EMPLOYMENT TRIBUNALS

Claimants: Miss D Hayes
Ms C Burr
Ms L Salford
Ms J-L Stewart

Respondent: Petspyjamas Limited

Heard at: Manchester (by CVP) **On:** 1 and 2 February 2021

Before: Employment Judge Ross(CVP)
Mrs C Linney (CVP)
Ms D Kelly (CVP)

REPRESENTATION:

Claimants: Miss D Hayes (Claimant)
Respondent: Mr Sanders (Counsel)

JUDGMENT with reasons having been given orally and sent to the parties on 24 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This was a preliminary hearing to decide the following issue:

(1) Were Aimee Withrington and Florence Simons, whom the respondent treated as employee representatives in the collective consultation

redundancy process, 'appropriate representatives' within the meaning of s.188 TULR(C)A 1992 ("**s.188**")?

2. The claimants alleged that they did not have the opportunity to elect these representatives, that the respondent was in breach of its obligations of s188A(1) generally and that the representatives were therefore not *"employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)"* under s.188(1B)(b)(ii) TULR(C).

3. The respondent's position was that these employee representatives were freely selected by nomination by the affected employees, and that the claimants were given the opportunity to nominate representatives. No other representatives were nominated, and therefore those representatives were elected for the purposes of s.188 without any need for a formal ballot (see *Phillips v Xtera Communications Ltd* [2012] ICR 171 (EAT).

4. It was agreed that if the claimants succeeded on this preliminary issue liability is established, and if the respondent succeeded then the claims are defeated

5. We heard from all four claimants and from Mr Rushworth of the Respondent.

6. The respondent is a dog friendly travel destination website business, where pet owners can browse and book holidays for pet friendly hotels, bed and breakfast and cottages in the UK and in Europe. Unsurprisingly, it has been very badly affected by the COVID-19 pandemic, as have so many other businesses. It is a relatively small business with under 50 employees at the relevant time. It had a team of employed sales people working from home and it had a team of non sales people which included finance, marketing and technical staff. We rely on Mr

Rushworth's evidence that at the relevant time the actual number the business employed was 45 people, and we rely on the HR1 form (page 254) that 36 people were placed at risk of redundancy, comprising 26 clerical, five professional, four managerial and one technical.

7. Mr Rushworth's oral evidence was slightly contradictory in terms of the number of people who were actually made redundant. He eventually said 27 people were actually made redundant, and of those 22 were sales staff. We rely on the table on pages 363-365 which shows that 26 people were in fact made redundant, and on the table at page 359 which names the individuals. Accordingly, we find that there were 26 redundancies, with the sales team most adversely affected.

8. We find that the sales team were furloughed in March 2020 and we find that on 26 May 2020 the respondent wrote to the staff at risk of redundancy. We find the staff were sent an email and then a document described as a "DocuSign"

document which was described as being an “at risk of redundancy” letter. We find it is likely the email which was sent was the email of the type at page 68 of the bundle sent to Miss Hayes, with the DocuSign document embedded in the email at page 65. We are referring to that as the type of email because Miss Hayes, although she accepts she received the email, does not accept that she had the embedded document at the relevant time, and neither does Ms Burr, but the other two claimants accept that they did receive that embedded DocuSign document.

9. The DocuSign letter is lengthy. Within the body of the letter are two paragraphs about nominating employee representatives. One paragraph says, “We require one employee representative per group of workers whom you may elect by nomination”, and later elsewhere in the letter is a paragraph giving an email address to contact and a deadline by which to do this.

10. We rely on Ms Salford’s candid evidence that she did receive the DocuSign document but with the stress of the pandemic, worries about putting food on the table and personal responsibilities, she did not notice the paragraphs about electing an employee representative.

11. We rely on Ms Stewart’s email to Mr Rushworth on 26 May, the same date of the letter, where she specifically queries the nominations process to find that she had read and opened that document at the time.

