terms and conditions. The employee may also claim compensation for non-economic damage.

Areas to Watch

Please provide an outline of any upcoming legislative developments or other issues of particular concern or importance that are not already covered in your answers to the questionnaire. Please limit responses to the jurisdictional level rather than descriptions of wider global trends. Please limit your response to around 200 words.

From January 2024, employers that are part of a group of companies will be subject to new obligations in relation to reorganisation and downsizing processes. The most important changes for group companies are:
·Other suitable work: If the employer has no suitable work to offer its employees, the employer is obligated to examinewhether any of the other (Norwegian) group companies have any suitable work to offer. If such other suitable work exists in a group company, these employees shall be offered the open position.
·Preferential right to new employment: The employees' preferential right to new employment is expanded and applies to both the employer and all of the group companies (in Norway).
The new amendments for group companies will require comprehensive coordination between the group companies.

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Learn more

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Tor Olav Carlsen re-joined BAHR in 2021 as Deputy Head of the employment department and was promoted to partner in 2023. He has a broad employment practice, acting for employers and senior executives. Tor Olav was formerly Head of Legal at the Norwegian Employers' Association Spekter, illustrating his strong profile in this area. He has considerable experience of collective bargaining negotiations and court litigation. During his career, he has regularly published articles in the Norwegian Employment Law Journal, Arbeidsrett. Tor Olav regularly handles both domestic and cross-border employment and pensions issues for international blue-chip companies. Tor Olav also has extensive experience in the development of incentives schemes. During Tor Olav's time as in-house counsel and Head of Legal at Arbeidsgiverforeningen Spekter, he was ranked as an individual in several leading legal rankings, including the GC Powerlist Norway.