NINESTJOHNSTREET

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Overview

This paper addresses two topics:

(1) the legal landscape following the judgment of the EAT in USDAW v Ethel Austin Ltd (in administration); USDAW v Unite the Union & others [2013] IRLR 686 (commonly knows as the *Woolworths* decision); and

(2) a brief update on other recent changes to an employer's collective consultation obligations.

The Issue arising in *Woolworths*

Both *Ethel Austin* and *Woolworths* were high street retailers with chains of stores which became insolvent. They entered well-publicised periods of administration, followed by liquidation. The entire workforce of both employers was made redundant.

In subsequent claims for protective awards, an issue arose as to when the employer's obligation to consult collectively was triggered. Should the number of employees to be made redundant be aggregated across the totality of the establishments in the employer's undertaking, or should the court's focus be on the number to be made redundant within each establishment?

The employment tribunals at first instance took the latter approach, following then existing authority.

The consequence of this was that, in the absence of collective consultation, an employee's entitlement to a protective award depended simply on whether they were assigned to an establishment at which the employer intended to make (or did make) 20 or more redundancies. Some 1210 employees of *Ethel Austin* and 3233 employees of

Woolworths did not fall within this description. They received nothing by way of a protective award.

The Union claimants appealed and the same issue fell for reconsideration.

The Relevant European and Statutory Provisions

The appeal turned upon reconciling the provisions of Council Directive 98/59/EC (the Collective Redundancies Directive) with the language of the domestic legislation (the Trade Union and Labour Relations (Consolidation) Act 1992), set against the background of earlier European and domestic authorities. It is therefore important to consider the precise wording of each.

The Collective Redundancies Directive

Article 1(1) of the Directive provides as follows:

1. For the purposes of this Directive:

(a) "collective redundancies" means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(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;

Each Member State therefore has a choice as to which provision to transpose into domestic law. As is apparent from the wording of s.188 TULRCA, the UK opted for 1(a)(ii)

Section 188 TULRCA

Insofar as is relevant Section 188(1) provides as follows:

(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.

What vexed the EAT for the purpose of the appeal was the interpolation of *at one establishment* within s.188 when that phrase did not appear at all within Article 1(1)(a)(ii).

The Position before *Woolworths*

The European cases principally have been concerned with the definition of the word 'establishment'. It came to be considered by the ECJ in *Rockfon A/S v Specialarbejderforbundet i Danmark* [1996] IRLR 168.

The ECJ held that the notion of establishment was something different to the employer's entire undertaking:

When looking at how the Community legislature has used the term 'establishment' from time to time in various texts in the field of social policy we see that it was seeking to identify something distinct from what the term 'undertaking' designates. We see that, in certain cases, it uses the two terms cumulatively, clearly distinguishing their meanings. (paragraph 28).

But does this mean that an establishment is necessarily something less than (i.e. a fraction of) the overall undertaking? Apparently so...

In the case now before us, if the Community legislature had wished that all an undertaking's workers, wherever they are employed, should be taken into account in determining the total number of workers on the basis of which dismissals are to be determined to be lawful or unlawful, it should have used a more appropriate term. This point is in fact made by the United Kingdom in its observations. (paragraph 32).

The theme was picked up again in the subsequent decision of the ECJ in *Athinaiki Chartopoiia AE v Panagiotidis* [2007] IRLR.

The notion of establishment was a concept of Community law and was not to be tainted by any domestic interpretation:

According to the Court's case-law, the concept of 'establishment', which is not defined in that Directive, is a term of Community law and cannot be defined by reference to the laws of the Member States (case C-449/93 Rockfon [1996] IRLR 168, paragraphs 23 and 25). It must, accordingly, be interpreted in an autonomous and uniform manner in the Community legal order. (paragraph 23)

Further, it must be interpreted in the broadest sense so as to further the aims of the Directive:

In so doing, the Court has defined the term 'establishment' very broadly, in order to limit as far as possible cases of collective redundancies which are not subject to Directive 98/59 because of the legal definition of that term at national level ... However, given the general nature of that definition, it cannot by itself be decisive for the appraisal of the specific circumstances of the case at issue in the main proceedings. (paragraph 26)

The last sentence in this paragraph is important. Whatever the definition of establishment, that cannot decide a case one way or the other. Rather, it should be determined on its application to the facts on a case-by-case basis.

