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Challenging employers on Collective
Responses to the Question of
Establishment
9th October 2013

Introduction



- The rise and rise of protective awards

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The Statutory obligation to consult



- Section 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:
 - Where the employer is proposing to dismiss 100 or more employees at least 45 days, and*
 - Otherwise, at least 30 days.**before the first of the dismissals takes effect*

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Key issues

- Two key issues:
 - i. Identifying 20 employees;
 - li. Ensuring that the 20 employees are at one establishment

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Establishment

Examples of Establishment in UK Case Law:

- Company depot - *Barley v Amey Roadstone Corporation Ltd No 2* [1978] ICR 190
- Bakery shop - *Clarks of Hove v Bakers' Union* [1979] 1 All ER 152
- Building site - *Barratt Developments (Bradford) Ltd v Union of Construction, Allied Trades and Technicians* [1978] ICR 319

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Collective Redundancy Directive

Article 1 - two options:

- (1) 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;
- (2) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question

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CRD Case Law



Athinaiki Chartopoiia AE v Panagiotidis [2007] IRLR 284 – single business under an umbrella company held to be an establishment

Later UK cases –

MSF v Refuge Assurance – branches of an insurance company

Renfrewshire Council v Educational Institute of Scotland [2013] ICR 172 individual school

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Change in Direction



USDAW v Ethel Austin Ltd and Ors

- Establishment is a matter of European Law
- UK Gov adopts option (ii) of the CRD
- Remove words "at one establishment"

Establishment = the business as a whole

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Impact of USDAW



1. Obligation applies where employer proposes to dismiss 20 employees **across the business**
2. Employers to complete HR1 and consult with the Union
3. Consider redundancies proposed before July –
Note – 3 month less 1 day time limit
4. Use network of reps to identify single redundancies and check there are 20 altogether
5. Claim for a protective award

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Who are the appropriate Representatives



- Where the Union is recognised = the Union
- Applies to employees even if not a member, provided Union recognised
- If Union is not recognised elect representatives

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Election of Representatives



Employer must ensure:

- i. Election is fair;
- ii. Employees within the group are eligible to stand as a candidate and none should be unreasonably excluded;
- iii. The number of representatives must be sufficient;
- iv. Employees are entitled to vote for as many candidates as there are representatives;
- v. The election is secure.

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Problems for the Employer



1. Complying with the election provisions;
2. Ensuring there is sufficient time for meaningful consultation (Section 188(2) of TULR(C)A 1992.

Meaningful consultation must begin when employer "proposing" to dismiss.

"Proposing" means at the point at which a strategic commercial decision compelling the employer to contemplate or plan for redundancies, has been taken.

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Practical effect of USDAW



Employers can no longer:

1. Manipulate the number of employees whom the employer proposes to dismiss;
2. Reorganise the business so that redundancies take place at only one part

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Solution



Recognise the Union because:

1. The Union is more likely to have a representative in various parts of the business;
2. No for delays caused by electing representatives;
3. Protective awards are costly - £70 million in USDAW

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Conclusion



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