



EMPLOYMENT TRIBUNALS

Claimants: Ms N Bircham and Others

Respondents: (R1) Aspire Achieve Advance Limited (In Liquidation)
(R2) Secretary of State for Business, Energy and Industrial Strategy

Heard at: Nottingham **On:** Wednesday 6 May 2020

Before: Employment Judge Hutchinson (sitting alone)

CORRECTED JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. The claims for a protective award in respect of the Claimants in schedule 1 to this judgment fail and are dismissed.
2. The claims for a protective award made by the Claimant in schedule 2 of this document are struck out for non-compliance with the Tribunal orders.

REASONS

Background to this hearing

1. At a telephone case management Preliminary Hearing conducted by myself on 24 March 2020 it was agreed that I would conduct a hearing with written submissions to determine the issue of whether those Claimants that are referred to in the two schedules to this judgment satisfy the establishment test to enable them to make a claim under section 188 of the Trade Union and Labour Relations Consolidation Act 1992 ("TULRCA").
2. The parties had been able to agree terms in respect of a number of employees and it was identified that what was left was 14 employees upon which I was required to determine whether they were engaged at an establishment with 20 or more people who were to be made redundant.

The non-compliant claimants

3. In respect of six of those Claimants named in the second schedule it is said by the Respondents that they have not complied with the orders of the Tribunal.
4. None of those Claimants referred to in the second schedule have provided

any disclosure or statements and I am therefore unable to determine their purported establishment.

5. I note that in respect of one of those Claimants, Ms E Lawrence she has been in contact with the first Respondent's solicitors in respect of the documents and statement required to address the position in relation to establishment. I have seen a copy of the e-mail chain. Ms Lawrence provided a copy of her P45 which did not provide any information about her place of work. I can see in the e-mail exchange that the first Respondent's solicitors explained this and asked for further evidence. They did not receive any reply to their e-mail dated 1 April 2020.

6. It is for the Claimants to demonstrate that they were employed at an establishment with 20 or more people and as they have failed to provide any evidence or comply with the orders of the Tribunal their claims are struck out.

The other disputed Claimants

7. The remaining Claimants as set out in the first schedule are: -

- Natalie Bircham
- Holly Redfern
- Sharon Seel
- Ruth Sutton
- Rachel Thompson
- Colin Wilkinson
- Garry Bennett
- Barbara Robson
- Chloe Britton
- Ami Elizee
- Anthony Emmanuel
- Mohammed Zaman
- Phil Dorn

Documentation and evidence

8. There is an agreed bundle of documents and witness statements from all the above Claimants.

9. The official receiver has undertaken a search of the personnel files of the disputed Claimants and disclosed documentation relevant to the question of establishment. This is also in the bundle.

10. I have seen a payroll document which is at pages 169-190 called the "payroll spreadsheet". This document came from the first Respondent's records and was e-mailed to the official receiver by Tracy Winter who worked for the first Respondent as a finance and payroll administrator. This payroll spreadsheet was maintained by the first Respondent prior to liquidation and it is the official receiver's understanding from viewing the properties of the file that the document was first created on 2 March 2015.

11. The first Respondents have produced for me for ease of reference the payroll spreadsheet as an excel document which enabled me to more easily

review and analyse the information. The spreadsheet refers to cluster/location and several different cluster/locations are referred to. Namely;

Central

East Midlands

West Midlands

North West

North East

South East

South West

Yorkshire and Humberside

East

it is contended by the claimant's that they were engaged not at particular offices but that the establishment should be determined as the cluster that they worked in.

The facts

12. All the Claimants were employed by Aspire Achieve Advance Limited at various locations in the UK. They were all dismissed on 11 October 2018 on the closure of the business. The staff were provided with a letter which was headed "Notice to all employees of Aspire Achieve Advance Limited" and was signed by Richard Irons, Managing Director. The letter said that the Directors of the company had taken steps that day to place the company into liquidation. That the employment of all employees was terminated with immediate effect.

13. There was no trade union who was recognised by the Respondent for the purpose of collective bargaining.

14. No staff representatives were employed or appointed under the provisions of the 1992 act as amended and so the employer had an obligation to consult with each and every employee and to inform them of the redundancy situation in good time before the redundancy.

15. None of the employees were given information on the possible redundancy prior to 11 October 2018 and no consultation was undertaken with any of the Claimants or any of the employees made redundant.

