EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/46 English law on collective redundancy consultation inconsistent with EU Directive (UK)

<p>In USDAW - v - Ethel Austin Ltd. & another case (known more widely as “the Woolworths case”), the UK’s Employment Appeal Tribunal (“EAT”) decided that collective redundancy consultation is triggered when 20 or more employees are proposed for redundancy across the sites of any single employer within a 90-day period, not, as previously thought, when 20 or more are potentially redundant at a single establishment.</p>

Summary

In USDAW - v - Ethel Austin Ltd. & another case (known more widely as "the Woolworths case"), the UK's Employment Appeal Tribunal ("EAT") decided that collective redundancy consultation is triggered when 20 or more employees are proposed for redundancy across the sites of any single employer within a 90-day period, not, as previously thought, when 20 or more are potentially redundant at a single establishment.

This is a significant change to the law on collective consultation in the UK, which could have costly implications for multisite employers. An employer will now have a duty to consult if it proposes at least 20 redundancies anywhere in its business within the relevant time frame. If it does not do so, it could face multiple claims and "protective awards" of up to 90 days' gross pay per affected employee.

Key legislation

EU member states were given the option of choosing one of two definitions of collective redundancy for consultation purposes when implementing the Collective Redundancies Directive (98/59/EC) ("the Directive"). The UK chose the second of the definitions, which requires collective consultation in the case of:

the dismissal, over a period of 90 days, of at least 20 workers, whatever the number of workers normally employed in the establishments in question (Article 1(1)(a)(ii)).

This was purportedly adopted into the language of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"); but the domestic Act does not replicate the Directive's phrasing. Section 188(1) states that:

"Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals."

The essential problem here is that TULRCA requires the 20 or more employees to be "at one establishment" for the employer's collective consultation duty to arise, whereas the Directive seems to apply even where the affected employees are at different "establishments".

Facts

This conjoined appeal against Ethel Austin Ltd (in administration) and WW Realisation 1 Ltd (formerly Woolworths Plc) by the USDAW union resulted from the similar decisions of two separate Employment Tribunals. The two retailers had gone into administration in 2010 and 2008 respectively, with thousands of employees losing their jobs as a result.

The union representatives brought claims for a failure by the administrators to consult collectively on the mass redundancies. The two Tribunal Judges upheld some of the respective claims and made protective awards of the maximum 90 days' pay in respect of the Ethel Austin employees and 60 days' pay for the Woolworths employees.

However, those first instance decisions both held that each individual store in the Ethel Austin and Woolworths businesses was a separate "establishment" and that there was no duty to collectively consult under TULRCA at any store employing fewer than 20 employees. This was despite the fact that, in the case of Woolworths' administration, over 27,000 redundancies were being made nationwide and the Tribunal decision excluded a total of 4,400 employees

from entitlement to any compensation.

USDAW appealed to the EAT in both cases, arguing that the redundant employees working at stores with fewer than 20 employees were entitled to protective awards in line with their peers across the larger stores. Its key argument was that, in order to comply with the Directive, section 188 TULRCA should be interpreted purposively as requiring an employer to consult where it proposes to dismiss as redundant:

(a)20 or more employees at one or more establishments;

(b)20 or more employees at one establishment, with the word "establishment" being interpreted broadly in light of the Directive's purpose as meaning the whole of a relevant retail business rather than each of its stores; and/or

(c)20 or more employees (with the words "at one establishment" being deleted from section 188 altogether).

Judgment

The EAT first considered the history to the implementation of TULCRA in the UK. When it was first enacted, the collective consultation duty under section 188 was triggered when any number of employees (even a lone individual) were at risk of redundancy, provided only that they were represented by a recognised trade union. This provision was changed by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, when the government modified the legislation so that collective consultation duties would only arise where 20 or more employees were at risk (whether or not a trade union was recognised). However, there was no mention of the phrase "at one establishment" in the consultation before the legislative change or the related Parliamentary debates, nor any indication of a Government intention to limit the protection afford by section 188 to situations where 20 or more redundancies were proposed within a single establishment. The EAT concluded that it was probably just a drafting mistake that it had been limited in that way.

The EAT accepted that section 188 of TULRCA is more restrictive than the Directive. It therefore went on to consider whether the domestic legislation could be interpreted purposively, as argued by USDAW. It noted that in *Ghaidan - v - Godin-Mendoza* (2004), which concerned the approach that UK courts should take when interpreting domestic legislation in light of the European Convention on Human Rights (www.practicallaw.com/1-107- 6550), the House of Lords stated that courts can add or take away words to comply with higher authority. This decision was relied on by the EAT in *EBR Attridge LLP and another v Coleman* (2010), when it added words to the Disability Discrimination Act 1995 to cover

"associative discrimination", as required by the Equal Treatment Framework Directive. The Judge in that case felt justified in doing so because the added words went with the grain of the legislation and were compatible with its underlying purpose.

The EAT held that it was entitled to follow the *Attridge* approach in the present case, and so to construe section 188 TULRCA in a way that complied with the Directive. The Directive did not link the number of redundancies to any particular establishment and it was clear that Parliament had intended to implement EU law correctly.

The EAT thought that any of USDAW's three proposals would be acceptable. It noted that it would, if necessary, take option (b) and read "establishment" as if it covered all of the sites of the employer's retail business. However, as that would produce a fact-sensitiveapproach, the EAT was prepared to take the bold step of adopting option (c) and deleting the words "at one establishment" from section 188 altogether, so that the section could be applied universally, without any detailed factual consideration. Accepting option (a), to read "at one establishment" as if it meant "at one or more establishments", would be inconsistent with the EAT's view that the employees' place of work was irrelevant. Nevertheless, it noted that it would be prepared to accept this route if it were going too far in adopting option (b) or (c).

