A COLLECTIVE RESPONSE TO THE QUESTION OF ESTABLISHMENTS

We have already heard from Damien Brown on collective consultation. I want to focus on the effect of the decision in *Usdaw v Ethel Austin Ltd and Ors*, more commonly known as the Woolworths case, to show how Unions are best placed to deal with the challenges ahead.

By way of background, the Employment Tribunal statistics published on the 12th September 2013 by the Ministry of Justice, show claims for failure to inform and consult in a redundancy situation increased by 39% from the previous year 2011/2012. In fact, the number of claims lodged for a failure to inform and consult in a collective redundancy situation increased by a huge 149% from 2007/08, to 2012/2013.

The rise is likely to be due to the large number of proposed redundancies since the recession began as well as the propensity for employers to dismiss and re-engage employees on new terms and conditions. You may recall that the obligation to consult in a collective redundancy situation also applies where the employer dismisses and re-engages employees on new terms and conditions of employment.

Recap of the obligation

Just to recap the obligation to inform and consult in collective redundancy situations is set out in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A').

Specifically the provision provides:

*S.188(1) - Where an employer is **proposing** to dismiss as redundant **20** or more employees **at one establishment** within a period of 90 days or less the employer **shall consult** about the dismissals all the persons who are **appropriate representatives** of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals:*

(1A) The consultation shall begin in good time and, in any event:

a. Where the employer is proposing to dismiss 100 or more employees at least 45 days, and

b. Otherwise, at least 30 days.

before the first of the dismissals takes effect.

The two key issues which have vexed Trade Unions when faced with employers who refuse to collectively consult are:

i. Identifying that there are at least 20 employees whom the employer proposes to dismiss; and

ii. That those 20 employees are at one establishment.

Inevitably the two issues as to whether or not there are 20 employees at one establishment are inextricably linked.

At the heart of the issue is the fact that there is no definition of establishment in either the Collective Redundancies Directive ('CRD') or in the TULR(C)A 1992. As such, case law has tended to focus on

the particular circumstances of the case. So, company depots, in *Barley v Amey Roadstone Corporation Ltd No 2 [1978] ICR 190*), bakery shops in *Clarks of Hove v Bakers' Union [1979] 1 All ER 152* and building sites in *Barratt Developments (Bradford) Ltd v Union of Construction, Allied Trades and Technicians [1978] ICR 319*, have all been held to amount to one establishment..

However, since those cases the European Courts have made it clear that what amounts to establishment must be interpreted in light of the Collective Redundancies Directive 98 /59/EC.

Article 1 of the Directive gives 2 options where the obligation to collectively consult arises as follows:

(i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers:
- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more;

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question

The key point to note for now is that both options refer to establishments not "one establishment"..

The European cases interpreting Article 1(i) of the CRD have not been of great assistance to cases in the UK. This is because although they have applied the principle that when interpreting the Directive

the Court should ensure the widest possible scope so as to comply with the purpose of the Directive, namely to protect workers in the event of collective redundancies, the European cases have tended to be brought where the employer is arguing that establishment means a smaller establishment within a larger operation so as to avoid the obligation to collectively consult. For example, in *Athinaïki Chartopiia AE v Panagiotidis [2007] IRLR 284*, the European Court found that the obligation to consult did arise in a case where the company operated 3 separate businesses in 3 separate locations. When the employer closed 1 of the businesses the employer argued that that business could not be a separate establishment because it was not independent. However, the European Court disagreed finding that one of the businesses amounted to a separate establishment because:

(i) It was a unit to which the workers who were made redundant were assigned to carry out their duties;

(ii) The business consisted of a distinct entity which itself had a degree of permanence and stability and which performed one or more tasks; and

(iii) It is important to interpret the term "establishment" broadly so as to ensure the Collective Redundancies Directive applied

The fact that each business did not have autonomy as regards economic, financial or administrative matters did not mean that it was not an establishment for the purposes of the Collective Redundancies Directive. Specifically, in that case, central management was responsible for all purchases and sales, the pay roll and produced a single balance sheet. The fact that there were these central functions did not negate against the Court finding that one business, on its own, amounted to "establishment".