16. All the Claimants claim a protective award on the grounds of failure to inform and consult in accordance with section 188 of TULRCA.

17. The Respondent worked with employers providing apprentices with work place training in-house through its network of academies. They operated from several establishments which included those where the Claimants in the first schedule were based, namely: -

- Leicester
- Middlesbrough
- Newcastle
- Manchester
- London, Kings Cross

18. I shall deal with the facts in respect of each of the establishments as follows: -

Leicester

19. The following Claimants comprised in the first schedule were based at Leicester namely: -

19.1 Natalie Bircham

19.2 Holly Redfern

19.3 Sharon Seel

19.4 Ruth Sutton

20. Their witness statements are at pages 191, 202, 218 and 239 of the bundle.

21. There are several documents in the bundle which refer to the Claimants being based at the Leicester Academy. In particular: -

21.1 An e-mail sent from Sian Shaw, HR Adviser to Natalie Bircham on 13 September 2018 (page 199) which confirmed: -

“All other terms and conditions including your base currently remain unchanged. Please note that as your base is Leicester, you will not be able to claim mileage to and from this site...”.

21.2 A letter sent to Holly Redfern from James Page, HR Assistant regarding a job offer dated 23 November 2015 (page 203). It confirms: -

“Your job will be based at our academy in Leicester.”

21.3 Ms Redfern’s contract of employment dated 1 December 2015 (page 209) confirms at clause 5.1: -

“Your normal place of work will be on the client’s premises specified in your offer letter (Leicester).”

21.4 A letter sent to Ms Seel from James Page, HR Assistant, re job offer dated 31 March 2015 (page 219) confirms: -

“Your job will be based at our academy in Leicester.”

21.5 Ms Seel’s contract of employment dated 5 April 2015 (page 225) confirms at clause 5.1: -

“Your normal place of work will be on the client’s premises specified in your offer letter (Leicester).”

21.6 Ms Sutton’s contract of employment dated 9 October 2015 (page 254) confirms at clause 5.1: -

Your normal place of work will be on the client’s premises specified in your offer letter (Leicester).”

22. All the Claimants referred to above confirm in their witness statements that they were based at the Leicester academy even though their jobs did involve visits to other sites as of their employer.

23. It is the first Respondent's contention that there were not 20 or more people based at the Leicester establishment and no evidence has been produced to me that there were 20 or more people based at this location.

24. I have seen the payroll spreadsheet which lists a total of 6 employees based in Leicester which includes Ms Redfern and Ms Seel. There are 5 individuals on the payroll spreadsheet stated as based in the "East Midlands cluster" but without a specific office location which includes Ms Bircham. Her contractual documentation makes clear that she was based at Leicester. I am satisfied having viewed the statements and the documentation provided to me that there were only 11 employees based at the Leicester establishment.

25. I am satisfied that the Leicester establishment is not part of any East Midlands cluster which includes other offices in that area. The East Midlands cluster as described in the payroll is not an establishment where the claimants could have been employed.

Middlesbrough

26. This only affects the Claimant Rachel Thompson who the first Respondent contend was based at their office in Middlesbrough.

27. Rachel Thompson's contract of employment dated 12 October 2016 is at page 285-296. Clause 5.1 states as follows: -

"Your normal place of work will be on the client's premises specified in your offer letter (Middlesbrough) but the employer reserves the right to change this on a temporary or indefinite basis as the business requires. Any changes will be discussed with you at the time and agreement reached prior to the change taking place."

28. The payroll spreadsheet lists a total of 4 employees based in the North East Cluster - Middlesbrough, including Ms Thompson. There is a further individual who is said to be based in the North-East cluster but without a specific office location. I understand that this individual was not located at Middlesbrough. Even if that individual was there would only be 5 employees based at Middlesbrough.

29. I have seen Ms Thompson's e-mail of 26 February 2020 at page 284. She referred to her contract of employment and the term of it but I have referred to above. She goes on to say: -

"I was promoted to Digital Marketing Sector Lead for the North East and Yorkshire and Humberside. My role as sector lead involved me supporting regionally, will regularly travel to all academies in the North East and Yorkshire and Humberside. I spent a lot of time at Sheffield academy with regular trips to Derby to meet with the Head of Digital Marketing.

