The Advocate General concluded that the UK is entitled to retain its long held view that it is only where an employer proposes 20 or more redundancy dismissals within 90 days “at one establishment” that the obligation to collectively consult is triggered. This was the previously held view that an employer was entitled to calculate redundancies with reference to employees in one local employment unit rather than across the whole business.

History
Woolworths went into administration in November 2008 resulting in shop closures and large-scale redundancies. USDAW and employee representatives complained to an Employment Tribunal, seeking protective awards on the basis that Woolworths had breached its information and consultation obligations under section 188 of Trade Union & Labour Relations (Consolidation) Act 1992.

The Employment Tribunal decided that each store was a separate “establishment”. Therefore, the duty to inform and consult did not apply to stores with fewer than 20 employees and so those employees were not entitled to a protective award (although their colleagues made redundant from larger stores, in exactly the same circumstances, were).

There were over four thousand employees who missed out on the protective awards and they appealed successfully to the Employment Appeal Tribunal (EAT). The EAT controversially ruled that the words “at one establishment” in the relevant employment legislation should be disregarded when deciding whether the duty to carry out collective redundancy consultation applies. Or put simply, if an employer was proposing to dismiss 20 or more employees as redundant within a period of 90 days or less, irrespective of where those employees were based, then the employer must comply with its collective consultation obligations or run the risk of a protective award being made against it. The point was referred to the European Union’s Court of Justice (ECJ).

Commentary
We expect employers to welcome the recent Advocate General’s opinion as it endorses the orthodox approach of counting numbers for collective consultation by reference to the local employment unit rather than across the whole business. Even though the Advocate General’s opinion is not binding on the ECJ, the ECJ usually follows the Advocate General’s opinion.

The practical effect of the law as it stands following the EAT’s ruling is that collective consultation obligations for larger multi-site employers will be more readily triggered as, an all sites approach, or a “pick and mix” approach means that the collective consultation obligations and employee thresholds will be more quickly reached with the result that employers face more onerous consultation obligations than previously was the case.

Continued on page 2
*Woolworths Collective Consultation: The Final Demise of the Pick & Mix? continued*

However, even if the ECJ does adopt the same approach as the Advocate General, the Woolworths case will then return to the Court of Appeal for its decision. So it may be some time before we have a final, binding judgment overturning the EAT's decision and giving a final position on this issue. Consequently and until a final binding judgment is handed down, some employers may decide to take a cautious approach and continue to aggregate redundancy numbers across their business. We think it is prudent to approach collective redundancies, in the meantime, in this way and on the basis that the EAT decision remains good law.

However, some employers, perhaps those without Unions, may feel more confident about reverting to the orthodox approach of counting employee numbers per local establishment and local unit. However care, even then, should be taken as even under the “old law” cases on what amounted to an “establishment” were highly fact sensitive.

The ECJ's decision is expected in the next few months and we will provide a further update then.

*Do you really know where your employee’s contractual “place of work” is? Is it fair to make mobile employees redundant because of a change in location?*

No, not in certain circumstances, said the Employment Appeal Tribunal in Exol Lubricants (Employer)v Birch and another (Employees).

Two employees were employed by Exol Lubricants as delivery drivers using HGVs. They lived in Manchester but the employer’s depot that they had to attend to load up was situated over 70 miles away in Wednesbury. Their contracts stated that their place of employment was at the depot.

The employer agreed to make available and paid for secure parking for the employees’ HGVs near their homes in order to cut down the costs of them commuting each day. The employees were also paid for their commuting time to and from the depot, which was treated as part of their working day. It was accepted by both employer and employees that, by common practice, this arrangement had become a term of their employment contracts. All of the other HGVs were parked at the depot in Wednesbury.

This arrangement subsequently became unaffordable for the employer and the two employees were notified that the arrangement was to be terminated. The employees refused to agree to this change and so the employer decided to dismiss them by reason of redundancy.

The employees brought claims for unfair dismissal in the Employment Tribunal (ET):

The employer argued that the employees’ place of work was Manchester and, as it no longer wished the employees to keep their lorries at the secure parking site, its requirement for lorry driving in Manchester had diminished and therefore there was a redundancy situation.

The ET rejected the employer’s defence on the basis that the employees’ place of work was not in Manchester but in Wednesbury because that was where their working day began and ended. The ET found that there had been no potentially fair reason for dismissal on the grounds of redundancy.

