A highlight on how to carry out a reorganisation and redundancies in the UK, the US, France and Germany

Jonathan Maude
Hogan & Hartson, London
jmaude@hhlaw.com

With contributions from: Andrea Ward (UK), Hanno Timner (Germany), Jean Martinez (France) and Barbara Roth (US)

In the light of the recent restructuring processes that multinational companies are facing at the moment, the following contribution will provide a high-level and preliminary approach on how to reorganise and carry out redundancies in the UK, the US, France and Germany.

Reorganisation and redundancies in the UK

The concept of 'redundancy' is usually understood to mean job losses, resulting from poor business performance and financial pressures. However, a redundancy can arise for different reasons and employers need to understand whether their business decisions will lead to dismissals and whether redundancy payments will be needed.

Business reorganisations and the desire to improve efficiency often identify a need to reduce headcount, even if there is plenty of work to do and the company has no financial difficulties. As a result, such reorganisations can lead to redundancies, in good and bad economies. In the current financial crisis, however, we have seen many more examples of business and workplace closures which have affected thousands of employees across the country. This article considers the key legal concepts and statutory requirements for employers to follow, before making redundancies in these situations and looks at more innovative ways of avoiding redundancies.

Employers seeking to dismiss employees for redundancy need to satisfy the statutory definition of 'redundancy' in the Employment Rights Act 1996 and employees must be 'redundant' in the context of the definition to receive a statutory redundancy payment. The definition is broad, but in practice, there are essentially three potential 'redundancy situations':

- business closure;
- workplace closure; and
- a reduction in the need for staff to do the available work.

Redundancy is a potentially fair reason to dismiss employees, but regardless of the circumstances, employers must follow a fair and reasonable process prior to dismissal, otherwise they may face claims of unfair dismissal (from employees with more than one year's service). In addition, employees with more than two years' service will be entitled to statutory redundancy pay and every employee will be entitled to notice of termination. So, although redundancies are a crisis measure and often seen as a means of limiting expenditure, in the short-term careful consideration is required as there will be costs consequences. A recent survey conducted by the CBI found that the average cost of redundancy payments is £12,000 per employee, but this does not consider the possible compensation payable in a successful unfair dismissal claim (potentially up to £66,200), or the legal costs and management time involved in defending such claims.

A fair and reasonable redundancy procedure must include consultation and consideration of ways to avoid redundancies. In many redundancy situations, employers need to consider how many jobs are at risk and the starting point is to determine a 'pool' of employees from which the selection for redundancy is to be made. Employers will also need to consider appropriate, and objective, selection criteria, to decide which employees in the pool will be made redundant. This selection process is less important in situations where the entire business or place of work is due to close, but employers still need to consult and consider suitable alternative employment, or other means of avoiding redundancies, where possible.

The consultation process is determined by the number of proposed redundancies. If an employer is proposing to dismiss as redundant 19 or less employees, within a 90 day period, there must be 'individual consultation' with each of the employees. While there is no prescribed period or format for individual consultation, employers should ensure that the consultation is meaningful and the outcome (redundancy) is not predetermined.

In contrast, an employer proposing to dismiss as redundant 20 or more employees from one establishment in a 90 day period, has an obligation to engage in 'collective consultation' with 'appropriate representatives' of the 'affected employees', which will include employees who are at risk of redundancy, as well as those who may be affected by the changes that result. No redundancies can be made within the consultation period; which is 30 days for 20 to 99 employees and 90 days for 100 or more employees. During this time, employers are required to consult with appropriate trade union representatives, or otherwise elected employee representatives and only after the consultation period has ended, can notice of termination be given. Employers that fail to consult are penalised and, in addition to statutory redundancy pay and notice payments, may be held liable to pay a 'protective award' to each of the affected employees – at up to 90 days' pay per employee, these sums cannot be taken lightly.

In addition to consultation (whether individual or collective) employers are bound to consider suitable alternative employment options and offer employees such alternatives, if they exist. There is no legal requirement to create jobs, if there are no vacancies, but employers should offer reasonable assistance to employees and not put the onus on them to find their own new position. The focus should be on avoiding redundancies, wherever possible and this demands objectivity and often, lateral thinking. Even if employees are likely to reject an alternative, such as part-time work, or a sabbatical, these options should still be considered as part of the consultation process.