To confirm, my place of work varied and included academies in Middlesbrough, Newcastle, York, Leeds, Hull, Sheffield and Derby."

30. There is no documentary evidence provided to support this assertion that she mainly worked at Sheffield. The only evidence I have before me about the establishment where Ms Thomson was engaged is her contract of employment which clearly states that she was engaged at Middlesbrough. I am satisfied that that was the establishment where she was based for this claim.

31. In any event the payroll spreadsheet provided to me lists only a total of 14 employees based in Sheffield. There are a further 3 individuals on the payroll spreadsheet stated as being based in the Yorkshire and Humberside cluster but without a specific office location. Even if these and the Claimant Rachel Thompson were added there would still only be 17 employees at the Sheffield establishment.

Newcastle

32. It is contended by the first Respondents that the following were based at their office in Newcastle, namely: -

- Phil Dorn
- Barbara Robson
- Colin Wilkinson

33. They contend that the Newcastle office was itself an establishment. It had less than 20 employees based there and I now deal with the facts in respect of each of these individuals: -

Phil Dorn

33.1 His contract of employment is dated 3 October 2017 (page 420) and confirms at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Newcastle).”

34. The payroll spreadsheet lists a total of 11 employees based in “North East cluster – Newcastle” which includes Mr Dorn. If Mr Wilkinson was included at that establishment there would be 12 employees at that establishment.

35. In Mr Dorn’s statement dated 10 March 2020 (page 417) he says:

“I was employed as a tutor for Customer Service Management IT and Administration covering the North East and North Yorkshire. This involved travel all over the above region including working from Sheffield, York and on occasion the Derby offices.”

36. He produced no documentary evidence and does not assert at which establishment he says he was based contrary to his contract of employment. I am satisfied that he was based at Newcastle. The fact that he travelled to other sites does not alter the establishment where he was based namely Newcastle.

Mr Wilkinson

37. It is Mr Wilkinson’s assertion in his witness statement:

“The main centres I spent time in were Sheffield and the North East. I would attach my claim to the Sheffield site. The site is where most meetings I had with my line managers/Directors under the Regional Managers.”

38. He produced no documentary evidence to support his contention and particularly no evidence to support his contention that he was based at Sheffield. In any event I have already determined on the evidence that I have seen that there were less than 20 employees based at Sheffield in any event.”

39. On the contrary I am satisfied that the establishment where Mr Wilkinson was based was Newcastle. I rely on the following pieces of evidence namely: -

39.1 A letter sent to Mr Wilkinson from Jessica Ford, HR Assistant re a job offer letter dated 1 September 2014 (page 310). It confirms:

“Your job will be based at our academy in Newcastle.”

39.2 An employee change form dated 29 June 2017 (page 315) confirms that Mr Wilkinson’s “home academy will be Newcastle with expectations to cover the North East.”

40. As stated above Newcastle does not have an establishment with 20 or more people. Although he does not specifically contend this I am satisfied that the establishment where he was employed was not a cluster known as the North East cluster.

Mrs Robson

41. Mrs Robson’s contention in her witness statement (page 316) is that:

“When I commenced employment Middlesbrough academy had not yet opened and I was classed as home based from the start of my employment. This continued as my learners were based at various locations across Yorkshire and Humberside and then the North East regional area.”

42. She goes on to say that from 1 October 2015 she covered a large geographical area regularly travelling to academies in the North East and Yorkshire and Humberside. She refers to a total of 10 different academies she worked at.

43. She then goes on to say:

“I was promoted to Professional Services Sector Lead for the whole country from February 2018 and was responsible for having regular update meetings with senior colleagues. I was also trainee IQA which saw me travelling to Peterborough and Preston. Remote appointments were also conducted regularly with management teams with professional services.

Although my original contract stated Middlesbrough, I was home based

and have 3 years of expense claims to back this up, which can be provided showing the range of areas covered and also regular frequency.”

44. It is the first Respondent’s contention that Mrs Robson was based at Newcastle as per the payroll spreadsheet. Mrs Robson’s contractual documentation suggests she was based in Middlesbrough. I have seen the following documents: -

44.1 A letter to Mrs Robson from James Page, HR Assistant regarding a job offer letter dated 26 August 2015 (page 318) which states:

“Your job will be field based covering the North East of England with your base for work being our academy in Middlesbrough.”

