Significant Change to UK Collective Redundancy Consultation

Prior to the recent decision of the Employment Appeal Tribunal (“EAT”) in USDAW v WW Realisation 1 Ltd, the collective consultation obligations applied where “an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less” (s188 of Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”)). Failure to comply with this obligation entitled those employees to a protective award of up to 90 days pay.

However, the EAT has now held that the words “at one establishment” within TULRCA are to be disregarded for the purposes of any collective redundancy involving 20 or more employees. This results in a radical widening of the collective redundancy consultation rules.

**USDAW v WW Realisation 1 Ltd (UKEAT/0548/12/KN)**

The decision arises out of combined cases in respect of the administration of Woolworths and Ethel Austin. Each had a business comprising a head office and a number of shops with varying numbers of employees. After going into administration, both companies carried out large-scale redundancies without informing and consulting. USDAW and employee representatives sought protective awards on the basis of the failure to inform and consult under s188 of TULRCA. The Employment Tribunal applied the “establishment” test and found that each store was a separate establishment, so the obligation to consult collectively only arose in larger stores where 20 or more employees were to be made redundant. As a result, employees in the larger stores received substantial protective awards, whereas employees in smaller stores did not receive an award. The decision of the ET was appealed to the EAT.

The EAT considered whether TULRCA can be interpreted in accordance with the Collective Redundancies Directive (98/59/EC) (“Directive”) to allow protective awards to be made to Woolworths’ employees working at stores which employed less than 20 staff. The EAT accepted that section 188 of TULRCA is more restrictive in scope than the Directive regarding the definition of collective redundancy. The EAT found that there was no indication in the consultation or the debates at the time that the 20 employees would have to be made redundant “at one establishment”. Whilst the establishment test was included in the legislation, the clear parliamentary intention was to implement the Directive correctly. In the circumstances, the EAT held that it was entitled to construe section 188 of TULRCA in a way that complied with the Directive, and decided that the words “at one establishment” should be deleted from section 188 TULRCA altogether.

The Secretary of State has applied to appeal the decision and we await a decision.
Practical Implications

This case brings about a significant change to the current law on collective redundancy consultation. As the EAT declined to refer the case to the European Court, the “new law” as outlined by the EAT has immediate effect, subject to appeal. Therefore, the obligation to collectively consult will now be triggered where one employing entity proposes to dismiss as redundant 20 or more employees over a 90 day period, irrespective of whether those dismissals take place at a single company office or at several offices or locations. This change in the law raises a number of key issues:

• Monitoring Redundancies - The decision will affect all employers with a single business encompassing multiple sites, proposing to make redundancies across more than one location. Employers may need to implement systems in order to adequately monitor the number of proposed redundancies across their business as whole.

• Current Redundancy Exercises - The decision raises the question as to whether employers currently engaged in collective redundancy consultation need to restart or extend the consultation process where establishments with less than 20 dismissals have been excluded from the process. These employers should take legal advice on the effect of the decision on their particular redundancy situation.

• Retrospective Effect? - It is unclear whether the change to the law is retrospective. There is a 3 month time limit for bringing claims from the date of the last dismissal of an affected employee, and so employers who have concluded redundancy exercises within the last 3 months may now face claims from employees that feel their dismissals contravene the new law. If the new law does have retrospective effect, it is hoped that the tribunals will be lenient in these cases in terms of the levels of the protective awards.

If you have any questions regarding this update, please contact:

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