Establishing interpretation in the Collective Redundancies Directive

Jennifer Gant comments on the implications in the UK of a recent ECJ ruling

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DURING THE WOOLWORTHS INSOLVENCY, REDUNDANCIES WERE MADE AT A NUMBER OF INDIVIDUAL STORES, BUT NO CONSULTATION WAS UNDERTAKEN

The CJEU has recently ruled in the case of *USDAW and B. Wilson v VW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd, and the Secretary of state for Business, Innovation and Skills*[1] on how the meaning of "establishment," as used in the Collective Redundancies Directive,[2] should be interpreted in the EU. The Directive is aimed to approximate Member State laws on procedures for making large scale redundancies to afford greater protection to workers through consultation obligations when at risk of redundancy due to an employer's financial problems. However, the Directive is also designed to take into account the need for balanced economic and social development within the EU.[3]

Collective redundancies are often required in corporate rescue and insolvency situations; as such, the application of the Directive is a relevant consideration for insolvency practitioners. Its effects can impact on insolvency outcomes due to the social costs of the Directive and, at times, compensation for failure to comply with its obligations required from the company in financial distress.

The Directive allowed for two different frameworks in implementation. Most Continental jurisdictions have chosen to implement the Directive by utilising some version of Article 1(1)(a)(i), in which case the Directive would apply if at least 10 redundancies were to be made over a period of 30 days in establishments employing between 20 and 100 workers; at least 10% of the workers in establishments employing between 100 and 300 workers; or at least 30 workers in establishments employing 300 or more workers. In the other option provided in Article 1(1)(a)(ii), the Directive would apply if over a period of 90 days at least 20 employees were to be made redundant, regardless of the number of employees at the establishment in question. The UK opted for the second version of the Directive's provisions.

The Directive was implemented in the UK through the Trade Union and Labour Relations (Consolidation) Act of 1992 and it specifies that for the provisions to apply, the relevant redundancies must occur at one establishment. The single establishment requirement was added in the UK implementation and has come to cause controversy in the meaning of "establishment." In the *Woolworths Case*,[4] a UK Employment Appeal Tribunal (EAT) sought to mitigate the restrictive nature of the UK implementation in the light of what it perceived were the purposes of the Directive.

During the *Woolworths* insolvency, redundancies were made at a number of individual stores, but no consultation was undertaken. An Employment Tribunal (ET) application was made for a protective award for failure to consult with the affected employees. The ET found that the individual stores were "establishments" for the purpose of the collective redundancies provisions. However, as many of the individual establishments were small, fewer than 20 redundancies were made, so that collective consultation provisions would not apply. The result was that the redundancy of approximately 4,500 Woolworths and Ethel Austin employees would be deemed not to require consultation and would not benefit from a protective award.

The EAT found that the ET definition of establishment was too restrictive and led to results that failed to satisfy the purposes of the Directive to protect employees at risk of redundancy, applying the *Marleasing*[5] interpretative requirements. The EAT proceeded to define "establishment" in such a way as to ensure that the Directive would have the broadest effect. It aggregated the establishments of a company, ignoring the "one establishment" wording in the Act, thereby bringing more employees under the protection of collective consultation and satisfying the purposes of the Directive as the EAT perceived them.

The opinion of the Advocate General (AG)[6] in three cases dealing with the definition of "establishment," including the broad interpretation the UK took in *Woolworths*, was that it must have a consistent meaning regardless of the impact that this may have on the Directive's effectiveness to protect employees. The AG noted that "establishment" had previously been defined in the *Rockfon* case[7] and followed in *Athinaiki*,[8] as the unit to which the redundant employees are assigned to carry out their duties, a definition that benefitted the affected workers in those cases.

The AG noted that while this previous case law has only considered Article 1(1)(a)(i), a different approach to (ii) should

EU MEMBER STATES RETAIN VERY DIFFERENT VIEWS ON HOW MUCH SOCIAL PROTECTION SHOULD EXIST IN CORPORATE INSOLVENCY

not be necessary, and would indeed create legal uncertainty. Following the AG's opinion, the CJEU also opted in favour of coherency over perceived fairness. Uniformity of interpretation aids in increasing transparency and foreseeability for employers who choose to restructure. The CJEU also determined that if a different definition were applied, this would cause a major difference between jurisdictions opting for different implementation frameworks, which would be contrary to the need to promote approximation of Member State laws in this area. The diverse interpretation of establishment would result in worker protection that was not comparable among other Member States.

The UK Court of Appeal is expected to overturn the EAT decision and revert back to the original ET decision. Thus the Woolworths and Ethel Austin workers will be left with no recourse under the Collective Redundancy Directive. While these companies and their administrators and liquidators may be breathing sighs of relief at this result, this brings into the spotlight the fact that EU Member States retain very different views on how much social protection should exist in corporate insolvency. Many jurisdictions have implemented the Directive within the first framework, but with far lower thresholds which, were they applied in the UK cases, would bring those employees within the remit of the Directive.

Thus while the CJEU decision adds legal certainty to the definition of establishment, it may also mean quite different outcomes for workers depending on their jurisdiction's choice of implementation. The UK has been given great flexibility on how to apply its collective redundancy provisions, pending the result of the Court of Appeal. For cross border insolvencies, particularly for large retail companies, those jurisdictions that have implemented the Directive according to Article 1(1)(a)(ii), or otherwise have higher thresholds for the Directive's application than other Member States, will benefit from greater flexibility in the dismissal of employees during restructuring.

The thresholds of the Directive were also intended to offer some relief for SMEs. It would be difficult to classify either Woolworths or Ethel Austin as an SME. Thus there is a question as to whether or not the thresholds have been used to benefit the wrong entities. If the underlying aim is to strike a balance between the protection of employees and reduced social costs for smaller businesses, is it not unfair to allow large companies to benefit at the expense of thousands of employees?

Differences in implementation affect procedural matters relating to employees in different jurisdictions, but can also negatively affect employee morale and cooperation, leading to potential obstacles to what might otherwise be smooth restructuring processes. A more cohesive EU law of collective redundancies may indeed be called for to mitigate these potential adverse effects on the Common Market, as well as the potentially unfair use of the available thresholds to protect large retail establishments who happen to have small shops under their wing that can sneak under those thresholds. ■

Footnotes:

1 Case C-80/14.
2 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.
3 Recital 1, Preamble of the
4 *USDAW v Ethel Austin (in administration)* UKEAT/0547/12/KN and *USDAW and Mrs B Wilson v (1) Unite the Union, (2) WW Realisation 1 Ltd, and (3) Secretary of State for Business Innovation and Skills* UKEAT/0548/12/KN.
5 Case C-106/89.
6 Opinion of the Advocate General WAHL delivered on 5 February 2015 in Case C-182/13 *Lyttle and Ors v Bluebird Bideo 2 Ltd, Case C-392/13 Cañas v Nexea Gestión Documental SA and Case C-80/14 USDAW and B Wilson v (1) WW Realisation, in liquidation, (2) Ethel Austin Ltd, and (3)Secretary of State for Business Innovation and Skills*.
7 C-449/93, EU:C:420, at paragraph 32.
8 Case C-270/05 *Athinaiki Chartopoiia* EU:C:2007:101, paragraph 25..

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