Commentary

This decision has dramatically, and immediately, extended the scope of an employer's obligation to collectively consult with its employees. Location is now no longer a relevant factor, and the potential redundancy of 20 employees at different sites who all work in different roles will now fall under the consultation regime. Whilst every employer with more than one site will be affected, it is the larger employers with multiple sites that are likely to find the implications of the EAT's decision the most difficult to deal with in practice.

Employment Tribunals are likely to follow this decision and employers should now proceed on the basis that there is no longer an "at one establishment" qualification under section 188 when planning large-scale redundancies.

In another relevant development, a Northern Ireland Tribunal has separately referred some of the same issues raised by the Woolworths decision to the Court of Justice of the European Union ("CJEU") for clarification (*Lyttle v Bluebird*). In particular, it has asked whether the 20 employee trigger applies to all the employer's establishments or to one establishment.

The Department for Business, Innovation and Skills ("BIS") has commented to the UK's Employment Lawyers Association that the decision has "wide and unwelcome implications". There is an argument that in rewriting statute, the EAT went too far in this case, and BIS is

currently seeking to appeal the EAT's decision. However, we are unlikely to return to the original position, given the concerns of compliance with the Directive. The CJEU or Court of Appeal may develop the law in new ways and, for this reason, the Woolworths decision may not be the last word on the subject. Unfortunately, it will likely be many months before the Bluebird case appears before the CJEU and it may well be after any Court of Appeal hearing in this case. Whilst applying the ratio of this case in the meantime, it would be wise for employers and their advisors to expect further developments.

Comments from other jurisdictions

Germany (Paul Schreiner): Section 17 of the *Kündigungsschutzgesetz* (Unfair Dismissal Protection Act) focuses on the establishment affected by the termination of employment. Under this provision, the consulting duty depends on the percentage of employees terminated over the total number of employees in the establishment. If an establishment has more than 20 employees but fewer than 60, the duty to consult with the works council arises if five or more employees are terminated within 30 days. For between 60 and 500 employees, the treshold is 10% or 25 employees, and in an establishment over 500 employees, it is 30 employees.

Hungary (Gabriella Ormai): The Hungarian employment law follows Article 1(1)(a)(i) of the Directive concerning the definition of collective redundancy. This approach was maintained by the new Hungarian Labour Code (Act I of 2012, in force since 1 July 2012), although it altered the consultation phase of the process for collective redundancies.

The law previously required the employer to initiate consultation with the works council or if none, with an *ad hoc* committee made up of the representative trade unions and employees, including an obligation to provide certain information relating to the planned measure. The new law limits the consultation to an obligation to consult the works council. The practical result of this is that if there is no works council operating at the employer, the employer is not bound to a initiate consultation at all. Although the new law has maintained the general right of the representative trade union to provide its opinion on the planned measures and in that way consultation can be initiated, in practice this right tends not to be significant because there is a lack of representative trade unions operating at employers. In addition, it shifts the initiative to consult from the employer to the representative trade union. The new legislation is clearly a step back in terms of employee protection in connection with collective redundancies.

Whether the legislative amendment is in compliance with the Directive is debatable. The Directive obliges the employer to consult with workers' representatives. Pursuant to Article

1(1)(b): "*workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States*". Although there is no clear definition in Hungarian law of "workers' representatives", the primary role of works councils and representative trade unions is to protect the employees' social and economic interests.

Poland (Marek Wandzel): When implementing the Collective Redundancies Directive (98/59/EC), Poland chose the first of the definitions set out in Article 1(a) of Directive 98/59. Therefore, 'collective redundancy' means dismissals effected by an employer over a period of 30 days where the number of redundancies is at least ten within employers normally employing at least 100 but fewer than 300 workers and at least 30 within employers normally employing 300 workers or more. The Polish law of 13 March 2003 explicitly uses the term "employer", which has a broader meaning than "establishment". This does not necessarily mean that the coverage by that law is broader than in the UK, since it is possible to award the prerogatives of an employer to an establishment in situations where the management of the establishment can hire and fire employees independently. Therefore, a large company can have several "establishments" and each of them can be a separate "employer" within the meaning of the collective redundancies legislation, in which case it is possible to make hundreds of workers redundant without necessarily triggering the law on collective redundancies. It is also worth mentioning that the Polish law on collective redundancies applies only to employers with 20 employees or more. Employees made redundant by small employers do not get protective awards at all. Such differentiation was approved by the Polish Constitutional Tribunal as compatible with the Polish Constitution.

The above can be illustrated by the following example. Suppose a retail company has 50 stores in Poland, each employing 30 people. In 'scenario A', the company has not delegated its duties as employer to local management, so therefore the company as a whole qualifies as the "employer". If the company decides to reduce the headcount in each store from 30 to 29 employees, it will need to comply with the law on collective redundancies (because 30 x 1 = 30), meaning that it must follow the statutory procedure and pay the redundant staff compensation even though no more than 2& of total staff are to lose their jobs. In 'scenario B', the company has delegated its duties as employer to local management, so therefore each store qualifies as a separate "employer" within the meaning of the law on collective redundancies. If each store decides to dismiss nine employees, there is no collective redundancy (because there are less than ten dismissals per employer), even though a total of 30 x 9 = 270 employees (18% of the total) are losing their jobs. The employer will, however, need to pay them compensation.

Subject: Collective redundancy consultation; TULRCA 1992

Parties: USDAW - v - Ethel Austin (in administration) and (1) USDAW, (2)Mrs B Wilson - v - (1) Unite the Union, (2) WW Realisation 1 Ltd, (3)Secretary of State for Business, Innovation and Skills

Court: Employment Appeal Tribunal

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