Woe for Woolworths Employees – Collective Redundancies and the meaning of "establishment"

BRIEFING

The European Court of Justice ("ECJ") has released its judgment in the case of *USDAW and another v WW Realisation 1 Ltd (in liquidation) ("Woolworths"), Ethel Austin Ltd ("Ethel Austin") and another (C-80/14)* (the "Woolworths Case"), which concerned the meaning of "establishment" in the European Collective Redundancies Directive (*Directive 98/59/EC*) (the "Directive") as implemented by the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

Background

Woolworths and Ethel Austin were two national high street retailers who went into administration in November 2008 and March 2010 respectively. The result was large scale redundancies across numerous retail sites.

Under TULRCA, when an employer proposes to dismiss 20 or more of its employees within a period of 90 days **at one establishment**[1], it is required to consult collectively with representatives of the affected employees. As the redundancies in Woolworths and Ethel Austin came about quickly and as a result of their insolvency, no collective consultation process took place.

If an employer fails to comply with the collective consultation provisions, an employment tribunal can make a protective award of up to 90 days' gross pay for each affected employee.[2] Where the employer is insolvent (and the protective award remains unpaid), an employee may apply to the Secretary of State for the award (up to a certain limit) to be paid out of the National Insurance Fund.[3]

In the case of Woolworths and Ethel Austin, protective awards were made but only to those employees who worked at stores with 20 or more employees. The tribunals in each case had found that each store was a separate "*establishment*" for the purposes of TULRCA.

[1] Section 188 TULRCA

[2] Section 189 TULRCA

[3] Section 166 – 170 Employment Rights Act 1996

USDAW appealed to the Employment Appeal Tribunal ("EAT"). In both cases the EAT held that the words "*at one establishment*" in TULRCA was incompatible with the Directive and that those words should be disregarded for the purposes of a collective redundancy involving 20 or more employees. The result of that decision was that an employer would need to look at the entirety of its business and consult collectively whenever the number of redundancies proposed reaches 20 or more, even if spread across a number of smaller sites; a major departure from the previous position.

The Secretary of State appealed that decision to the Court of Appeal who referred the case to the ECJ.

The Decision in the Woolworths Case

The Court of Appeal referred a number of questions to the ECJ, including:

(a) In Article 1(1)(a)(ii) of the Directive, does the phrase "*at least 20*" refer to the number of dismissals across all of the employer's establishments in which dismissals are effected within a 90-day period, or does it refer to the number of dismissals in each individual establishment? and

(b) If Article 1(1)(a)(ii) of the Directive refers to the number of dismissals in each individual establishment, what is the meaning of "*establishment*"? In particular, should "*establishment*" be construed to mean the whole of the relevant retail business being a single economic business unit, or such part of that business contemplating making redundancies, rather than a unit to which a worker is assigned their duties, such as each individual store?

Following previous European case law[4], the ECJ found that the term "*establishment*" in the Directive means the unit or entity to which workers made redundant are assigned to carry out their duties.

The ECJ referred to guidance given in the previous cases as to the meaning of "*establishment*".[5] In particular, "*establishments*" in the context of an undertaking **may** consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more tasks and which has a workforce, technical means and a certain organisation structure allowing for the accomplishment of those tasks.

However, there is **no need** for it to have legal, economic, financial, administrative or technological autonomy, a management which can independently effect collective redundancies or geographical separation from the other units and facilities in the undertaking.

The decision as to whether the individual stores in the Woolworths Case were establishments is one for the domestic courts to make and, accordingly, the case will return to the Court of Appeal for determination in light of the ECJ's judgment.

Comment

Given the clear guidance from the ECJ, it seems likely that the Court of Appeal will grant the appeal and restore the decisions of the original tribunals, namely that the individual stores each constituted a separate establishment for the purposes of TULRCA.

This decision will be welcomed by employers (and the Secretary of State in respect of insolvent companies) and it restores some welcome certainty to an area of law which had been left in a state of flux since the EAT decisions in 2013.

[4] The cases of *Rockfon A/S v Specialarbejderforbundet I Danmark, acting for Nielsen & Ors [1996] IRLR 168* and *Athinaiki Chartopoiia AE v Panagiotidis and others C-270/05 [2007] IRLR 284*

[5] The Directive provided member states with a choice of two possible definitions of "collective redundancy", both of which made reference to "establishments". The UK elected to implement the definition contained in Article 1(1)(a)(ii). The previous case law before the ECJ on the meaning of "establishment" related to Article 1(1)(a)(i).

However, this decision will not be welcomed by the employees of the small Woolworths and Ethel Austin stores who have suffered a financial disadvantage when compared with their colleagues who gained a better outcome simply by virtue of working at a larger store.

It is also noteworthy that in the previous ECJ cases referred to in the judgment, the ECJ had stated that an establishment should be defined "*broadly*" and so as to limit so far as possible, collective redundancies falling outside the scope of the Directive, that is, so as best protect employees. In the previous cases before the ECJ, the employees were favoured by their individual workplaces each being an establishment, unlike the employees of Woolworths and Ethel Austin.

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