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Advocate General gives opinion on the meaning of "establishment" for the purpose of collective redundancy consultation

Advocate General Wahl has given an opinion on the meaning of the word "establishment" in Article 1(1)(a)(ii) of Directive 98/59/EC (the Collective Redundancies Directive), for the purpose of calculating whether the threshold number of redundancies which triggers the requirement for employers to consult with employee representatives in collective redundancies has been met.

The Advocate General gave this opinion in response to the referral of a number of questions arising in three cases from across Europe concerning the interpretation of the Collective Redundancies Directive: *Lyttle and ors v Bluebird UK Bidco 2 Ltd*, referred by the Belfast Industrial Tribunal, *Cañas v Nexea Gestión Documental SA, Fondo de Garantía Salarial*, referred by the Juzgado de lo Social No 33 de Barcelona (Spain), and *USDAW and anor v WW Realiation 1 Ltd (in liquidation) and anor (the "Woolworths case")*, referred by the Court of Appeal of England and Wales.

The key issue at hand was whether Article 1(1)(a)(ii) should be interpreted to mean that the threshold triggering an employer's obligation to consult on collective redundancies is met when 20 workers are to be made redundant across the whole of an employer's business, or rather when 20 workers in any particular location, or "unit" of a business are to be made redundant. This question hinged on the meaning of the word "establishment".

The Advocate General emphasised the importance of adopting a coherent and consistent interpretation of the word "establishment" in order to ensure the uniform application of EU law. He held that the word "establishment" has the meaning developed in the case law decided by the Court of Justice of the European Union, namely "the unit to which the workers made redundant are assigned to carry out their duties". The Advocate General stated that the local courts are to decide what constitutes a local "employment unit" in each case. This will be a question of fact, turning on the specifics of each case. However, it is not necessary to aggregate the redundancies across all of an employer's establishments for the protections in the Collective Redundancies Directive to become available.

This interpretation means that employers in the UK and Ireland would only be required to consult collectively when 20 workers are to be made redundant in any one "unit", rather than when the employer proposes 20 redundancies across the entire business. This is a very different threshold for activating the collective consultation requirement. If the Court of Justice of the European Union (the "ECJ") follows this opinion later in the year, this will therefore be welcomed by employers.

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This is a significant opinion, which contradicts the decision of the Employment Appeal Tribunal (the "EAT") in the *Woolworths* case, which concerned the interaction between the Collective Redundancies Directive and s.188(1) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), which implements that Directive in the UK. The EAT held that the words "at one establishment" should be deleted from s.188(1) TULRCA in order to interpret this section in a way which is compatible with the Collective Redundancies Directive. This decision resulted in many employers in the UK starting collective redundancy consultation when they proposed to make redundant 20 or more workers across the whole of their business, not just in a single "establishment" or "unit" of their business.

The Advocate General's opinion does not bind the ECJ. However, it is likely that the opinion will be influential on the ECJ, which will rule on these questions later in the year. If the ECJ does adopt this opinion, this will have important implications for employers in the UK and Ireland. Significantly, the requirement of employers to commence the collective consultation procedure will be less easily triggered. Pending the ECJ decision, the EAT's decision in the Woolworths case remains good law, and employers should consider the requirements to start the collective consultation procedure whenever they reach a proposal to make 20 or more workers across their entire business redundant.

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