



Advocate General delivers opinion in USDAW v Woolworths

What is an establishment? Not a difficult question to answer you would have thought, but it has taxed the minds of judges in the UK and is now being considered by the Court of Justice (CoJ) in Europe. This is about how you count employees for the purposes of reaching the thresholds of 20 and 100 employees for collective consultation.

Fortunately for many employers, Advocate General Wahl has given a preliminary opinion which, if followed, they will find helpful. He is of the view that “establishment” means the local employment unit to which the employees are assigned, which (if followed by the CoJ) will reduce the chances of employers being caught by collective redundancy obligations under UK legislation. Although his opinion is not binding on the CoJ, it will be persuasive. Employers will be hoping that the CoJ will follow the opinion when it delivers its judgment later this year.

The case in question is the long-running “Woolworths” case. When Woolworths went into liquidation, thousands of workers were made redundant. Under the relevant UK legislation, 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 is obliged to consult the appropriate representatives of the affected employees about the proposed dismissals. Woolworths treated each individual store as an establishment. USDAW, the union representing the dismissed employees, argued that the Respondents had failed to comply with these obligations, and the question arose as to the meaning of “establishment” in the UK legislation.

The Employment Tribunal agreed with USDAW that there had been a failure on Woolworths’ part to comply

with the legislation, but held that, rather than all of Woolworths' stores collectively constituting one establishment, each individual store was an establishment. Accordingly there was only a failure to comply with the legislation at stores that had 20 or more employees.

USDAW appealed that decision. At the Employment Appeal Tribunal (EAT) it was held that the UK's collective consultation legislation was too restrictive and did not comply with the relevant EU legislation. Specifically, the EAT held that the words "at one establishment" should be deleted from the UK legislation, the effect of which was that employers would have to aggregate all dismissals, regardless of location or other employment unit, when determining whether or not the collective consultation thresholds had been reached.

The Secretary of State (who had been joined to the case) appealed this decision, and the Court of Appeal made the subsequent reference to the CoJ.

In delivering his opinion, the Advocate General said that the purpose of the EU legislation was to protect the socio-economic effects of redundancies in a given local context and social environment. The Advocate General made his own views on this matter clear, stating that:

"...it is precisely the local community that may wither and fade away without protection from collective redundancies. Conversely, directive-relevant local dismissals which are below the thresholds do not pose the same threat to the survival of local communities. Although the aggregate number of dismissals effected in a restructuring process might be high on the national scale, that does not say anything about how those effects are felt locally. Local jobseekers might, where they are not many, more readily be reabsorbed into the employment market."

In the Advocate General's opinion, it was not necessary to aggregate the dismissals across all of their establishments for the purposes of determining whether or not the collective consultation thresholds have been reached. However, he also found that it is open to EU member states to afford employees a greater level of protection than that provided by the EU legislation, as long as all employees benefit from it. He also said that it would be for the domestic courts to determine what constitutes a local employment unit (and therefore an establishment), based on the facts of each specific case.

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