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European Employment Law ALERT

Collective Redundancy Consultation - Good News for Employers

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European Court of Justice (ECJ) rules on the meaning of 'establishment'

After two years of litigation, the ECJ has finally approved a return to the status quo in collective redundancy exercises in the European Union. In three different cases (two, in the UK brought against retailers which went into administration (bankruptcy), and a related Spanish case), the ECJ had to decide which employees should be included in assessing whether collective redundancy consultation obligations were triggered. In all three cases, the ECJ confirmed that employers only need to count employees who are at risk of redundancy in the local unit where they are assigned to work (i.e. normally their local office, plant or other worksite).

This decision is good news for employers. It ends two years of uncertainty after a decision of the UK Employment Appeal Tribunal (in the *Woolworths* case), which suggested that employers should count all redundancies within their UK operations. This caused employers significant difficulties both in information-gathering across the organization to assess whether the threshold was reached, and in having to follow a collective consultation process where in fact they were below the collective threshold in the employees' workplace.

Legal Background

The European Collective Redundancies Directive (98/59/EC) (the "Directive") gives European member states a choice between two approaches to "collective redundancy". Whether there is a collective redundancy can be based either on a pure numbers threshold or on a combination of numbers and a percentage of overall headcount. The UK legislation (Trade Union and Labour Relations (Consolidation) Act 1992) which implements the Directive takes the first approach: employers are obliged to inform and collectively consult where they are proposing 20 or more redundancies at one establishment within a period of 90 days or less. The Spanish legislation takes the second approach, so that collective consultation is triggered where there are redundancies of either 10 or 30, or where they reach 10% of overall headcount (depending on the size of the organization), again over a 90-day period.

The collective consultation process imposes mandatory discussions with employee representatives for a minimum period, generally at least 30 days in both the UK and Spain, but rising to 90 days in the UK where 100 or more employees are affected. There are also obligations to make filings with government bodies, and in some European countries there can be mandatory payments into government funds or "social plans" to minimise the financial impact on the terminated employees and help them into new employment. No terminations can take effect until the consultation is completed.

Where an employer fails to comply with the collective consultation obligations, there can be timings and cost consequences. In the UK, an employment tribunal may make a "protective award" of up to 90 days' gross pay for each terminated employee (subject to an earnings limit which is currently £475). The financial stakes can then be high.

A welcome decision for employers

This case concerned the meaning of "establishment". Does it mean each separate place to which the impacted workers are assigned to work? Or does it mean the employer's entire business across the UK, so that all worksites need to be aggregated in assessing whether the collective threshold is met?

The ECJ confirmed that local units are assessed separately. This is consistent with its previous decision in a Greek case (*Athinaiki Chartopoiia AE v Panagiotidis*) where an "establishment" for redundancy purposes was held to be a distinct entity, with sufficient permanence and stability, but which did not need autonomous management. This means only redundancies at the employee's individual workplace should in most cases be counted, although purely temporary locations (such as a temporary building site, or a "pop up shop") may raise questions in practice. The Advocate General, in a decision that preceded the ECJ judgement, gave a further example, where an employer has several stores in one shopping centre, and termination at those stores might be aggregated for purposes of the threshold.

In the great majority of cases, however, the position is clear. The ECJ decision will be welcomed by all employers, but particularly by larger companies who have faced real practical difficulties in trying to track terminations across their business to assess whether they meet the collective threshold. The ECJ's decision means that terminations now only need to be tracked at the particular worksite where the impacted workers are assigned to work. There is no requirement that the relevant establishment has its own management or whether the decision to make the redundancies was made at local site level or at group level, so employers simply need to assess where the employee is assigned to work under their contract, and in practice. The ECJ confirmed that this interpretation of "establishment" applies to both of the approaches to collective redundancy under the Directive i.e. whether the local member state has chosen a "percentage" or a "numbers-based" approach to the collective redundancy threshold, giving welcome consistency for multinational employers with operations across the EU.

As the EU Commission is in the early stages to consolidate the rules on worker consultation in Europe (a consultation is due to close on 30 June to consolidate the different regimes for consultation on business transfer, redundancy and employee representation), the scope and approach for collective redundancy may continue to evolve in the near future. But for the time being, the principles of the recent ECJ decisions apply with immediate effect.

If you would like further information please contact any member of our International Employment Law practice.

USDAW and another v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and another (C-80/14),

Lyttle and others v Bluebird UK Bidco 2 Ltd (C-182/13) , Cañas v Nexea Gestión Documental SA and another (C-392/13)

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