WHITE PAPER ON REORGANISATION - THE ROLE OF EMPLOYEE PARTICIPATION

Introduction

This white paper discusses the role played by works councils or other staff representatives and trade unions in the context of reorganisations that involve dismissals (forced or otherwise).

You must have a works council in place if your business employs 50 or more people. If you employ fewer than 50 people, those employees are often entitled to representation (see the section below on employee representatives).

The role of the works council

The Works Councils Act requires you to request the advice of the works council in good time so that it can have a material impact on the decision to be made. Which stage of the decision-making process is at is thus highly relevant to answering the question of whether the works council's advice must be requested. The decision-making process can be roughly divided into four stages:

Stage 1: policy intention
If your intention to reorganise is not yet clear enough or specific enough to submit to the works council for its advice, then it is referred to as a policy intention. Although the works council is not yet entitled to issue its advice at that point, this does not mean that it has no role to play at all during this period. Specifically, you are obliged to inform the works council (at least twice a year) about possible expectations and prognoses relating to reorganisations and possible consequences for the staff, even if an intention to reorganise has not yet materialised. At this stage, as well, the works council is entitled to pose questions and receive information.

Stage 2: proposed resolution
If you specifically intend to implement a reorganisation with forced dismissals, then, in principle, the works council must be afforded the opportunity to issue its advice on this plan. This would only be different if the proposed resolution to reorganise were not sufficiently 'significant'.

When the works council's advice is requested, the works council must not only be provided with written notification of the proposed resolution itself, but it must also be informed of the reasons and considerations underlying the intended reorganisation, the consequences the reorganisation is expected to have for the staff and any measures that may be taken in response to such consequences (such as a redundancy scheme). This enables the works council to formulate a well-considered, substantiated and thorough advice on the proposed resolution to reorganise. Your request for advice must be followed up
with consultations with your works council, during which you will provide more information to the works council, both proactively and at the works council's request, and a more detailed explanation of your plans.

**Stage 3: resolution**

After you have received the works council's advice, you must decide what to do. If the works council's advice endorses the reorganisation, you may pass a resolution. The situation will be more difficult if the works council declines to endorse the reorganisation, or only endorses it 'subject to conditions'. Will you act in accordance with all or part of the advice and take possible objections into account, or will you implement all or some of your original plans? If you opt for the latter, you will have to provide the works council with written grounds explaining why you have deviated, either fully or partly, from the works council's advice.

If you will not be acting in accordance with all or part of the works council's advice, then the works council must be afforded one month (starting on the date the works council was notified of the resolution in writing) to appeal the resolution to the Enterprise Division. You may not implement the resolution until that one-month term expires unless your works council expressly indicates that it will not avail itself of its right of appeal. If the works council institutes an appeal and the Enterprise Division subsequently rules that you were not reasonably entitled to pass the resolution you passed, then the Enterprise Division may, at the works council's request, require you to withdraw all or part of the resolution and to reverse any consequences that may already have materialised (sometimes even including dismissals).

**Stage 4: implementation of the resolution**

The resolution may actually be implemented in the last stage. If you implement a resolution regarding which you sought the works council's advice, the works council will no longer be entitled to appeal to the Enterprise Division.

**Practical arrangements with the works council**

The works council is not obliged actually to avail itself of its right to issue an advice or to announce its advice within a certain period of time. This means it is also important to make practical arrangements with the works council. The question of what period of time is 'reasonable' in a given situation depends not only on the complexity of the request for advice, but also on the information you provide and the urgency of the proposed resolution. A proposed resolution to reorganise with forced dismissals is often a sensitive issue and is generally, particularly in the preparatory stage, a strictly confidential one as well.

A request for advice on a proposed reorganisation resolution also often contains sensitive and confidential information and how you time the provision of information within your organisation is often crucial to the success of your reorganisation. By law, the works council is subject to a general duty of confidentiality with regard to commercially sensitive information (such as investment plans and manufacturing methods). It is nevertheless important, in situations where such is required, to impose a special duty of confidentiality on the works council (and its secretariat and possible its advisers) in connection with a request for advice regarding an intended reorganisation. In doing so, you may announce which data fall within the scope of the duty of confidentiality and the period during which that
duty must be fulfilled. An intentional violation of a duty of confidentiality is a punishable act and may constitute a reason to impose sanctions, such as dismissal.

Finally, it would be wise to make agreements with the works council about the costs of engaging legal and other advisers. This will avoid a situation in which you are ambushed with enormous expenses incurred by the works council.

**The role of employee representatives**

What if your organisation has no works council? In that case, you must hold a staff meeting at which your staff is afforded the opportunity to issue an opinion on your proposed reorganisation resolution, at least in a situation in which a proposed resolution may 'affect' at least a quarter of your staff. Unlike a works council, a staff meeting has no right of appeal if you do not act in accordance with all or part of its opinion. That means that you also need not wait a month to implement the reorganisation resolution. What the employees may, do, however, is force you to seek the advice of the employee representatives.

Any employer who employs 50 or more people is obliged to establish a works council. What if you have, for one reason or another, not established a works council even though your business fits this description? If so, then you should keep in mind that the employees can still seek an order from the sub-district court requiring you to establish a works council and enjoining you from implementing any reorganisations or dismissals, forced or otherwise, until that has been done.

**The role of trade unions and the UWV**

Sometimes, a proposed reorganisation resolution will require you not only to involve the works council, but trade unions as well. Many collective labour agreements impose an obligation to consult and negotiate with the relevant trade unions about taking measures, such as a redundancy scheme, to mitigate the consequences the reorganisation will have for staff.

If the proposal involves a collective dismissal within the meaning of the Collective Redundancy Notification Act, you must notify the relevant trade unions. You also have to notify Employee Insurance Agency (“UWV”) of this intention. That notification must include not only the reason(s) for the intended collective dismissal (accompanied with financial data), but also a statement of the number of intended dismissals and the timing of the intended dismissals. You must also state whether you have requested the works council to issues its advice.

Legally speaking, a dismissals are deemed to constitute a collective dismissal if your proposed reorganisation resolution is expected to lead, over a period of three months, to more than 20 dismissals for economic reasons within one of the six UWV districts (1. Friesland, Groningen and Drenthe; 2. Overijssel and Gelderland; 3. Noord-Brabant and Limburg; 4. Zuid-Holland and Zeeland; 5. Flevoland and Utrecht; and 6. Noord-Holland). How the dismissals are effected is irrelevant: both dismissals effected via the UWV and the sub-district court and those effected in consultation (by means of a settlement agreement) count for these purposes.
After the notification, you must consult with the trade unions regarding the options for avoiding the dismissals (or reducing the number of dismissals) and for mitigating the consequences for staff as much as possible, possibly through a redundancy scheme. You must inform the UWV about your consultations with the trade unions. Would you like more information on redundancy schemes? Please read our blog entry on the topic.

In order to prevent you from implementing your reorganisation plans during your consultations with the trade unions, you may not dismiss employees until one month after you have notified the trade unions and the UWV of your intentions. This 'waiting period' will not apply if you have reached agreement with the trade unions and/or if they can reconcile themselves to your plans.

Did you wrongfully fail to comply, or fully comply, with your notification and consultation obligations? That will have consequences. First, the UWV will refuse to process any applications for dismissal permits. Employees will also be unlikely to consent quickly to an amicable termination of their employment contracts. Employees who have already been dismissed and who realise that you failed to comply, or fully comply, with your notification and consultation obligations may even have the option to seek an order from the sub-district court reversing their dismissal or granting them compensation.