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Collective redundancies

On 30 April 2015, the European Court of Justice handed down its decision in the important case of *USDAW and another v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another* which has been widely reported as the 'Woolworths case'. The case concerns the number of prospective redundancies that trigger the collective consultation requirements under section 188(1) of the Trade Union and Labour Relations (Consolidations) Act 1992 (TULRCA).

TULRCA, which was introduced to implement the European Collective Redundancies Directive, states that collective consultation obligations are to be followed where an employer proposes to dismiss 20 or more employees 'at one establishment' within a period of 90 days or less. In this particular case, WW Realisation 1 Ltd which traded as Woolworths and Ethel Austin Ltd, went into administration (Woolworths in 2008 and Ethel Austin in 2010) resulting in large-scale redundancies. They did not carry out collective consultation in all stores as many of their units employed fewer than 20 staff. When claims were taken for protective awards for the failure to carry out collective consultation, the Employment Tribunals in each case held that each store was a separate 'establishment' and consequently the duty to inform and consult had not been engaged in respect of those stores that employed fewer than 20 employees meaning those employees were not entitled to protective awards.

The union USDAW appealed the Tribunal's decisions and the Employment Appeal Tribunal found that the words 'at one establishment' in section 188 of TULRCA, were incompatible with the Directive. Furthermore, the Employment Appeal Tribunal held that the words 'at one establishment' should be disregarded for the purposes of a collective redundancy involving 20 or more employees, and that collective consultation provisions should be followed where 20 or more employees are proposed as redundant across the whole of the employer's business. This decision sent a shock wave to employers and created real logistical problems for large organisations with successive rounds of redundancies at different locations.

The Secretary of State appealed to the Court of Appeal which referred the cases to the European Court of Justice to consider whether under the Directive, the number of dismissals effected within the 90 day period is across all of the employer's establishments or in each individual establishment and whether the meaning of 'establishment' should be interpreted as the whole of the relevant business or the unit to which the employee is assigned such as an individual store.

The European Court of Justice held that the term 'establishment' under the Directive means the unit or entity to which the employees at risk of redundancy are assigned to carry out their duties and does not refer to the employer's whole 'undertaking' or business. Although aggregating the number of dismissals across the whole business would increase the number of employees protected by the Directive, the purpose of the Directive is not only to afford greater protection to workers in collective redundancies but also to ensure comparable protection in different member states, harmonising the resulting costs to businesses across the EU.

The application of the European Court of Justice judgment to the Woolworth and Ethel Austin cases still needs to be decided by the Court of Appeal and it is now likely that organisations will not need to consult in cases where fewer than 20 employees are at risk at one location, even if there is a potential for further redundancies at other sites or units within 90 days. However, until the case is heard by the Court of Appeal, the requirement to consider numbers of potential redundancies across the organisation remains good law and legal advice should be sought.

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