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Collective Consultations Post *Woolworths*—Bad News for UK Employers

UK Employment Appeal Tribunal issues decision that will require employers to collectively consult on all redundancies of 20 or more employees over a 90-day period.

On July 1, the UK Employment Appeal Tribunal (EAT) issued its decision in *USDAW v Woolworths*.[1] The decision will dramatically change how employers will carry out cross-site redundancies, confirming that—subject to any appeal or new legislation—employers must collectively consult when 20 or more employees are proposed to be dismissed by reason of redundancy within a period of 90 days or less, regardless of where the employees are located. UK employers should review their current and future redundancy programmes in light of this case.

Background

UK Position

In the UK, employers have a general duty to consult with employees individually before deciding to terminate their employment on the grounds of redundancy. In addition, employers have the duty to collectively consult with either trade union representatives or elected employee representatives if the employer wishes to dismiss a certain number of employees.

In the UK, the obligation to collectively consult is set out in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which states that the obligation to collectively consult is triggered by an employer proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

If the duty to collectively consult is triggered, the consultation process must begin (i) at least 45 days before the first dismissal takes effect if 100 or more redundancies are proposed or (ii) at least 30 days before the first dismissal takes effect if between 20 to 99 redundancies are proposed. Failure to comply with the duty to collectively consult can lead to an award of up to 90 days' pay per affected employee (the protective award)—which can be very costly to employers.

Potential Conflict with EU Position

The duty to collectively consult derives from a European directive. The directive in question—Council Directive 98/59/EC (the Directive)—sets out that the duty to collectively consult is triggered when the number of redundancies is "over a period of 90 days, at least 20 [dismissals on the grounds of redundancy] . . . in the establishments in question." Under EU law, the UK was obliged to adopt the Directive, which sets minimum standards to protect employees. The UK did this through implementing sections 188 to 198 of TULRCA.

On analysis, there is a difference between the Directive and TULRCA, as the Directive refers to 20 dismissals in the "establishments in question", whereas TULRCA refers to 20 dismissals "at one establishment". Under EU law, if the national court determines that there is an inconsistency between UK legislation and a directive, the UK

1. View the decision at http://www.employmentappeals.gov.uk/Public/Upload/12_05470548fhwwSBKN.doc.

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legislation should be interpreted in light of the directive.

Importance of the Difference

In the UK, employers have, in accordance with UK legislation, relied on the “one establishment” test to avoid the duty to collectively consult where they have kept numbers of redundancies below 20 in each site/establishment. The test on what constitutes an “establishment” in the UK is complex, but, generally, the courts have accepted that different geographic locations amount to different establishments.

Decision of the Employment Tribunal in *Woolworths*

Woolworths, a collection of retail stores, went into administration (a form of insolvency in the UK) in November 2008 and ceased to trade in January 2009. Employees were dismissed by the administrators without consultation. The Union of Shop, Distributive and Allied Workers (USDAW) brought claims on behalf of the employees, stating that they were entitled to the protective award.

The Employment Tribunal (the court of first instance) ordered that the majority of employees should receive 60 days’ pay by way of protective award but found that 3,233 employees were not due the award. The reason for this was that some employees were employed in stores that had fewer than 20 employees, and, according to commonly accepted practice, the tribunal held that each store was a separate establishment. Accordingly, the duty to collectively consult was not triggered at these stores.

USDAW appealed the decision to the EAT on the basis that the “one establishment” test adopted by the Employment Tribunal was inconsistent with the Directive.

Decision of the EAT in *Woolworths*

In USDAW’s appeal, it set out that, “in order to comply with the Directive, section 188 (of TULRCA) should be interpreted as requiring the employer to consult where it proposes to dismiss as redundant 20 or more employees (a) at one or more establishments; and/or (b) at one establishment, broadly interpreted in accordance with the Directive to mean the whole of the relevant business, rather than each of its relevant stores; and/or (c) deleting the words ‘at one establishment’ from section 188”.

The EAT overturned the Employment Tribunal’s decision, agreeing with USDAW that TULRCA and the Directive were not consistent. The EAT held that there should be some interpretation of TULRCA to yield the outcome that the obligation to collectively consult arises when 20 or more employees are to be dismissed—**irrespective** of their location.

Although the EAT felt any of the appeal points would achieve this result, the court held that there should be a purposeful construction of section 188 of TULRCA, so as to delete the words “at one establishment” (appeal point (c)). The EAT believed that this would provide the clearest and simplest result and would result in the legislation being applied without the need for detailed consideration going forward.

Next Steps

This decision goes against previous authority from the EAT, and, notably, it goes against the decisions of the last two presidents of the EAT. In addition, although the European Court of Justice (the ECJ) has never been asked to consider this particular issue, it has reviewed cases that involve the UK’s method of calculating redundancy numbers on the basis of establishments. If the ECJ believed that section 188 of TULRCA was inconsistent with the Directive, it is likely that this would have been mentioned in obiter by the court, but it has not done so.

However, subject to any appeal or new legislation, the requirement for collective redundancy consultation will be triggered in the future when an employer proposes to make redundant 20 or more employees within a 90-day period, even if they are employed across multiple establishments. It will not be open to the employer to avoid

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collective consultation by ensuring that fewer than 20 employees are made redundant at a number of different locations.

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