SQUIRE SANDERS

THE WOOLWORTHS CASE

2 July 2013

Watch out if … you are making redundancies

As the duty to consult collectively may be triggered, even if you are making less than 20 employees redundant at any one location.

A few weeks ago reports were circulating about a case in which the EAT had apparently said that the words "at one establishment" in s. 188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 should be disregarded when it comes to deciding whether the duty to carry out collective redundancy consultation applies. The EAT's written judgment has now been published and we can confirm that the law governing collective redundancies has indeed changed. This decision represents a significant change to the law and it means that if your company is proposing to dismiss 20 or more employees as redundant within a period of 90 days or less, irrespective of where those employees are based, then you must ensure you comply with your collective consultation obligations under s.188 (i.e. 30 or 45 days), or run the risk of a protective award (90 days' pay) being made against you.

The joint appeals of (1) ***USDAW v Ethel Austin Ltd (In administration)*** and (2) ***USDAW & ors v WW 1 Realisation Ltd & ors*** (better known as the "Woolworths case") came out of the demise of Ethel Austin and Woolworths, both retail businesses. In both cases significant redundancies were made when the businesses collapsed and the trade union and employee representatives brought proceedings in the Employment Tribunal claiming that the employers had failed to comply properly with their duty to consult the appropriate representatives about the proposed redundancies, as they were required to do so under s.188 of TULR(C)A 1992. The claims were successful, but the Tribunals only made protective awards in respect of employees who worked at stores with 20 or more employees, on the basis that the duty to consult collectively did not apply to those employees who worked in the smaller stores. This is because the duty to consult collectively is only triggered where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. In the Tribunals' view each store constituted a single establishment and as such the duty to consult only applied to those stores with 20 or more employees. The representatives challenged these decisions and the EAT has now upheld their appeals.

According to the EAT, the current wording of s.188(1) of TULR(C)A 1992 does not properly implement the corresponding provisions in the Collective Redundancies Directive, notwithstanding long-held practice in the UK. In its view the Directive requires the UK legislation to provide protection for employees where the number of proposed redundancies by an employer is at least 20 overall (i.e. irrespective of where they work) over a period of 90 days and not merely where the number being proposed at any one location exceeds that number. To achieve this result the EAT has said that the words "at one establishment" in s.188(1) should simply be "disregarded". How's that for judicial decision making?

Needless to say this decision is not good news for employers. It means they need to look again at how they handle any redundancies, especially those businesses contemplating redundancies across multiple sites. They can no longer safely assume that each site will be treated as a separate location. Take the following example: Employer A is proposing 5 redundancies at site A, 10 at site B and 10 at site C, all within a period of 90 days. Prior to this decision the employer would probably not have had to concern itself with collective consultation, but going forward the fact that the business is proposing 20 or more redundancies overall within a period of 90 days, even though less than 20 are being proposed at each site, means the collective consultation obligations will be triggered. This is likely to be extremely confusing for multi-sited employers who will need to keep a running total across their business of where changes are taking place, with a constant totting-up process, or potentially face a claim for a 90-day protective award. Certainly, those organisations which are unionised will need to be particularly cautious, as the unions will be alive to this change in the law. The wide definition of redundancy for collective consultation purposes means that this decision will also affect dismissals following a failure to agree changes to terms and conditions.

It is not yet clear whether there will be any further appeal. We will be exploring the implications of this decision in greater detail in our monthly newsletter. In the meantime, if you have any questions about what this case means for your business, please contact one of the following or your normal contact in the Labour & Employment team.

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