Case Number: 1805257/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs L James **Respondent: H Docherty Ltd (in administration)**

Heard at: **Leeds** **On:** **24 January 2020**
Before: **Employment Judge Davies**

Appearances

Claimant: **In person**
Respondent: **Did not attend**

JUDGMENT

EMPLOYMENT TRIBUNALS RULES OF PROCEDURE RULE 21

1. The Claimant was not assigned to an establishment at which it was proposed to dismiss 20 or more employees as redundant so her complaint under s 189 Trade Union and Labour Relations (Consolidation) Act 1992 is not well-founded and is dismissed.

REASONS

1. Introduction

1.1 This was a hearing under Rule 21 of the Employment Tribunals Rules of Procedure of Mrs James's claim for a protective award. She attended and represented herself. The Respondent did not attend but I took into account the written submissions that the administrators had provided.

2. The Issues

2.1 Although this was a hearing under Rule 21, it was still necessary for me to be satisfied on the material available that the legal requirements for making a protective award were met. The issues that potentially arose were as follows:

2.1.1 Was the Respondent proposing to dismiss as redundant 20 or more employees?

2.1.2 Were there any special circumstances that rendered it not reasonably practicable for the Respondent to comply with the requirement under s 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") to consult affected employees?

2.1.3 If so, did the Respondent take all such steps towards compliance with that requirement as were reasonably practicable in those circumstances?

2.1.4 If the Respondent was in breach of s 188 TULRCA, should a protective award be made?

2.1.5 What length of protected period does the Tribunal determine to be just and equitable?

2.2 In the event, I found that the Respondent was not proposing to dismiss as redundant 20 or more employees at the establishment to which the Claimant was assigned. The duty to consult did not apply to her and it was not necessary to consider the remaining issues.

3. The Law

3.1 The duty on an employer to consult in the case of collective redundancies is contained in s 188 TULRCA, which provides, so far as material, as follows:

> **188 Duty of employer to consult representatives**
> (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.
> …

3.2 The right to complain of an employer's failure to comply with a requirement of s 188 is provided for by s 189 TULRCA.

3.3 Under s 188, the proposal must be to dismiss as redundant 20 or more employees "at one establishment". That requirement was considered by the CJEU in *USDAW v Ethel Austin Ltd* [2015] ICR 675. That case concerned the large numbers of workers made redundant when the Woolworths and Ethel Austin retail companies went into liquidation. Employment Tribunals made protective awards in the case of employees who worked at stores with 20 or more employees but not those who worked at stores with fewer than 20 employees. The CJEU agreed with that approach, even though it meant that not all employees were protected. The CJEU held that the "establishment" is the unit to which the workers made redundant are assigned to carry out their duties and it gave guidance about what "establishment" means. It is a question of fact for the Tribunal to decide to which establishment employees were assigned. In a case called *Mills & Allen Ltd v Bulwich* UKEAT/154/99 the EAT made clear that, on appropriate facts, the establishment to which a member of a nationwide sales team was assigned to carry out his or her duties, might be that nationwide team rather than the employee's local office. However, it remains a question of fact. In *MSF v Refuge Assurance* [2002] ICR 1465 the Tribunal found that each member of field staff was assigned to a particular branch office but went on to say that the establishment to which they were assigned was the head office. The EAT overturned that decision.

4. The Facts

4.1 The Respondent had a head office in Birmingham, where there were more than 20 employees. It had a number of branch offices, including Leeds, Warrington and Gateshead. There were between 4 and 7 employees at those branches.

4.2 The Claimant worked as an Area Sales Manager from October 2018 onwards.

She was initially interviewed by Mr Smith in the Leeds office. Her written contract did not assign her to any particular base – it said that she was field based and would have to attend overnight appointments when necessary. In practice, the Claimant worked from home and covered a patch in the north of England. Her business would go through either the Warrington or the Leeds branch, depending on the location of the customer. By the time of her redundancy, she was line managed by the Regional Manager, Mr Dodds, who was based in the Gateshead office. He would come out to her and they would go out on her patch for the day. Occasionally she might attend training in Gateshead. Her customers were mainly long-standing ones. Sometimes she would develop new ones and sometimes she might get a call with a lead. Occasionally that might come from Head Office.

4.3 She had been to Head Office two or three times in total, for meetings of all the Area Sales Managers, the Regional Sales Managers and the Commercial Manager. The Claimant checked the Respondent's "catalogue" online. It did not assign the Area Managers to a particular branch, but listed them separately.

5. Application of the law to the facts

5.1 I started by considering to which establishment the Claimant was assigned. I found that she was not assigned to Head Office. She was on the facts assigned to Leeds and/or Warrington. She worked on a day to day basis in Leeds and the north west. She serviced existing clients there and generated new ones. She did not regularly attend Head Office. She was not managed through Head Office and her business did not go through Head Office. She was managed on her own patch and her business went through the books of the two branches for which she was responsible. Those factors all point to her being assigned to the branches for which she was responsible and not to Head Office. The fact that she attended occasional meetings at Head Office and occasionally received a lead from Head Office was not enough to say that this was the establishment to which she was assigned to carry out her duties.

5.2 The duty to consult under s 188 TULRCA did not therefore apply to the Claimant and she cannot succeed in a claim for a protective award.

Employment Judge Davies
20 September 2019