Finding new ways to avoid redundancy is fast becoming a trend in the current market. As organisations need to make difficult decisions to reduce operating costs redundancies are affecting almost every working environment. Employees are expensive assets and though making redundancies may be an option, the associated costs, procedures and repercussions have led employers to look at innovative ways of retaining staff and attempting to reduce costs by other means. The increased use of flexible working, reductions in the use of agency staff and paid overtime as well as pay and benefit freezes have all been used as alternatives to redundancy, with remarkable acceptance by employees. Whereas in the past these measures might have caused consternation and distrust, the realities of the economic climate have given employees a new perspective. We can therefore expect to see more and varied solutions to the redundancy problem as the recession continues, as having a job on different terms is preferable to having no job at all.

United States – Employment 'at will'

In the United States, most employees are employed 'at will.' That is, unlike in many European countries, most US employees do not have employment contracts, and the employer is free to terminate their employment at any time and for any reason (other than unlawful discrimination), without notice and without payment of severance to the terminated employee.

While there are exceptions to this general rule, employment at will is a hallmark of the US employment system and provides many benefits to employers. One such exception is the discharge of a sufficiently large number of persons within a relatively short period to trigger US and state plant-closing or mass-layoff laws. These laws, however, only require advance notice to employees but no payment so long as the notice requirement is met. The federal plant-closing and mass-layoff law – known as 'WARN' – applies only to employers with 100 or more full-time employees and is not triggered unless 50 or more employees are terminated. Some states have parallel laws that apply to smaller employers and reductions-in-force affecting fewer employees. The law and regulations have been subject to interpretation by courts, and employers should consult counsel to determine whether these laws are triggered. Another exception applies to employees who have written employment agreements. While such agreements are not prevalent in the United States, they are enforceable.

In the current economic environment, many companies have found it necessary to cut the size of their workforces as a way to reduce their expenses in response to a decrease in their revenues. Employers who have workforces represented by a labour union typically must engage in discussions (or 'bargaining') with the union over these reductions-in-force, and seniority is often the major factor in determining which individual employees are selected for termination.

With respect to employees who are not represented by a labour union, a major concern for employers is the need to ensure that the selection of individuals for layoff does not result in the fact or appearance of unlawful discrimination based on an individual's protected personal characteristics such as race, gender, age, national origin, religion or other similar factors. Federal laws such as the Civil Rights Act of 1964, as amended (known as Title VII), and the Age Discrimination in Employment Act have been augmented by state and local laws that also protect employees against various types of discrimination. The protections under state and local laws are sometimes broader than those under federal law. For example, some state and local laws permit employees to make claims of discrimination on the basis of sexual orientation, though that is not a protected characteristic under Title VII. Methods for accomplishing this include utilising fair and non-discriminatory systems to select employees for termination, as well as conducting a statistical analysis of the workforce to make certain that employees, female (or in some cases male) employees and employees over 40 are not disproportionately affected. This process requires advice of counsel to ensure that all the necessary factors are considered. Note that it is not sufficient to assess the ages of employees solely on the basis of whether they are over or under 40. Age discrimination can be found to exist even where two employees are both over 40. Similarly, some state and local laws also protect employees who are under 40.

Employers are not required to give employees severance or other payments in the event of layoff, unless the employee handbook or a written agreement so requires. In most states, employers are also not required to pay employees for unused vacation days, unless the employer has a contrary policy. Nevertheless, employers often wish to obtain from employees a release of the employee's ability to bring any claims against the employer and therefore decide to give terminated employees a severance payment or continuation of certain employee benefits in exchange for the employee signing a release of claims. Such releases must comply with specific legal requirements to be enforceable.

In negotiating the terms of a release, the continuation of medical cover is usually included, due to a law known as COBRA. This law requires many employers to make available to employees who terminate their employment for any reason, the ability to continue in the employer's medical insurance and other health-related plans for a period up to 18 months, at the employees' own expense. Some employers pay for part or all of laid-off employees' COBRA coverage in exchange for the employee signing a release of all claims.

