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European Employment Law ALERT

Potential Good News for Employers - ECJ Attorney General Issues Helpful Definition of "Establishment" in Redundancies

By Ming Henderson and Georgina McAdam

The Advocate General of the European Court of Justice (ECJ) has given his opinion on the 'Woolworths' case (*USDAW and Wilson (C-80/14)*). In his opinion, "establishment" refers to the "local employment unit" to which the redundant employees were assigned. In other words, for the purposes of determining if the collective redundancy threshold is met, an employer does not need to consider the number of employees being made redundant across its business as a whole but rather the number of employees being made redundant at a particular establishment.

Background

In the UK, where an employer is proposing to dismiss as redundant 20 or more employees *at one establishment* within a period of 90 days or less, it has to collectively consult with the representatives of any employees affected by the dismissals (Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), which implements the European Collective Redundancies Directive).

A Tribunal can make a *protective award* of up to 90 days' gross pay for each affected employee, if an employer fails to comply with the collective redundancy requirements.

Woolworths and Ethel Austin Limited went into administration that resulted in large scale redundancies. Claims were brought for the failure to consult and the Tribunal granted protective awards to the employees, except for those who worked at stores with less than 20 employees. In the Tribunal's view, each store was a separate "establishment". Therefore, the duty to inform and consult was not engaged in respect of employees who worked at a store with less than 20 employees.

On appeal, the Employment Appeal Tribunal ("EAT") held that the words "at one establishment" in TULRCA were incompatible with the Directive and should be discarded. Therefore, the collective redundancy threshold would be met if an employer was proposing to make 20 or more employees redundant across its business within a period of 90 days or less. It would be irrelevant if each of these employees worked at different locations and were being made redundant for unrelated reasons.

The decision was appealed and the Court of Appeal referred the cases to the European Court of Justice ("ECJ").

Decision

The Advocate General considered the 'Woolworths' case along with two other cases that were very similar. In the Advocate General's opinion, the meaning of "establishment" in the Directive refers to the "local employment unit" to which the

employees were assigned to carry out their duties (e.g. a shop). This is because the purpose of the Directive is to protect workers where there are large scale redundancies in a local area. However, member states may opt to provide a greater level of protection should they choose to, as long as it is more favourable to the workers. It is for the national courts to determine how the local employment unit should be defined, as this is dependent on the facts of the case.

Implications for redundancies going forward

The Advocate General's opinion is not binding. However, it is usually followed by the ECJ, which would be good news for employers. The position in the UK would revert to the pre-EAT position, where the threshold for collective redundancies would be more difficult to reach (i.e. the pool for establishing the threshold would be based on each local employment unit rather than on the business as a whole).

Until then, in the UK, employers should continue to follow the EAT's decision and aggregate the number of employees being made redundant across all of its establishments, when determining if the duty to inform and consult is triggered. It is not clear when the ECJ will give its decision, however, it is expected later this year.

We will closely monitor the developments in this case and will issue a further Alert in the coming months.

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