But what actually is an establishment?

Thus, for the purposes of the application of Directive 98/59, an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks. (paragraph 27)

So that's clear then...

It is important to note that both *Rockfon* and *Athinaiki* concerned employers who were disposing of part of its undertaking, resulting in mass redundancies. The employers argued that the part disposed of did not amount to an establishment of itself and therefore collective consultation obligations did not arise. Put another way, the establishment was the whole and not each part. The ECJ disagreed and held that, on the facts, the establishment was the part and not the whole and so collective

consultation obligations existed for employees made redundant from that part of the undertaking.

Of course, and somewhat ironically, in the *Woolworths* litigation the employers' argument was the converse of the employers' argument in *Rockfon* and *Athinaiki*: each retail branch amounted to a separate and distinct establishment and, for the purpose of s.188, should not be regarded as the entire undertaking.

It is also important to note that the Member States in *Rockfon* and *Athinaiki* had chosen to implement the Article 1(1)(a)(i) method of establishing when collective consultation obligations are to be triggered, in contrast to the UK. There is in fact no European decision on the alternative Article 1(1)(a)(ii) method.

So what have the UK courts previously had to say about Section 188 TULRCA set against the background of the Collective Redundancies Directive?

In short, it is inconsistent but there is nothing they can do about it.

In *MSF v Refuge Assurance plc* [2002] IRLR 324 the EAT concluded that:

As will have been seen, Article 1(1)(a) of the Directive gives Member States a choice of two types of collective redundancy which they may adopt in their domestic legislation. The second is one which is irrespective of the number of workers normally employed in the establishments in question. However, s.188, whilst appearing to take the second choice (redundancies of at least 20 persons over 90 days) speaks of the redundancy of 20 or more being 'at one establishment'. In this respect, too, it appears to us to differ from the Directive to a degree irremediable by construction. Again, given that MSF are neither able to enforce the Directive nor to disapply the section, we are left with the task of applying a straightforward construction of the language of the section to the facts. Thus there arises the question of what is 'an establishment'. The question is important in the case before us as field staff workers worked in relatively small units which, if each was separately regarded as an establishment, would effectively disapply s.188 simply by reason of the smallness of the branches concerned and the thin spread of redundancies over a large number of them. (paragraph 52).

Applying *Rockfon* and *Athinaiki* the EAT found that an establishment was the part and not the whole and so applying the unvarnished s.188 no collective consultation obligations arose.

Shortly before the decision of the EAT in *Woolworths* the matter came before the EAT again in *Renfrewshire Council v Educational Institute for Scotland* [2013] IRLR 76 - a case in which the Tribunal at first instance found that the establishment was the education and leisure services of the Council (i.e. the greater whole) as opposed to the individual schools at which the redundant teachers had worked (i.e. the smaller part). The EAT reversed the Tribunal's decision.

The EAT was evidently troubled by a literal application of the *Rockfon* definition of establishment to cases concerning a domestic implementation of Article 1(1)(a)(ii) (as in the UK) since, typically, in such cases the larger the establishment the more likely that protection is afforded, unlike the facts of *Rockfron* and *Athinaiki*:

