SQUIRE SANDERS

# THE WOOLWORTHS CASE

Your frequently asked questions

With the initial shock over, now is the time for employers to consider how to respond to the EAT's controversial decision in the ***Woolworths*** case.

As highlighted in our recent Alert, the EAT has said that the words "at one establishment" in s.188(1) of TULR(C)A 1992 should be disregarded when it comes to determining whether the duty to consult collectively over redundancies is triggered. This means that employers will be required to consult with appropriate representatives whenever they are proposing to dismiss as "redundant" (including dismissals arising from a failure to agree changes to terms and conditions) 20 or more employees anywhere across their business. Single-site employers have nothing to fear from this decision, but multi-site employers do need to look again at how they deal with redundancies across their business.

We set out below some of the questions we have been asked about this decision and our outline answers.

## Q1 This case has to be wrong! Can we just ignore it?

**A** Unfortunately not. The EAT's decision in the ***Woolworths*** case contradicts two earlier EAT decisions on the "establishment" point, so we have conflicting EAT decisions and unfortunately there is no higher case authority on this point. It is, however, to be expected that Tribunals will follow the most recent EAT decision (i.e. this one). Employers should not therefore ignore this decision.

There may well be an appeal, but we do not know yet. The EAT gave permission to appeal to the Court of Appeal within 21 days of the transcript of the judgment so we should find out soon.

A Northern Irish Tribunal has also referred the very same issue to the ECJ for a preliminary ruling. The reference was made in April 2013, which means we are unlikely to get a response until next year.

## Q2 Does this decision affect all employers?

**A** As highlighted above, this decision will not affect those employers with a single site. It is of direct relevance to employers with multiple sites. Deleting the words "at one establishment" from s.188(1) means that an employer proposing an aggregate 20 or more redundancies at any of its sites within a 90-day period will be obliged to consult collectively about its proposals. Employers will no longer be able to argue that because they are making less than 20 redundancies at any one site/location/branch/store/division, the duty is not triggered.

The statutory definition of "dismissal as redundant" under s.195(1) is wide and covers not just normal redundancies, but also any situations where it is proposed that employees will be dismissed by terminating their current contract, even though the employer proposes to immediately reemploy them under a new contract (the "termination and re-engagement" approach). An employer must therefore count not just normal redundancies, but also where it is seeking to implement changes to terms and conditions via the "termination and re-engagement" route. The fact that the employer is not proposing any ultimate reduction in headcount as part of that process makes no difference. It must still include these proposed dismissals as part of its calculation of whether the collective consultation obligations are triggered in respect of any 90-day period.

## Q3 Is this decision confined to circumstances where an employer is making redundancies because it has become insolvent?

**A** No. The two businesses that featured in this case were insolvent, but nowhere in the judgment does the EAT say its views about deleting the words "at one establishment" are limited to circumstances such as this, even though this would make much more practical sense to employers.

## Q4 Does it make any difference if an employer has different reasons for the proposed redundancies in different sites?

**A** On the face of it, no. As set out above, we had hoped that the EAT's decision would be limited to circumstances in which there is one underlying reason for all the proposed redundancies, e.g. insolvency. The EAT has not, however, placed any such restrictions on its observations. It simply said that the words "at one establishment" should be deemed deleted from the legislation – this means that once 20 or more redundancy dismissals are proposed (and as mentioned above, the definition of redundancy has a wider meaning for collective consultation purposes) within the relevant time window, then the duty to consult will be triggered.

However, s.188 requirements are specific to the "employer". Group companies are separate legal entities and therefore different "employers" for these purposes. This means that each company's proposals must be considered separately, and the collective consultation obligations are only triggered by a company/employer if 20 or more of its employees are proposed to be dismissed by reason of redundancy within a relevant 90-day period. In short, each group company must keep its own running total of proposed redundancies among its own staff, and it need not count any redundancies proposed by any other group company (even where the two group companies have affected staff at the same site).

## Q5 What should we do if we are making redundancies across our business?

**A** First of all, you should find out how many redundancies (in the wider sense of that definition referred to above) are being proposed to see if this is 20 or more within a 90-day period, thus triggering the duty to consult collectively. The statutory trigger for collective consultation requires the employer to look at a rolling period of 90 days to assess whether its proposal(s) for that 90-day period will result in 20 or more redundancy dismissals over that time.

If the duty is triggered then, depending on what stage you are at in the process, you could either start from scratch - which will clearly have cost implications and delay matters – or press on and take the risk of a claim. Alternatively, you could seek to carry out some form of collective consultation in the hope that, if a claim is presented, any award would be small, bearing in mind the sudden change in the common understanding of the law and that you were in the middle of a redundancy exercise already.

## Q6 Are there any ways to get round the obligation to consult collectively?

**A** The only way to "get round" the duty to consult collectively is to ensure you do not trigger the obligation in the first place.

The duty to consult collectively will only be triggered if an employer is proposing to dismiss as redundant 20 or more employees in a 90-day period. Clearly therefore if an employer is making redundancies over a longer period of time, the duty will not be triggered.

In calculating whether 20 or more dismissals are proposed, the dismissal is only treated as "taking effect" when the employment contract comes to an end (i.e. on the expiry of the notice period, not the date upon which notice is served). An employer can therefore deliberately stagger the dates upon which it is proposed that the dismissals will "take effect", so that there are successive batches of redundancies with no more than 19 redundancies "taking effect" in any rolling 90-day period. This would avoid the collective consultation obligations and the risk of any protective award.

Also, s.188(3) allows an employer to specifically exclude from its calculations any redundancies in respect of which consultation has already begun. So if an employer has already started collective consultation for one batch of employees and after the commencement of that process more redundancies are proposed within the same 90-day period, the employer can discount the "first batch" in calculating whether a separate duty to consult collectively arises in respect of the "second batch".

