# Trigger movements

John McMullen investigates the changing landscape of collective redundancy law

**IN BRIEF**

- Directive gives two options for defining collective redundancy.
- EAT: UK has incorrectly transposed second option into TULR(C)A.
- Words "at one establishment" must be deleted from s 188(1).
- ECJ to consider meaning of "establishment" in context of Directive's second option.

As it is currently drafted, the obligation to inform and consult under s 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) is engaged when 20 or more redundancies are proposed "at one establishment" within a period of 90 days or less. The question is whether this threshold applies to 20 or more redundancies across the entire business, or within a smaller unit within the business, for the obligation to be triggered. If it is the latter, workers in those smaller business units may lose out on information and consultation rights.

## EU law

To understand this provision it is necessary to outline the options available to member states when implementing the Collective Redundancies Directive (98/59/EC). Under Art 1(1)(a) of the Directive, member states can chose from one of two definitions of "collective redundancy". These are as follows.

### Option one

The dismissal, over a period of at least 30 days of:

- 10 workers in an establishment with 21 to 99 workers;
- 10% of the workforce in an establishment with 100 to 299 workers; or
- 30 workers in an establishment of 300 or more workers (Art 1(1)(a)(i)).

### Option two

The dismissal, over a period of 90 days, of at least 20 workers, whatever the number of workers employed in the establishments in question (Art 1(1)(a)(ii)).

## Rockfon

Many member states have chosen option one. In this regard, the interpretation by the European Court of Justice (ECJ) of the concept of establishment for the purposes of option one may be observed in *Rockfon A/S Specialarbejderforbundet i Danmark C-449/93*, [1996] ICR 673. In this case the facts were that Rockfon was part of a multinational group, Rockwool International which comprised, in total, four companies. The group had a centralised personnel department in a company called Rockwool A/S. Rockfon dismissed 24 workers out of its workforce of 162. For determining when the consultation provisions were triggered, Denmark adopted the scheme in the Directive (option one) which provided that where dismissals occurred over a period of 30 days (as was the case in Rockfon) consultation provisions applied where workers to be dismissed were:

- 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; and
- at least 30 in establishments normally employing 300 workers or more.

If *Rockfon* A/S was itself an establishment, clearly the consultation provisions were triggered because the redundancies exceeded 10%. Rockfon contended however that it was the Rockwool *group* which constituted the establishment and, since the group employed more than 300 workers, consultation would only have been required if in excess of 30 workers were to be dismissed.

The ECJ held that Art 1(1)(a)(i) of the Directive did not preclude two or more interrelated undertakings in a group, neither or none of which has a decisive influence over the other or others, from establishing a joint recruitment and dismissal department so that dismissals on grounds of redundancy in one of the undertakings could take place only with that department's approval. Establishment for the purposes of the Collective Redundancies Directive must, however, be understood as designating the unit to which the workers made redundant are "assigned to carry out their duties". It was not necessary to construe establishment as meaning a unit endowed with a management which could independently effect collective redundancies. That would be incompatible with the aim of the Directive, because it would allow companies belonging to the same group to try and make it more difficult for the Directive to apply by conferring the power to take decisions concerning redundancies on a separate decision making body.

## Athinaiki Chartopoiia

In *Athinaiki Chartopoiia AE v Panagiotidis C-270/05* [2007] ICR 284, [2007] All ER (D) 186 (Feb) the concept of establishment was considered again by the ECJ. In this case Athinaiki Chartopoiia had three separate production units in three different locations in Greece. Each of the units had distinct equipment and a specialised workforce and a chief production officer. Decisions concerning operating expenses, purchase of materials and product cost were taken at the company's head office. In July 2002 the company decided to close down the first unit, dismissing almost all of the 420 workers employed there. It began consultation with workers' representatives. When agreement was not reached, the minister for labour extended the consultations for 20 further days. However, the company proceeded to terminate the contracts of the employees concerned before this extended consultation

period had expired. The Supreme Court of Cassation referred the issue of whether the independent unit was an establishment to the ECJ for a preliminary ruling. The ECJ held that the production unit in question came within the concept of establishment for the purposes of Directive 98/59.

The court held that an establishment need not have any legal autonomy, nor need it have economic, financial, administrative, or technical autonomy to be regarded as an establishment. Nor is it essential for the unit in question to be endowed with a management that could independently effect collective redundancies. In the present case the unit in question had distinct equipment, a specialised workforce and its operation was not affected by other units. It had a chief production officer who ensured that the work was carried out properly, was responsible for supervision of the entire operation of the unit's installations and ensured that technical questions were resolved. Those factors gave such a unit an air of establishment for the purposes of the application of the Directive.

