

ECJ's decision on Woolworths' staff--who benefits?

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Employment analysis: The European Court of Justice's (ECJ) decision to limit the consultation obligations for collective redundancies comes as a relief to employers and a blow to employees. Peter Edwards, barrister at Devereux Chambers, discusses the rationale behind this decision.

Original news

Union of Shop, Distributive and Allied Workers (USDAW) and another v WW Realisation1 Ltd (in liquidation) and others: C-80/14

What conclusion did the ECJ reach on how 'establishment' should be interpreted in the context of the requirement on an employer to inform and consult about collective redundancies?

The ECJ held that the word 'establishment' has the same meaning in art 1(1)(a)(i) as it does in art 1(1)(a)(ii) of Directive 98/59/EC (Collective Redundancies Directive):

'[establishment is] the unit to which the workers made redundant are assigned to carry out their duties. It is not essential in order for there to be an "establishment" that the unit in question is endowed with a management that can independently effect collective redundancies'.

The ECJ further held that it is permissible under the Collective Redundancies Directive to limit collective redundancy requirements to redundancies of at least 20 employees at a single establishment, and not where the aggregate number of dismissals across all establishments reaches or exceeds the threshold of 20 workers. Contrary to the decision of the Employment Appeal Tribunal (EAT), the ECJ's judgment is that the Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1) (TULR(C)A 1992) is entitled to limit the obligation to collectively consult where there are fewer than 20 proposed redundancies at a single establishment.

Did the ECJ apply the same or different reasoning to the Advocate General?

The overall rationale of the ECJ's judgment is broadly the same as that adopted by the Advocate General.

Does the ECJ's judgment effectively determine the issues in the case (which will now return to the Court of Appeal) or is there still scope for argument as to how the ECJ's conclusions will apply on the facts?

The ECJ's judgment effectively determines the issues in the case. Even the dogged USDAW is left with nothing to argue. Unlike many judgments of the ECJ (particularly in the field of holiday pay and the Working Time Directive 2003/88/EC), the decision is clear, concise and not open to any arguments on interpretation. The Court of Appeal will have no choice but to overturn the decision of the EAT and restore the first-instance tribunal decisions that the relevant group of redundant employees (those working in stores with under 20 employees) are not entitled to bring protective award proceedings.

Has the legal test on when an employer is obliged to carry out collective consultation about proposed redundancies simply returned to how it was understood prior to the EAT's decision, or has this litigation impacted on it in any way?

The legal test has indeed returned to what it was understood to be. The relevant statutory provision was always clear, which is why the EAT had to delete part of the statutory wording in order to produce the desired result (thought wrongly by the EAT to be consistent with the meaning of the Collective Redundancies Directive).

In simple terms the obligation to collectively consult only arises if the employer has a proposal to dismiss as redundant at least 20 employees at a single establishment. Aggregation of redundant employees across a number of establishments to produce the magical number of 20 (as was done by the EAT) is neither required nor permissible under the existing domestic legislation. The words deleted from the act by HHJ McMullen will be restored and continue to have effect once the Court of Appeal goes through the motions of applying the judgment of the ECJ.

What should employees, employers and insolvency practitioners take from this judgment going forward?

The judgment provides certainty for employers and insolvency practitioners where there would otherwise have been considerable doubt. It is fairly easy to identify particular establishments/units within an organisation and to count the number of employees working at that establishment. If the number is less than 20, then the collective consultation requirements do not apply. It is fair to say that an obligation to collectively consult in circumstances where a small number of employees are being made redundant across a wide range of locations would have been administratively burdensome. There is no such obligation according to the ECJ's judgment.

On the flipside, employees who are dismissed when a large company becomes insolvent, with the loss of all jobs, will take little solace from the certainty when they receive no protective award on the seemingly arbitrary basis that they happen to be based in a smaller branch of the insolvent organisation. Indeed the irony will often be, as in the case of Woolworths, that well-remunerated managerial staff who work in large head offices can recover protective awards while the lowest-paid staff working in small outlying posts will not. The rationale of the ECJ for that discrepancy--that a small number of redundant employees in a particular geographical location are likely to find it easier to obtain alternative employment--will be difficult for those employees to understand in this relatively common example. Smaller stores are often located in the most economically-deprived areas whereas larger stores with more employees are usually based in affluent areas.

How, if at all, does the ECJ judgment impact on the duty to notify the Department for Business, Innovation and Skills of collective redundancies?

The judgment will have no impact on the notification requirements. The obligations on employers and insolvency practitioners continue as they have prior to the intervention of the EAT.

USDAW has stated that it hopes for a change in the law so that workers from all workplaces affected by large-scale redundancy situations would be treated as part of the same collective consultation (ie in line with the earlier EAT judgment). How likely do you think it is that the law will be changed in this way?

The challenge to the existing legislation was both innovative and tenacious. It was driven by USDAW's view that all of its members, who were made redundant following the insolvency of an entire company, should have an equal right to claim protective awards irrespective of the part of the organisation in which they were working. It is difficult to argue with that view from the perspective of USDAW's redundant members. However, para [67] of the ECJ judgment makes it clear that it is permissible for member states to implement more favourable provisions in this regard than those contained in the Collective Redundancies Directive.

In my view, the prospects of a change in the law look remote in the current climate. A Conservative government is unlikely to have any inclination to agree to an early legislative change producing a further drain on the public purse.

Interviewed by Stephanie Boyer.

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