THOMPSONS TRADE UNION LAW SERVICE
HEAD OFFICE BRIEFING

In a groundbreaking case pursued by USDAW, the Employment Appeal Tribunal has re-defined the threshold at which the obligation to consult over collective redundancies arises in UK law.

Section 188 TULRCA provides that the obligation arises where the employer proposes to dismiss as redundant 20 or more employees *at one establishment*. In the USDAW v Ethel Austin case (known as the USDAW and Woolworths case), the EAT ruled that the requirement for the 20 or more proposed redundancies to be at one establishment was to be disregarded.

The EAT reached this conclusion because UK domestic legislation had not correctly implemented the EU Collective Redundancies Directive.

The effect of this decision is that the collective consultation obligation is triggered when 20 or more redundancies are proposed across an employer as a whole, as opposed to being limited to circumstances where they are proposed at one single establishment within an employer's operation.

Facts

The case emerges from a claim pursued by USDAW on behalf of its members who were formerly employed by Woolworths prior to it entering into administration. When Woolworths entered into administration USDAW, as the recognised trade union, pursued a claim for a Protective Award on behalf of its members who had been made redundant. However only those members employed in stores which employed 20 or more employees were successful in obtaining a Protective Award. Those employed in stores with less than 20 employees were left without a remedy. The rationale for this was that the Employment Tribunal determined that each store was a separate establishment for the purposes of collective consultation obligations and therefore there was no duty to consult with the recognised trade union in respect of stores employing less than 20 employees.

Judgment

The EAT noted that Member States were given two options as to how to legislate to give effect to the EU Directive. Under the option chosen by the UK Government, the obligation was triggered when the number of redundancies, over a 90 day period or less, was at least 20, "whatever the number of workers normally employed in the establishments in question". That option contained no reference to the 20 or more proposed redundancies being at one establishment.

The EAT therefore went on to consider whether it could give effect to the Directive notwithstanding the conflicting wording set out in TULRCA. It decided that it could even though that involved (not for the first time) taking the radical step of adding words to, or removing words from, UK statute law. It decided that the appropriate way to do this was to disregard the words "at one establishment" in the threshold set out in s.188 TULRCA. Therefore the collective redundancy consultation obligation would

arise when an employer was proposing to dismiss 20 or more employees as redundant across its business as a whole, without any further qualification.

This meant that all those employees dismissed by Woolworths, whether employed in a store with 20 or more employees or not, could benefit from a Protective Award.

Implications

1. Section 188 TURCA no longer requires 20 or more redundancies to have been made "at one establishment" to trigger collective consultation obligations as these words are to be disregarded. The relevant question now is simply whether the employer has proposed to make 20 or more redundancies across the business as a whole.

2. Unions, (or elected representatives or members in cases where the union is not recognised) should ensure that in any redundancy exercise being carried out going forward they check across the business as a whole to see whether any other redundancies are being made within a 90 day period. If the aggregate number of redundancies is 20 or more across the employer within a period of 90 days or less, then the collective consultation obligations will apply.

3. As the EAT reinterpreted UK law, this decision applies to previous redundancy exercises. On this basis unions should consider checking whether any redundancy exercises that members have recently been involved in (or indeed are ongoing) should have triggered collective consultation obligations since there were more than 20 redundancies proposed across the business as a whole within the period of 90 days or less. If unions become aware of any such situations then claims for a protective award can still be pursued provided that they are lodged within 3 months less 1 day from the date of the last dismissal to take effect. Claims for enforcement of a protective award must also be made by affected employees within three months of the last day of the protected period under the protective award (although an Employment Tribunal has discretion to extend that period where it was not reasonably practicable for the Claimant to have presented the claim within that period). It would obviously be desirable for unions to lodge any claim for a Protective Award prior to 29 July 2013 when Employment Tribunal fees will be introduced. However a fee of £250 would still have to be paid if any affected employee needed to subsequently issue enforcement proceedings.

4. The Directive does not apply to workers employed by "public administrative bodies or by establishments governed by public law". The scope of that exclusion is largely untested, but it is likely to restrict the effect of the judgment in bodies such as local authorities. Therefore although the EAT in this particular case determined that the wording "at one establishment" should be disregarded it remains on the statute book and the case may well not change obligations on public administrative employers.