The employer appealed to the Employment Appeal Tribunal (EAT):

The EAT upheld the ET’s decision. In determining the meaning of the “place where the employee was … employed”, the EAT concluded that it is important to consider:

- for employees, such as lorry drivers, with no fixed place where they carry out their duties, the provisions in the employment contract on their place of work;
- depending on the facts of the case, any connection the employee may have with a depot, or head office, or something similar.

The EAT concluded that in this case, the employees’ contracts stated that their place of work was where the depot was and this was where they had to take their lorries every day to be loaded, where their instructions came from and the place where they reported to.

Given that there had been no demise in the employer’s requirements at the depot in Wednesbury, there was no redundancy situation and the employees had therefore been unfairly dismissed. However, the EAT commented that the outcome may have been different if the employer dismissed the employees for ‘some other substantial reason (SOSR)’.

There is relatively little case law on this subject and this decision therefore offers useful guidance to employers who employ mobile employees.

**Key points to note:**

1. Cases of this kind are fact sensitive and it is important for you to give full consideration as to whether redundancy is the most appropriate grounds for a dismissal. In order for redundancy to be a potentially fair reason for dismissal, on the grounds of workplace closure, you will need to determine the employee’s place of work using the EAT’s guidance above.

2. It is particularly important that you make sure your employee’s terms and conditions are up to date and that they fairly reflect what happens in practice.

3. If you then want to make fundamental changes to your employee’s terms and conditions you will need to consult with them through a formal process. If they refuse to accept the changes, then dismissal on the grounds of SOSR may be appropriate.

If you have any questions or concerns about mobile employees who work for you, relating to changes to terms and conditions and potential unfair dismissal claims, please contact a member of the Employment & HR team.

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Gross Misconduct Dismissals and Disability – Complex Decisions for Employers to make

Could dismissal for an act of gross misconduct fall outside the range of reasonable responses available to an employer, and amount to discrimination arising from a disability?

Yes, said the Employment Appeal Tribunal (EAT) in Burdett v Aviva Employment Services Limited.

This claim was about an employee suffering from a paranoid schizophrenic illness, who sexually assaulted female colleagues after discontinuing his medication without seeking medical advice first.

Following an investigation, whereby the employee admitted to the sexual assault and discontinuance of his medication, the employer, Aviva, found him guilty of gross misconduct and he was dismissed.

The Employment Tribunal (ET) found that Aviva had dismissed the employee because he had committed acts of gross misconduct and that it had reasonable grounds for its belief, given the employee’s admission of guilt.

The employee appealed on three grounds:

1. That the ET had not properly considered whether the employee had, in fact, wilfully or grossly negligently engaged in the sexual conduct;
2. That the ET had not looked at whether there were mitigating circumstances that might take dismissal outside the range of reasonable responses;
3. That the ET had failed to demonstrate that it had properly scrutinised the means chosen by Aviva to achieve its legitimate aim.

The EAT held that the employee admitting that he had committed sexual assault and discontinued his medication had been treated by Aviva as admitting that he was guilty of gross misconduct.

However, gross misconduct required culpability and it was not clear from the ET’s reasoning whether or not it had addressed the issue of the employee’s culpability, in particular the effect of his mental illness on that concept.

The EAT also decided that, in finding whether dismissal was the right sanction, the ET had failed to consider mitigating circumstances and wrongly assumed that dismissal automatically fell within the band of reasonable responses following a finding of gross misconduct.

Finally, the EAT said in relation to discrimination arising from disability, that the ET had been mistaken finding that dismissal was a proportionate means of achieving Aviva’s legitimate business aim (of setting appropriate standards of conduct within the workplace). This is because the ET had failed to consider whether the hardship caused to the employee by dismissing him, was equally balanced against the aim of setting appropriate standards of conduct within the workplace.

Points to consider:

1. Do not assume that dismissal will fall within the range of reasonable responses available to an employer following a finding of gross misconduct. One does not necessarily follow the other.
2. Always consider mitigating factors and document those considerations.
3. Always set out the reasons for reaching a particular conclusion, do not assume anything.
4. In cases of misconduct involving an employee with a disability, the employer must critically evaluate the possible alternative means open to it and the impact upon the employee. If only to rule other options out, this will assist an employer to show that a decision taken is reasonable and fair.
5. Discrimination arising from the disability may be permissible if it can be objectively justified by the employer. That will require a balancing exercise, to decide whether or not the sanction issued by the employer is proportionate.