I must confess to considerable misgivings whether the decision in MSF is, despite this general acceptance, necessarily a proper application of that in Rockfon. Although the European Court did define 'establishment' as I have noted, it did so expressly to advance the purpose of the Directive by regard to the consequences if (on the facts of that case) a larger unit were to be adopted as the establishment than that contended for by the employer. The right to consultation where it was contemplated that there might be a number of dismissals for reasons unconnected with the personal characteristics of the workers in question would be defeated, rather than advanced, by adopting the employer's approach. The decision, being one of the European Court, may be seen as one in which the reasoning was part and parcel of the decision, and it might almost as well be interpreted as a decision that that 'unit' constitutes an establishment for the purposes of Directive 98/59/EC which most widely confers consultation rights: for the 'sliding scale' in Article 1(1)(a)(i) this would usually be smaller rather than larger units, subject only to the applicable numerical thresholds, as it is to be interpreted as a decision that lays down a definitional starting point from which the rights in issue flow. For the applicability of rights deriving from Article 1(1)(a)(ii) the larger the 'establishment' is conceived to be the more likely it is that workers within it will be protected. The danger to what would otherwise be rights to consultation might be averted if the emphasis in applying Rockfon were to be placed on the purposive logic which led to the answers to the questions given by the court in that case, rather than literally upon the wording used to express the scope of 'establishment'. (paragraph 25).

Notwithstanding these misgivings, *MSF* was applied, but not without passing remark on the apparent inconsistency between TULRCA and the Directive:

...there seems to me to be force in the view of the Employment Appeal Tribunal expressed in paragraph 52 in MSF that the Act might not be compatible with the Directive, since the word in s.188 is 'establishment', in the singular, whereas in the Directive it is in the plural – 'the establishments in question' 2 . If so, then the meaning of 'establishment' as defined in Rockfon would not conflict with the purpose of the Directive in any case to which Article 1(1)(a)(ii) applied, since in such a case the 'establishments' would be aggregated for the purpose of establishing a numerical threshold. On this analysis, any shortcoming in ensuring the widest coverage of consultation rights under the Directive is the consequence of what must be assumed to be a deliberate legislative choice by Parliament; but the definition in Rockfon would still fall to be applied. (paragraph 26).

The *Woolworths* Decision

What did the EAT make of all of the above? In truth, not much. In very simple terms, the EAT concluded that s.188 did not properly transpose Article 1 of the Directive. Consequently, s.188 should be re-written (on *Marleasing* principles, as further explored in *EBR Attridge LLP v Coleman* [2010] IRLR 10) so as to strike from the provision the words 'at one establishment'.

The EAT was unmoved by the fact two Presidents of the EAT felt unable to take this step.

The crux of the EAT decision in *Woolworths* (and a good place to start in understanding it) is paragraph 41, which states:

The insertion of the phrase 'at least 20 whatever the number of workers normally employed in the establishments in question' in option (ii) [of Article 1 of the Directive] *does not detract from it; rather, it emphasises that the location where people work is irrelevant. Common to options (i) and (ii) is the focus on numbers of people to be dismissed, the number of redundancies, as the governing part of Article 1(1)(a) shows. The numbers are either 10, 10%, 30 (option (i)) or 20 (option (ii)). The difference between them is that option (i) requires you to consider the size of the existing workforce and in which establishments employees work. There is no such linkage in option (ii) and the extra words simply emphasise this distinction. There is no need to construe establishment in any particular way for option (ii), for the duty to consult applies 'whatever' establishment they work in. The point does not arise, whereas the authorities show that the meaning of the term is critical for option (i).*

On this analysis, the *Rockfon* definition of establishment is academic where the Member State has sought to implement option (ii). The simple question is: how many people does the employer propose to dismiss as redundant? If the answer is 20 or more, then he must consult collectively. The location of the employees and the units or establishments to which they are assigned is academic.

What does this all mean in practice?

In short, it results in a significant widening of the collective consultation obligation. Take a practical example:

Bloggs & Co propose to dismiss as redundant 19 members of staff from its distribution centre in Truro, and one manager from its head office in Inverness at approximately the same time.

The geographic and functional separation of the two places of work are now academic since the notion of 'establishment' has no part to play. Bloggs & Co would have to consult either with a recognised Trade Union or elected employee representatives for all affected staff.

Is the *Woolworths* decision correct?

That is not for us to say (an appeal is pending) but presumably the current President of the EAT (Langstaff J) thinks not.