44.2 Mrs Robson’s contract of employment dated 26 August 2015 (page 324) confirms at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Middlesbrough).”

45. I am satisfied that in fact Mrs Robson was based in Middlesbrough on the balance of probabilities. I have not seen any documentary evidence to support the case that she was based anywhere else. She may well have worked from home but I am satisfied the establishment which was her base was as per her contract, namely Middlesbrough. That establishment did not have 20 or more employees based there.

Manchester

46. This relates to Garry Bennett only. In his witness statement (page 270) Mr Bennett confirmed that he was a business manager based at Manchester and attached his contract of employment which is at pages 271-284 and that confirms at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Manchester).”

47. The payroll spreadsheet listed a total of 9 employees based at Manchester including Mr Bennett. There are a further 5 individuals on the payroll spreadsheet stated as being based in the North West cluster but without a specific office location. Even if these individuals were based in Manchester the number of employees in the Manchester establishment would be no more than 14.

48. There is no evidence that Mr Bennett was based at some “North West cluster” referred to by his solicitors. There is no evidence that the North West cluster formed an establishment.

London - Kings Cross

49. This relates to 4 of the Claimants, namely: -

49.1 Chloe Britton

49.2 Ami Elizee

49.3 Anthony Emmanuel

49.4 Mohammed Nahedus Zaman

50. I have looked at their witness evidence which is at pages 334, 364, 379 and 397 of the bundle.

51. Ms Britton acknowledged that she had a contract of employment which stated that her base was at London, Kings Cross academy. She also said that she worked covering the South East of England including academies at Chelmsford, Maidstone, Kings Cross and Romford and that she also had to attend the Derby head office for meetings (page 334).

52. Her contract of employment dated 29th of January 2018 at page 350 – 360 states at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Kings Cross) (page 352).”

I am satisfied that the fact she covered several academies in the South East did not change her base as per her contract. That the establishment where she was based was London King’s Cross

53. In her statement Ms Elizee (page 364) says that she supported various offices and would often complete recruitment days in locations such as Reading, Chelmsford, Guildford and Brighton. She also took an additional role as a pastoral welfare lead for the South East area and was responsible for commuting to various locations in the south east and supporting learners with any concerns.

54. Her contract of employment dated 3 March 2016 (page 367) confirms at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Croydon).”

55. I have also seen a letter sent to Ms Elizee from Sian Shaw, Human Resource Adviser re changes to terms and conditions of employment dated 21 December 2017. The letter confirms with effect from 2 January 2018 that her base would change to “Kings Cross” and it had been agreed that she would:

“Work 4 days per week at the Kings Cross academy and one day per week from home (page 376).”

I am satisfied that the fact she covered several academies in the south-east did not change her base as per her contract. That the establishment where she was based was Croydon.

56. In Mr Emmanuel’s statement he says that he was engaged as Regional IT and Functional Skills Trainer which entailed him travelling across the UK to various sites and providing delivery support in technical subjects and functional skills to both apprentices and trainers.

57. His contract of employment dated 12 June 2015 (page 382) confirms at clause 5.1:

“Your normal place of work will be on the client’s premises specified in your offer letter (Croydon).”

58. In a letter sent to Mr Emmanuel from Rachel Doulton-Thorpe, Regional Performance Director re changes to terms and conditions dated 29 March 2017 (page 395) it says:

“With effect from 1 May 2017 Mr Emmanuel’s base would change to “Kings Cross” with national travel.”

I am satisfied that whilst Mr Emanuel’s duties may well have taken him to different academies throughout the UK it did not change the establishment at which she was based, namely London King’s Cross

59. In Mr Zaman’s statement (page 397) he says that he was employed as an IT Tutor and that his role during the time with the company was the delivery of the information technology level 3 and level 4 apprenticeship standards to IT apprentices. He does not state at which establishment he was based.

60. I have seen a letter sent to Mr Zaman from James Page, HR Assistance re a job offer letter dated 24 August 2015. It confirms:

“Your job will be based at our academy in Kings Cross (page 398).”

61. Mr Zaman’s contract of employment dated 27 October 2015 confirms at clause 5.1 (page 404):

“Your normal place of work will be on the client’s premises specified in your offer letter (Kings Cross).”

I am satisfied that the establishment where he was engaged was London King’s Cross.