As with any settlement, the negotiated terms will be dependent on the circumstances and risk of claims.

Restructuring in France

The use of the French Labour Code by employees to stop companies' attempts to restructure their business or to seek subsequent damages is regarded as 'nothing new' by most international executives. Striking examples include parent companies ordered to pay severance amounts and damages to their insolvent subsidiary's employees under the co-employment theory (*Aspocomp*, Cass Soc, 19 June 2007), or companies being found guilty of fraudulent application of the TUPE legislation for having sold off a segment of their business, allegedly for the mere purpose of avoiding lay-off costs (*EADS systems and electronics*, Cass Soc, 21 June 2006).

A newer phenomenon is the utilisation of civil or bankruptcy law as an additional judicial tool in the context of restructurings. Recent examples include the attempted extension of the bankruptcy proceedings of an insolvent subsidiary to its parent company under the theory of co-mingling of assets (*Metaleurop*, Cass Com, 19 April 2005), or the nullification of a contribution agreement for unlawful cause when the buyer is considered to have fraudulently diverted the funds provided by the seller for restructuring costs (*TGI Béthune, Energy Plast*, 24 June 2008). In the *Metaleurop* case, the company finally won before the Supreme Court, and the *Energy Plast* ruling is still subject to reversal by a higher court. Nevertheless, these examples illustrate a new judicial trend that cannot be underestimated.

Within this context, corporations are obliged to act with great care and anticipation when carrying out restructuring measures. The following outlines some advice to keep in mind in order to mitigate liabilities, if at all possible.

Be prepared to give evidence of 'real and serious' grounds for restructuring

The current economic turmoil may give many companies the feeling that laying off employees is an obvious necessity. Even if this is true from a business point of view, companies must make sure that the decision can be justified from a legal perspective. In this regard, the grounds for dismissal (being either economic difficulties or the need to safeguard the company's competitiveness) must be considered as a real and serious cause, ie, the grounds must be established, and they must be consistent enough to justify dismissal.

From a temporal point of view, it must be noted that the grounds for dismissal presented to the works council at the beginning of the consultation procedure must still exist at the time of the notification of dismissal. This may be difficult to handle since the notification, due to procedural constraints, may happen several months later.

Another concern is the definition of the business sector to be taken into consideration for the purpose of alleging economic difficulties. It may seem obvious that a company making losses should be allowed to lay-off employees. However, this may not be the case under French law, as economic difficulties must be apparent within the entire business sector of the group to which the company belongs. In some cases, defining such a sector of activity may be difficult. One thing is certain: it is the company's duty to provide the judge with financial data related to the sector of activity it deems to be relevant (all countries included). Hence the necessity to build, in advance, a solid argument regarding the area of the business to be restructured, and to gather a wide set of evidentiary exhibits accordingly.

Anticipate redeployment options

Even if the grounds for dismissal are established (see point above), a dismissal can still be found to be unfair if the company fails to properly seek redeployment positions within the group, or fails to adequately propose such positions to the employee. This is a rather easy fight for employees given the amount of legal constraints created by case law.

In summary, (i) redeployment opportunities must be sought among the whole group, in an exhaustive way, and on the basis of the targeted employees' profiles (as opposed to just considering general positions); (ii) redeployment offers must be precise (eg, mentioning a salary range is not precise enough), and individualised (eg, posting offers on the intranet alone does not match such a requirement); (iii) companies may not abstain from proposing geographically distant jobs on the sole basis of a questionnaire to which the employee replied that he was opposed to any mobility (ie, employees' wishes must be appreciated on the basis of a job offer, not on that of a Q&A prior to any offer being made). Such constraints make it absolutely critical to involve HR in the process at group level and gather evidence of redeployment constraints from the start of the lay-off process until notification of dismissal.