As can be seen, this and other European cases do not assist the UK Unions in trying to argue that separate depots, branches or shops do not amount to "one establishment"

Indeed, in the other well known case of *MSF v Refuge Assurance,* the EAT considered the European cases and came to the conclusion that separate branches of an insurance company amounted to an establishment because the staff were assigned to particular branches. This meant that where the branch had less than 20 employees whom the employer proposed to dismiss, the obligation to consult did not arise.

Similarly, in the more recent case of *Renfrewshire Council v Educational Institute of Scotland [2013] ICR 172*, the Employment Appeal Tribunal held that an individual school amounted to an establishment. So again if the numbers employed in the school were less than 20 the obligation to collectively consult would not arise.

However, in the case of *USDAW v Ethel Austin Ltd and Ors* the Employment Appeal Tribunal considered the claim brought by the recognised Union on behalf of the employees who were made redundant when Woolworths went into administration and who were employed in stores with less then 20 employees. The EAT first considered that establishment was a matter of European law . Next it considered the two options set out in Article 1 of the Directive - which we looked at earlier- and took the view that the option the UK Government had chosen was option ii). Namely that the duty to consult applied "over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question". In the EAT's view that option did not refer to "at one

establishment" but referred instead to "establishments". That being the case the EAT considered what was the best way to address the anomaly and decided, following early decisions[1] that it could simply remove the words "at one establishment" in s. 188 of TULR(C)A in order to give effect to the Directive. This meant that the obligation to consult would apply "where an employer is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less …" On that basis, the Employment Appeal Tribunal held that some 4,400 employees, who had been excluded from a claim for a protective award because they were employed in a Woolworths store which had less than 20 employees, were entitled to a protective award of between 60 and 90 days pay.

It is interesting to note that the Secretary of State did not even appear at the Employment Appeal Tribunal obviously making the false assumption that in light of existing case law there was no risk of an Employment Appeal Tribunal finding that the UK law was incompatible with the Directive.

However, realising the broader implication of this decision the Secretary of State has now been granted permission to appeal to the Court of Appeal.

So what does the decision mean for Trade Unions now?

1. Until the appeal is determined, the current law has effectively changed so that any proposed dismissals **across the business** now count towards the 20 employee threshold. The obligation to collectively consult is not dependent on having at least 20 employees in each depot, shop, branch etc.

[1] See the case of *Coleman v Attridge Law [2010] IRLR 10*

2. Unions should remind employers of their obligations to complete an HR1 and consult with the Union citing the *USDAW* decision.
3. The change in the law is retrospective. This means that the decision applies to situations where the employer dismissed 20 employees as redundant across the business before the EAT decision in *USDAW*. However the deadline for lodging claims at an Employment Tribunal is 3 months less one day from the date of the last dismissals. Therefore if there were 20 or more employees whom the employer proposed to dismiss before July but the last of the dismissals was effective on 10 August the last day for lodging an employment Tribunal claim is 9 November 2013.
4. Going forward Unions need to use their network of reps to check where there are proposed redundancies in the workplace, even if it is just one or two to see if throughout the business there are 20 altogether. Remember, redundancies include where the employer is proposing to dismiss and re-engage employees on new terms and conditions.
5. Where an employer states that they are not willing to consult because the *USDAW* decision is on appeal, remind the employer that the Union will have no option but to lodge a claim to protect its members, that the employer is acting unreasonably (since they need only consult with the Union) and if the case proceeds, the Union will not only seek to recover the ET fees which now apply, but also make an application for costs.

The *USDAW* case also raises some important issues about the benefits of having a recognised trade union.

Appropriate representation

S.188 provides that:

> "*the employer* ***shall*** *consult about the dismissals all the persons who are* *appropriate representatives* *of any of the* *employees who may be affected by the proposed dismissals* *or may be affected by measures taken in connection with those dismissals*"

Where the Union is recognised in respect of the affected employees the appropriate representative is the Union representative. If there is more than one Union, as there may be where there is a different Union who represents different groups of affected employees such as in a University for example, each of the Unions must be consulted. Similarly where the affected employees are not a member of the Union but the Union is recognised in respect of those affected employees the employer must ("shall") collectively consult with the Union.