62. The payroll spreadsheet lists a total of 8 employees based at South East cluster – Kings Cross including all these Claimants. There were a further 3 individuals on the spreadsheet who were based in the South East cluster but without a specific office location. There is no evidence at all that there were 20 or more people based at the Kings Cross location.

The law

63. I have seen the submissions made by the Claimants and their representatives and the first Respondent.

64. The relevant legislation is section 188(1) of the TULRCA which provides a requirement that an employer should consult where it is:

“Proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.”

65. The relevant case law is as follows: -

- **Rockfon A-S v Specialarbejderforbundet I Danmark** [1996] CR673
- **USDAW and Another v Ethel Austin Limited and Others** [2015] ICR675
- **Athinaikim Chartopoiia AE v Panagiotidis and Others** [2007] IRLR284

66. This case law establishes as the first Respondents say: -

66.1 When determining whether a particular place of work is a separate establishment for the purposes of the TULRCA it is the entity (or unit) to which the workers made redundant are assigned to carry out their duties which will constitute their respective establishments.

66.2 When considering whether a certain place will be an establishment, the following factors may point to a separate establishment existing: -

- a) There is a distinct entity;
- b) with a certain degree of permanence and stability;
- c) which is assigned to perform one or more tasks and;
- d) which has a workforce technical means and a certain organisational structure to allow it to do so.

66.3 However there is no need for an establishment to have the following: -

- a) Legal, economic, financial, administrative or technical autonomy;
- b) a management which can independently affect collective redundancies;
- c) geographical separation from the other units and facilities of the undertaking.

66.4 Each case will turn on its own facts.

67. It is the first Respondent's position that I should consider the contract of employment for each disputed Claimant in conjunction with the payroll spreadsheet.

68. It is contended by the first Respondents that each of the different office locations were a separate establishment for the purposes of section 188(1). They point out that none of the disputed Claimants or indeed for the completeness of any of the Claimants in the proceedings saw in their witness statements to assert the establishment should be wider than this.

69. Messrs Simpsons Solicitors for Bircham, Sutton, Seel, Redfern and Bennett seek to assert that a "cluster" which is a group of different offices within

one geographical location e.g. North West cluster amounts to an establishment. There is no evidence produced in support of this submission though.

My conclusions

70 I am satisfied that the Claimants have failed to demonstrate that they were employed at an establishment with 20 or more people. That all the disputed Claimants place of work was at a particular office location. None of those locations had 20 or more employees who were made redundant.

71. In particular,

71.1 Ms Bircham, Ms Redfern, Ms Seel and Ms Sutton were all based at the Leicester office and that location had fewer than 20 employees.

71.2 Ms Thomson and Mrs Robson were both based at Middlesbrough and that this location had fewer than 20 employees.

71.3 Mr Dorn and Mr Wilkinson were both based at Newcastle and that this location had fewer than 20 employees.

71.4 Mr Bennett was based at Manchester and that this location had fewer than 20 employees

71.5 Ms Britton, Ms Elizee, Mr Emanuel and Mr Zaman were all based at London King's Cross and that this location had fewer than 20 employees.

72. For all these reasons therefore, these claims fail and are dismissed.

Schedule 1

Claimant's name	Case number
<u>Natalie Bircham</u>	<u>2602903/2018</u>
Holly Redfern	2602904/ 2018
Sharon Seel	2602905/ 2018
Ruth Sutton	2602906/ 2018
Rachel Thompson	2602569/ 2018
Colin Wilkinson	2602571/ 2018
Gary Bennett	2601674/ 2019
Barbara Robson	2503574/ 2018
Chloe Britton	2206554/ 2018 & 2206555/2018
Amy Elizee	2206557/ 2018

**Case No: 2602903/2018
and Others (see below schedule)**

Anthony Emmanuel	2206558/ 2018
Mohammed Nahiduz Zaman	2206560/ 2018
Phil Dorn	2503406/ 2018

Schedule 2

Claimant's name	Case number
Nyla Ahmed	2600212/ 2019
Louise Freeman	2600112/ 2019
Lauren Burrows	2600104/ 2019
Emma Lawrence	2206556/ 2018
Craig Thomson	2206561/ 2018
Matthew Cuzner	2206559/ 2018

Employment Judge Hutchinson

Date: 29 June 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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