## UK law

In *MSF v Refuge Assurance Plc* [2002] IRLR 324, [2002] All ER (D) 209 (Feb) the Employment Appeal Tribunal (EAT) held that the same definition of establishment must apply to s 188. This decision is heavily criticised by *Harvey on Industrial Relations and Employment Law* (Division E [2548]). But it was confirmed as correct by the EAT in *Renfewnshire Council v Educational Institute of Scotland* [2013] IRLR 76, [2013] All ER (D) 207 (Feb). In that case, therefore, where redundancies were taking place in Scottish schools, an establishment was each individual school, as opposed to the council's education department as a whole. However, it has strongly been argued that much depends on the circumstances of the case and that the overriding interpretation should be to advance employee rights. In *Rockfon* and *Athinaiki* an interpretation that a smaller business unit was an establishment advanced those rights. In the UK, if that objective is to be achieved, it is necessary, where possible "to aggregate several smaller units into one larger 'establishment'" (*Harvey on Industrial Relations and Employment Law*, Div E [2533]).

## USDAW

In *USDAW v WW Realisation 1 Limited* (UKEAT/0547/12/KN; UKEAT/0548/12) Judge McMullen QC considered that the UK government had incorrectly transposed option two of the Collective Redundancies Directive by focusing on the number of workers to be dismissed at one establishment as opposed to across the business as a whole.

This case was an appeal from the decisions of two employment tribunals concerning the Ethel Austin and Woolworths chains of stores respectively. Ethel Austin had 90 stores and a head office and went into administration on 8 March 2010. 490 employees were made redundant at locations with 20 or more employees and, with there having been a breach of s188, received the maximum 90 day protective award. But 1,210 employees who were made redundant received no protective award since they were at locations with fewer than 20 employees. Woolworths went into administration on 27 November 2008 and ceased to trade on 3 January 2009. By virtue of the 20 employee rule some 3,233 employees were disentitled to a protective award (in this case of 60 days).

Judge McMullen chose to tackle the seeming incompatibility of s 188 and Art 1(1)(a)(ii). In his opinion, the European Court had in cases such as *Rockfon* and *Athinaiki* and the case of *Agorastoudis and others* [2006] ECR 1-7775 favoured an interpretation in favour of workers' rights. Thus: "It will be seen that 'unit' is not a term that is universally applied. Distinguishing what is an establishment in one case from another is directed by the core objective of advancing the rights of workers in accordance with the Directive and the Charter [of Fundamental Rights of the European Union]. One can, as the European Court said in *Athinaiki*, regard it as broad construction, or possibly a narrow construction, but either way it has to be a construction which pursues the core objective."

The question therefore was whether s 188 could be construed in the light of the Directive to exclude the words "at one establishment" or to add words "at one or more establishments": would such a construction would "go against the grain" of the legislation? However, the judge considered that the ECJ judgment in *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR 1-4135 supplied the principle: "This permits additional words to be put in. They could be taken out; they can be moved around." He relied also on *Ghaidan v Godin-Medoza* [2004] 2 AC 557, [2004] 3 All ER 411 a case on the duty of the courts to broadly interpret legislation in accordance with s 3 of the Human Rights Act 1998 (HRA 1998). In his view there is no difference between the interpretative obligation under s 3 of HRA 1998, considered in *Ghaidan* and the interpretative obligations arising in the context of EU law.

The EAT, therefore, considered that the words "at one establishment" should be deleted from s 188 as a matter of construction pursuant to the UK's obligations to apply the Directive's purpose. The employees in the individual Woolworths' stores where fewer than 20 redundancies had been proposed should receive their protective award.

## Lyttle: insufficient information & consultation

In the Northern Ireland Industrial Tribunal the case of *Lyttle v Bluebird UK Bidco 2 Limited* (Case ref: 555/12; 1010/12; 1016/12) referred the construction of the equivalent legislation in Northern Ireland and of the Collective Redundancies Directive to the ECJ (the application was lodged on 15 April 2013).

The litigation arose out of redundancies in the Bon Marché business in the Isle of Man and Northern Ireland. It was conceded that insufficient information and consultation under Part VII of the Employment Rights (Northern Ireland) Order 1996 (SI 1996/1919) (the equivalent of s 188 of TULR(C)A) took place.

The chairman of the Industrial Tribunal decided to refer the construction of the Collective Redundancies Directive (and hence its effect on Northern Ireland legislation) to the ECJ for an opinion pursuant to Art 267 of the Treaty on the Sanction of the European Union. The questions are as follows:

In the context of Art 1(1)(a)(ii) of the 1998 Directive, does "establishment" have the same meaning as it has in the context of Art 1(1)(a)(i)?

If not, can "an establishment", for the purposes of Art 1(1)(a)(ii) be constituted by an organisational sub-unit of an undertaking which consists of or includes more than one local employment unit?

In Art 1(1)(a)(ii) of the Directive, does the phrase "at least 20" refer to the number of dismissals across all the employer's establishments, or does it instead refer to the number of dismissals per establishment? (In other words, is the reference to "20" a reference to 20 in any particular establishment, or to 20 overall?)

## Approach with caution

The *USDAW* case and indeed the outcome of *Lyttle* (see box above) may permanently change the landscape of collective redundancy law. Unless and until the matter is reviewed either by a higher court in the UK or by the ECJ in *Lyttle* an employer should take the cautious approach and inform and consult for the purposes of s 188 whenever proposing 20 or more dismissals whatever the number of establishments concerned and wherever they are located in the overall business. **NLJ**

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