Where the Union is not recognised the employer must consult with elected representatives. The employer can consult with a standing body of elected representatives **but only** if they are mandated by the workforce to consult on collective redundancies. The employer cannot just simply consult with an existing staff body or works council. Where there is no standing body mandated by the workforce to collectively consult in a redundancy situation, the employer must elect representatives in accordance with the provisions in TULR(C)A 1992. The provisions set out in Section 188A are quite onerous on the employer. In particular, the employer must ensure that :

- the election is fair:

- all employees within the group, department etc who are affected by the redundancies, or measures in connection with them, are eligible to stand as a candidate and none should be excluded unreasonably;
- the number of representatives for each group of affected employees must be sufficient so that their interests are effectively represented;
- all affected employees are entitled to vote and can vote for as many candidates as there are representatives; and
- the election is secure, i.e. so that employees can vote in secret.

In addition the employer should:

- decide whether the employees would be represented by representatives of a particular class of employees or representatives of the group as a whole;
- determine the length of office for the representative before the election, which should be sufficient to enable them to be informed and consulted in accordance with the legislation;

As is clear, the issue for employers who do not recognise the Union will be to ensure that there is sufficient time to elect representatives both in terms of allowing employees to stand as candidates and determining which groups of employees they will represent.

For larger employers there is the likelihood of a larger number of candidates putting themselves forward which may lead to delays in the consultation process with the likelihood that the employer

will not be able to comply with the onerous election provisions in good time to enable meaningful consultation to take place as required by s. 188(2) of TULR(C)A 1992.

An employer who simply issues Notice of Dismissal after 45 days without taking into account the fact that meaningful consultations have not even commenced because of the time taken to complete the election process, is at risk of being in breach of the collective consultation provisions. The obligation to consult applies where an employer is proposing to dismiss 20 or more employees as redundant. In *Akavan Erityisalojen Keskusliitto AEK Ry and Ors v Fujitsu Siemens Computers Oy [2009] IRLR 944*, the European Court held that the employer is obliged to consult, " once a strategic or commercial decision compelling the employer to contemplate or to plan for collective redundancies has been taken". What this means in practice is that if an employer decides to buy another company to do the night shift and plans to close the night shift at the current workplace, it is arguable that the obligation to consult applies once the decision is taken to buy the other company. While there are some who may say that this is far from clear, what is abundantly clear is that it is far easier for an employer to comply with these obligations where a Union is already recognised. If there is no recognised Union the employer, in this case, will end up electing representatives after the strategic or commercial decision compelling the employer to contemplate or plan for collective redundancies has been taken and so could be in breach of the obligation to consult.

So what is the practical effect of the *USDAW* decision?

Taking all this into account Unions can use the decision in *USDAW* not only to remind employers that the obligation to collectively consult arises at the point at which 20 employees across the business are

at risk of redundancy but of the benefits of having a recognised Union where the employer proposes to dismiss employees for redundancy and, importantly, where the employer proposes to dismiss and re-engage workers on new terms and conditions.

The decision in *USDAW* effectively means that employers who do not have a recognised Trade Union are likely to be more vulnerable to claims particularly as they can no longer seek to evade the obligation to consult by;:

i. Manipulating the number of employees whom the employer proposes to dismiss so that there are less than 20 at each workplace;

ii. Reorganising the business so that redundancies take place in only one part of the business.

Similarly employers who do not recognise Unions are going to find it harder to meet the obligation to consult where :

i. They propose smaller redundancies across the business, for example, when an employer proposes to make 10 redundant in Newcastle and 10 redundant in Southampton; and

ii. They have to elect to representatives.

In these cases the benefits of trade union recognition are obvious. In i. the union is more likely to have a representative in both Newcastle and Southampton and so enable collective consultation to take place. In ii. there is no need for the employer to engage in the time consuming elections with the risk

that any consultation begins after the commercial decision has already been taken which compels the employer to plan for redundancies.

Further problems for employers are that they may be liable to a criminal offence if they fail to properly or accurately complete the HR1 form identifying those whom it proposes to dismiss across the business and if the employer needs any further incentive, it should be remembered that protective awards are not insignificant sums indeed, in the *USDAW* case some £70 million was awarded.

Given all these issues, perhaps *USDAW* is not only a watershed in the law on collective redundancy but also a wakeup call to employers of the benefits of Trade Union recognition.