The appeal in *Woolworths* has an unusual history. It was dismissed on the paper sift *twice* by Langstaff J on the ground that the appeal had no reasonable prospect of success. The appeal was then allowed to proceed following an oral hearing before HHJ Peter Clark and then, or course, allowed by HHJ McMullen QC.

The EAT also did not have the benefit of argument on behalf of the insolvent employers or the Secretary of State - they went unrepresented.

Anybody who needs to argue against the decision would do well to read in full the judgment of Langstaff J rejecting the appeal on the sift which is helpfully reproduced in its entirety at paragraph 8 of the judgment of HHJ McMullen QC.

A tentative (and respectful) observation...

HHJ McMullen's confidence that, so far as option (ii) of Article 1 of the Directive goes: (a) there is no linkage with the establishment at which employees work, therefore (b) one does not need to consider *at all* the definition of establishment, is surprising.

Article 1(1) creates two schemes for identifying when collective consultation obligations are triggered. They are two parts of the same overall objective.

Option (i) is self evidently founded on a ratio (a proportion of redundant staff to total staff) which is establishment specific - is the threshold ratio met in respect of each establishment?

Why then should option (ii) be any different? It is at least arguable that the reference to *whatever the number of workers normally employed in the establishments in question* is no more than making it clear that, where option (ii) is concerned, the total number of employees at an establishment is not a factor since the absolute threshold of 20 (rather than a ratio) is to be applied. Nonetheless, it is still a threshold of 20 *per establishment*.

Also, the judgment in *Woolworths* does not address the point made in *Rockfon* that establishment means something different (and less than) the employer's entire undertaking - why refer to establishment at all if what is meant is the employer's entire workforce at large?

What should employers now do?

Woolworths is not necessarily the current law. It is one of three decisions of the EAT (two from Presidents of the EAT) and an Employment Tribunal will need to decide which decision to follow. Nonetheless, where an employer proposes to dismiss at least 20 employees as redundant in 90 days or less, regardless of their location, prudence dictates that an employer should set into motion its collective consultation machinery, whether with a recognised trade union or with elected employee representatives.

However, the EAT has granted the Department for Business, Innovation and Skills permission to appeal to the Court of Appeal. All Respondents facing Employment Tribunal proceedings where the effect of *Woolworths* is in issue would be wise to apply for a stay of proceedings pending determination of the appeal.

Where a stay is not granted, and in the absence of a judgment from the Court of Appeal, Respondents will need to seek to persuade the Tribunal that the decisions in *MSF* and *Renfrewshire Council* are correct and that *Woolworths* should not be followed.

Phased Redundancies

Something lost in the drama of the response to the *Woolworths* decision is that it says nothing about the meaning and effect of s.188(3) TULRCA, which states:

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

Of course, consultation in this context means collective consultation further to s.188, but it may serve to mitigate the effect of *Woolworths*, albeit in limited circumstances. Take the following practical example:

Jones Ltd proposes to dismiss 20 staff as redundant at depot X and starts a process of collective consultation. A month later, it proposes to dismiss a further 19 employees at depot Y.

In the above example, there would be no obligation to consult collectively with representatives of affected employees at depot Y. Obviously, employers should be keen to avoid stage managing redundancies so as to avoid consultation obligations, since a Tribunal is likely to look behind such a tactic.

A brief general update

There are two further recent developments in the field of collective redundancy consultation:

(1)

As part of the Coalition Governments drive to reduce the burden on employers wrought by employment legislation, where an employer proposes to dismiss as redundant 100 or more employees in a period of 90 days or less, the prescribed period between collective consultation commencing and the first notice of dismissal has been halved from 90 days to 45 days by the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013. This change applies to all proposals occurring on or after 6 April 2013.

(2)

The vexed question of what (if any) difference exists between a 'proposal' (used by s.188) and a 'contemplation' (used by the Directive) for redundancy dismissal has, for the time being, been put to bed by the EAT in *Kelly v The Hesley Group Ltd* [2013] IRLR 514.

There is no obligation to consult collectively until the employer has *formulated its proposals*.