A word of caution, though – employers need to be careful when dealing with separate batches of proposed dismissals within the same 90-day period. If a Tribunal finds that an employer already had in mind the "second batch" at the time of announcing the "first batch", but deliberately delayed the announcement of the "second batch" to seek to avoid the collective consultation obligations in respect of that "second batch", it would be exposed to the material risk of a Tribunal holding it liable for a protective award in respect of the second batch.

## Q7 What practical steps can we put in place to deal with this decision?

**A** The larger the employer and the more sites it has, the greater the risk that it will be caught out by this decision. This is why it is important to:

(a) **Communicate:** Communicate the effect of this case within your business. HR should ensure that any key decision-makers are aware of this decision and its potential impact.

(b) **Plan:** Think about your approach to redundancies. Detailed planning will be key going forward. Care is going to have to be taken to ensure that all relevant proposed "redundancy dismissals" are identified. If the collective consultation obligations are triggered this is going to affect the amount of information that must be prepared (and shared) and the length of time it is going to take. It will no longer be possible to make redundancies swiftly if the collective consultation obligations are triggered.

(c) **Put in place practical arrangements:** Put in place arrangements to ensure that the business (probably HR) is aware of any proposed redundancies across the entire UK business. Ensure, for example, that managers at a local level (who previously may have had authority to make redundancies locally without reference to Head Office) are alerting HR at a national level of any proposed redundancies. Employers are ultimately going to have to keep a running total of proposed dismissals to ensure they do not inadvertently breach their collective consultation obligations (see the section below re: putting in place an employee representative body).

(d) **Implement:** In light of the above, it is clearly important that if the collective consultation obligations are triggered employers comply with their obligations set out in the statute. This may not be the end of the world. If at any one site you are proposing 20+ redundancies already then you are bound by these obligations anyway. Adding another site's representative to the party or carrying out a separate election process for another site does not then add much to the duration or complexity of the process.

## Q8 Is it a good idea to put in place an employee representative body so it can be used in redundancy consultation exercises going forward?

**A** Maybe. In a collective redundancy situation if there is no recognised union in place the employer can consult either: (a) employee representatives elected specifically for the purposes of the redundancy consultation exercise; or (b) employee representatives appointed or elected for a purpose other than the consultation exercise, but who have authority from the affected employees to receive information and to be consulted about the proposed dismissals on their behalf. An employer may wish to pick the second option, especially if it has multiple sites/branches, to avoid having to elect representatives for each specific redundancy exercise.

## Q9 Can we simply deal with the risk of a claim by entering into a Compromise Agreement?

**A** It is not quite that straightforward. First of all, employees can only bring claims for a protective award in certain circumstances, namely where they are not represented by a Trade Union or other employee representatives. Claims for a breach of collective obligations are normally brought by Trade Union or employee representatives.

On the one hand this may be helpful for employers, or at least those in non-unionised workplaces, as it means that employee representatives will have to feel strongly enough about an employer's actions (or inaction) to stand up and bring (and pay for) a claim. If, however, an employer has not arranged for any representatives to be appointed, it will be leaving the door open for individual affected employees to bring a claim.

In unionised workplaces, this case may well be used as a means of gaining further union support, especially during collective redundancy exercises.

The second point to note is that employers cannot validly settle claims for a failure to inform and consult under TULR(C)A 1992 under a compromise agreement. Such a complaint can only be settled via Acas. This means that if an employer is entering into a compromise agreement with a redundant employee and is concerned that it might not have complied with its section 188 obligations, it cannot simply cover it off under the compromise agreement with the other claims.

## Q10 What is the "special circumstances" defence? Will an employer be able to rely on that?

**A** There is an exception to the obligation to consult collectively where there are "special circumstances which render it not reasonably practicable" for the employer to comply. In such circumstances the employer is still expected to "take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances".

The cases which have looked at "special circumstances" have defined it very narrowly. Each case will be judged on its facts, but we think it is fair to say that this defence will be of no assistance in the vast majority of cases, and certainly not if an employer simply wishes to avoid having to consult collectively.

## Q11 What should we put on the HR1 form?

**A** Employers are obliged to notify the Secretary of State if they are making collective redundancies. The amount of notice to be given depends on the number of proposed dismissals. A failure to provide the relevant notification is a criminal offence and may result in a fine of up to £5,000.

In light of this decision there are likely to be more circumstances in which an employer will have to complete one of these forms. As currently drafted, the form refers to notifying the Government of 20 or more dismissals "at one establishment". It also says: "If you operate from more than one site, each one is treated separately for notification and consultation purposes". When we spoke to the Insolvency Service this week we were informed that as there has been no change to the wording of the actual legislation the Government will not be changing its approach. In other words, each site will continue to be treated separately for notification purposes for the time being. There are apparently no plans to amend the form at this stage.

## Q12 What are the penalties for breaching the collective consultation obligations?

**A** A failure to comply with the obligation to consult collectively can result in a protective award of up to 90 days' actual pay per affected employee.

As a protective award is intended to penalise an employer for not complying with its obligations under section 188 (and not to compensate employees for their individual financial loss) Tribunals normally start at the top end of the scale (i.e. with 90 days' pay) and then reduce it depending on the extent to which an employer has complied with its obligations. As set out above, one would hope that in circumstances where a multi-site redundancy exercise has been carried out under the "old" rules in the run-up to the ***Woolworths*** case and is now challenged because of it, a Tribunal would exercise its discretion as to the amount (if any) of any protective award.







10215/07/13