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Practice Group(s):

Labor, Employment and Workplace Safety

Collective Redundancies: ECJ Clarifies Meaning of "Establishment"

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What happened?

Under the Trade Union and Labour Relations (Consolidation) Act 1992 (the "**Act**"), if an employer proposes to make large scale redundancies of 20 or more employees at one establishment within a period of 90 days or less, it must undertake collective consultation with appropriate representatives of the affected employees, as well as notifying the Secretary of State for Business, Innovation and Skills.

In *USDAW and another v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another*, the meaning of the words "at one establishment" was clarified by the European Court of Justice (the "**ECJ**"). This case concerned employees who had been made redundant following the closure of dozens of Woolworths and Ethel Austin stores across the UK after the companies went into administration. The affected employees' trade union sought damages on their behalf as neither company carried out collective consultation procedures in respect of stores with fewer than 20 employees.

In the first instance, the Employment Tribunal decided that this was the correct approach as each store was a "separate establishment". However, on appeal, the Employment Appeals Tribunal (the "**EAT**") overturned the Tribunal's decision. The EAT decided that collective consultation should occur when a company is proposing to make redundant 20 or more employees across its entire business within a 90 day period, thereby disregarding the "at one establishment" requirement that is contained in the Act.

Following this controversial decision, the Court of Appeal ("**CoA**") referred the issue to the ECJ for their judgement. Last week, the ECJ published its finding that, for the purposes of collective consultation, "establishment" means a local employment unit and then referred the case back to the CoA to determine whether, on the facts, each branch of Woolworths and Ethel Austin was a separate establishment.

What does this mean?

Although the ECJ has referred the case back to the CoA, there is little room for doubt that the decision of the EAT will be overturned and that the Tribunal was permitted to treat each store as a separate establishment.

Therefore, employers will not have to aggregate the number of proposed redundancies to determine whether the threshold of 20 or more employees has been reached (therefore giving rise to collective consultation obligations) where redundancy dismissals are implemented across various locations.

The ECJ's decision will undoubtedly be welcomed by employers who have business establishments in different locations across the UK since they will not now be required to collectively consult at an establishment where less than 20 redundancies are proposed.

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What should we do?

Despite this judgment, an employer is still required to carry out collective consultation where it is proposing to make 20 or more redundancies at a local employment unit within a period of 90 days and should carefully evaluate how many employees could be affected by any proposals that may lead to redundancies.

Furthermore, it will not always be obvious what constitutes a local employment unit. For example, the Advocate General suggested that if an employer operates several stores in one shopping centre, it is possible that all such stores could be regarded as forming a single employment unit. Unfortunately, the ECJ did not comment on this example and therefore employers should be wary of relying on this judgment where it has several business establishments in any particular vicinity and is intending to make 20 or more people redundant across those establishments.

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