If you have any concerns about the conduct of an employee who is disabled, please contact a member of the Employment & HR team.
What is home working?

Home workers might spend part of their time at home and be considered as having a home base. Home workers are usually defined as those who use their home as their office/place of work for the significant element of their working time.

This could also apply to staff that may provide services such as 'out of hours' support to customers. Perhaps they are working one or two days per week from home, or maybe they are a field based sales person that doesn't regularly work from a fixed office.

Legislation on home working

The employee may be away from the employers main workplace, however health and safety legislation still needs to be considered.

The Health and Safety at Work etc. Act 1974 and most associated Regulations and Guidance should be applied to home workers to ensure their safety.

Importantly, the Management of Health and Safety at Work Regulations (MHSWR) requires employers to carry out a risk assessment of the home working environment, identify any health and safety risks that may affect the employee, while working at home.

It may be necessary for the employer, or a suitable representative, to visit the employees home to carry out a risk assessment, although in most cases this can be satisfied with the cooperation of the employee. This can be achieved by providing a structured question set, which will ensure that the employee has considered their environment and potential hazards, as well as the Display Screen Equipment (DSE) regulations, which should be followed.

This gives the employee guidance and the opportunity to raise any issues or concerns. We would also recommend that this process be repeated regularly, usually once per annum. Also it is worth highlighting to the employee that they should raise any concerns as soon as they feel that there may be an issue or any if there are any significant changes.

Employers’ duties for home working

Home working employees should expect similar standards to those provided to the other employees.

The workspace should be adequate for the workers needs; ideally there should be some separation of the "workspace" from the home environment.

The employer will need to ensure the provision of suitable work equipment, it should be to the same standards as the workstations provided for office-based employees.

All of the Display Screen Equipment regulations are applicable, to home working employees.

Health and Safety Guidance for home workers

We are often asked about the obligations on employers in regard to employees working at home. To help on this topic we have asked Health and Safety experts Southall Associates Ltd to provide this month’s guest article which gives details on the things employers and employees should consider if they are permitted to work from their own home.

Electrical equipment

If electrical equipment is provided by the employer for use in the home, the employer has responsibility for its maintenance and examination.

The home workers’ domestic electrical system, including electrical sockets and the system itself are the home owner's own responsibility.

Common risks for home workers

Although it will to some extent depend on the nature of the work some common home working hazards include:

- **Lone Working**
  - How do we know if the employee has had some kind of issue?
  - Do we keep in regular contact and ensure that they are okay?

- **Work Equipment**
  - Do we ensure that their equipment is safe, comfortable and suitable?
  - Is equipment provided by the company or the employee?
  - Do we have a system to report any issues such as damaged or worn out equipment?

- **Display Screen Equipment (DSE)**
  - Do we regularly assess the employee and comply with the DSE regulations?

- **Slips, trips & falls**
  - Are we sure that housekeeping is maintained to make sure that, for example trailing cables are not allowed to create an unnecessary hazard?

- **Accident reporting**
  - It would be wise to advise your employee to report any accidents and incidents that they may encounter whilst working in their home environment. This is a useful safety net and offers an opportunity to work with the employee to iron out issues.

- **Regular Breaks**
  - Employees working from home are more likely to forget to take regular breaks from the screen, so it may be wise to set-up software tools which remind the employee to take a break when required.

If you have any queries relating to health and safety matters, please contact Southall Associates Ltd on 0845 257 4015 or visit their website at www.southallassociates.co.uk.
**Pre Employment checks**

Many employers use various pre employment checks to minimise the risks and costs associated with unsuccessful new hires. They may have valid concerns about previous criminal convictions or unsuitable personal characteristics that they want to investigate. However these concerns do not give an employer carte blanche to snoop on their prospective employees.

So what checks can employers legitimately undertake before they make a job offer?

**References**
Generally there is no obligation on an employer to request a reference for a potential new employee. However, in order to verify the work experience that a prospective employee has stated on their CV or application form, it is usual to request at least one reference from a former employer and to make the job offer conditional on that reference being satisfactory.