Consider the labour law risks related to your corporate decisions

Employees are increasingly seeking to challenge the group's corporate decisions when the business for which they work is closed down, or is sold out and subsequently closed down. One possible argument is that the group mismanaged its subsidiary (eg, through underinvestment, excessive management fees, infringements to business development, the choice of an overly fragile buyer, etc), causing it to go out of business. This was used by the former employees of Bull, a French computer company, whose action resulted in a settlement. Another possible claim is to seek damages for a violation of TUPE when the business sold is considered to have been artificially carved out by the seller in order to avoid redundancy costs (see *EADS* case above). Also, in the context of sales, employees may try to have the purchase agreement nullified, on the basis that the sale's hidden purpose was to transfer restructuring costs onto the buyer. This argument was used in a recent case involving baggage maker Samsonite (see *Energy Plast* case above). This case is currently under appeal, following a court decision favourable to the employees.

When a company is liquidated, claimants are entitled to extend the bankruptcy proceedings to the parent company under the theory of co-mingling of assets, leading it to become jointly liable along with its subsidiary. This is a major threat when subsidiaries are *de facto* managed by their parent companies, or when the financial organisation of the group is considered to reveal 'abnormal financial relations'. Also in the context of bankruptcy proceedings, another remarkable action is the nullification of financial operations (eg,

reimbursement of inter-company loans) accomplished during the so called 'suspicious period', that is, the period during which the company started to be unable to pay its debts as they are due, out of its available assets (called a state of 'suspension of payments'). This claim may be filed by the company's liquidator, in order to recover funds and pay the company's creditors.

Such claims are currently developing, aside from the more traditional lawsuits based on the French Labour Code, and this means that, from a corporate point of view, companies with subsidiaries in France must act with great care when they contemplate restructuring.

Redundancies in Germany (and how they might be avoided)

Germany's export-oriented economy has been severely hit by the global economic crisis. As a consequence of the economic decline, many companies have had to face the fact that the workforce they built up during times of economic growth is now far too large (and too expensive) to be maintained during the recession.

Facing this challenge, businesses often feel that the only possible strategy is to reduce the workforce through (large scale) lay-offs. However, as a result of the implementation of recent legislation providing for financial support, however, short time work has increasingly become a strategy used by businesses to cope with the economic crisis.

The following summarises the main issues to be taken into account in order to avoid the pitfalls of large scale lay-offs (if redundancies are unavoidable), and outlines the main requirements and benefits of short time work.

General protection against dismissal

All employees working for businesses with more than ten employees benefit from a general protection against dismissal. In this case, a dismissal is only valid under the condition that it is based on a legally accepted reason, eg, the loss of employment opportunities. In light of the economic downturn, many companies will be able to demonstrate that job opportunities have in fact been lost and that dismissals are generally justified. However, the decision as to whom to dismiss from a group of comparable employees must be made according to social considerations, including the length of service in the company, the employees' age and his/her legal support obligations (*vis-à-vis* children and spouse). Only if the employer complies with a selection procedure taking these factors into account, will such dismissals be considered valid.

Substantial involvement of local works councils

If a restructuring qualifies as a so-called 'operational change', the employer must observe substantive co-determination rights of a works council (ie, the employees' representatives within the business). Redundancies do qualify as a respective 'operational change' if certain numbers of employees are to be dismissed. For example, in a business with at least 60 but not more than 250 employees, the dismissal of at least 20 per cent of the work force (or 60 employees) qualifies as an 'operational change'.

In the event of an operational change, the employer must conduct negotiations with the works council towards a so-called 'compromise of interest agreement' and a 'social plan'. A compromise of interest agreement is a written agreement stipulating if, when and how the operational change is to be implemented, while the social plan aims to ease any detrimental financial consequences for the employees, especially through the provision of severance payments. It should be noted that German employment law does not provide for mandatory severance claims in the absence of such social plan. While the aforementioned co-determination rights of a works council might not prevent eventual lay-offs, they may delay the process and potentially lead to substantial additional labour costs. Employers are well advised to keep this in mind.

Short time work instead of lay-offs

In light of recent legislation providing for substantial financial support for businesses introducing short time work, employers are increasingly choosing this route as a means of surviving the economic crisis without substantial redundancies. The main advantages of short time work are that, even if employees' working time is reduced by up to 100 per cent, they will still receive 67 per cent of the difference between their net remuneration received prior to and after the introduction of short time work for a period of up to 24 months. Additional financial support granted by the employment agency is the reimbursement of all social insurance contributions as of the seventh month of short time work.