Generally there is no legal obligation on an employer to provide a reference for an employee or ex-employee and employers are therefore generally entitled to refuse to provide a reference. However, an employer’s policy on whether or not to give references and what sort of information to include, should be consistent or it could lead to allegations of discrimination. There are some limited exceptions to the general rule that there is no obligation to provide a reference so please do give us a call if you are not sure.

**CV checking**
According to research around a third of applicants exaggerate or embellish their academic qualifications on their CV in order to get a job. 20% said they would lie on their CV if it meant they would impress a future boss. Many employers therefore quite rightly choose to instruct specialist CV checking services to authenticate qualifications and experience. Employers should use this option with caution though and ensure that these specialist companies are sourcing this information through legitimate means.

**Criminal Records Checks (DBS checks)**
The Disclosure and Barring Service is able to carry out three levels of checks on employees (basic, standard and enhanced). For many employers the basic check will provide sufficient information to establish suitability for a role. However employers need to be cautious when requesting enhanced searches as they are restricted to certain positions and must relate to the employee’s suitability for employment.

**Right to work checks**
Employers are legally obliged to check that any prospective employee has the right to work in the UK. Failure to do so may result in a fine of up to £20,000 per illegal worker. If you have any queries on an employee’s right to work in the UK, do not hesitate to get in contact with a member of our business immigration team.

**Mandatory checks**
In some sectors pre employment checks on new staff are mandatory. For example if a person is carrying out certain prescribed functions for an organisation authorised by the FCA or PRA they must be approved and due diligence has to be carried out into their relevant history.

**Social Media checks**
With the ever increasing footprint of social media, much information is in the public domain on social networking sites Facebook, Twitter and LinkedIn. Employers need to make sure they are wary about carrying out indiscriminate checks on social media and avoid the temptation to snoop on prospective employees when there is no genuine commercial reason to do so.

**Health checks**
Other than in limited circumstances set out below, an employer must not ask about the health of the applicant either in the recruitment process or before offering work to a prospective employee. Employers must ensure they are not carrying out discriminatory practices in requiring potential employees to pass a health check when it is not essential to the role.

The most common circumstance in which employers may ask pre employment health checks is in order to establish if the applicant will be able to carry out a function that is essential to the job and tasks concerned or if it is a legal requirement e.g. night workers. Even then questions should be restricted to those which are relevant to the role. Employers often choose to outsource these checks to an Occupational Health Advisor.

**Getting pre employment checks correct**
Even with a rigorous interview and recruitment process there are always risks associated with new hires. Indiscriminate online vetting using social media is unlikely to be a fair way of carrying out pre employment checks. Employers must ensure any pre employment checks are non-discriminatory and comply with data protection law.

It is possible to make a job offer conditional on the outcome of pre- employment checks. However they must rely on facts and assess individuals based on the relevance of information specific to the role. Above all be honest and transparent informing prospective employees of the searches that may be undertaken.

If you have any queries or concerns over pre-employment checks, please contact a member of our Employment & HR team.
Employers face a raft of employment law changes in 2015

This year we will see a number of major developments in employment law. Many of the changes relate to working families, with the implementation of Shared Parental Leave (SPL) and pay being the most significant development.

SPL will be available to couples with a baby due, or children placed to adoption, on or after 5 April 2015. The parents will be able to share the balance of the mother’s maternity leave and, if available, statutory maternity pay.

Other changes expected to create work for HR and managers in 2015 includes:

- The Paternity and Adoption Leave (Amendment) Regulations 2014 which make significant changes to adoption, leave and pay. 26 week qualifying period to be eligible to take adoption leave will be removed, bringing it in line with the eligibility requirements for maternity leave.
- The Children and Families Act 2014 brings statutory adoption pay in line with statutory maternity pay by setting it at 90% of average weekly earnings for the first six weeks. Surrogate parents will also become eligible for adoption leave. There will also be a new right to take time off to attend adoption appointments.

- The right to parental leave will be extended to parents with children under the age of 18 years, 5 April 2015. (Shared parental leave is unrelated to parental leave, the statutory right to a period of unpaid leave that may be taken by a parent during the first five years of a child’s life).
- Restrictions on the defined contribution pension schemes will be removed from April 2015.
- The standard rates of statutory sick pay, maternity pay, paternity pay and adoption pay increase on 6 April 2015.
- The Fit for Work Service comes into force in May 2015 offering free occupational health assistance to employees.

If you have any concerns about the considerable changes to working family employment related matters, please contact a member of the Employment & HR team.

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