12. We find that at least ten other staff had received that letter: Nicole, Imogen, George, Michaela, Tim, Sam, Ross, Natasha, Lauren and Catherine all responded to Mr Rushworth with their nominations (see pages 342 onwards) and we find that some of these employees were from the sales team (they are identified at page 360).

13. We find that Mr Rushworth was slightly unclear in his replies to the employees who queried the process. Nicole said on 28 May by email, “I am electing Emily as group rep if the company is doing that as a whole, or if the groups are in departments I would like to elect Aimee”, and he responded by saying, “No problem, will make a note”.

14. In response to Ms Stewart’s query on 26 May Mr Rushworth said, “With regards to nominations it’s nominate yourself or a fellow employee from sales team to represent the team”.

15. We find of those employees who made nominations, six employees nominated Florence Simons and four employees nominated Aimee Withrington.

16. We find the respondent required 2 representatives- one from the non revenue generating teams and one from the revenue generating teams (which included sales). We find of the two employees nominated, Aimee Withrington was for

the non revenue generating teams and Florence Simons for the revenue generating teams.

17. We find that at 11:25 on 29 May 2020 Mr Rushworth informed the staff by email that Aimee Withrington and Florence Simons had been nominated, and he added "If you have any questions or concerns please get in touch". We find that noone did.

18. On 29 May, slightly later on in the day, Mr Rushworth sent the HR1 form copying in Aimee Withrington and Florence Simons and naming them as representatives. We find that the redundancies took effect from 1 July 2020.

19. We find that Mr Rushworth's evidence was slightly confused in terms of the language he used to describe the process. He referred in evidence to an election and a ballot but of course there was no election and there was no ballot – there was a request for nominations, which was responded to by 10 employees. Only 2 individuals were nominated. Given that there were 2 positions for representatives and only 2 employees were nominated, we find the respondent dispensed with the need for a ballot and appointed the 2 nominees as representatives.

The Law

20. Where an employer is proposing to dismiss more than 20 employees at one establishment, the employer must embark on a collective consultation process. See s188(1) TULCRA.

"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."

21. In this case, the respondent accepted that s188(1) TULCRA 1992 applied.

22. To find out who the "appropriate representatives" are we must go to s1881B(1B) which states:

"For the purposes of this section the appropriate representatives of any affected employees are –

(a) If the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:–

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)."

23. It is agreed there was no recognised trade union in this work place and no other existing elected employee representatives. We find the relevant section is therefore "(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)".

24. For the sake of clarification, the claimants as individuals have no status to bring a claim about the collective consultation process overall, or about any failings of the collective consultation process if there were properly elected representatives in place. The legislation requires the elected representatives to bring forward any complaint to the Tribunal. None of the claimants are elected representatives.

25. The only way the individual claimants can bring a claim about the collective consultation process not being conducted in accordance with the legal requirement is if the elected representatives were not properly elected.

Applying the law to the facts

26. The respondent says it complied with the law in relation to election of employee representatives and the claimants say that it did not. It is for the respondent to show the election of the representatives was conducted in accordance with the law (see s189(1B) TULCRA 1992).

27. The question for the Tribunal is: what is the law about the election of the elected representatives? We turned to s188A(1) TULCRA 1996 which deals with this:

"(1) The requirements for the election of employee representatives under section 188(1B)(b)(ii) are that –

(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;

(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;

(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that –

(i) so far as is reasonably practicable, those voting do so in secret, and

(ii) the votes given at the election are accurately counted."

28. When we considered this section, we reminded ourselves first of all the purpose of the legislation, which is that in a largescale redundancy situation where 20 or more employees are likely to lose their jobs, an employer should consult collectively with representatives of the workforce.

29. We also reminded ourselves of the principle in the case of **Phillips v Xtera Communications Ltd 2012 ICR 171** that where an employer receives only two nominations for two positions of employee elected representatives there is no

requirement to hold a formal election. The two nominees can go forward as the elected representatives.

30. We now turn now to the first part of section 188A(1):

"(a) The requirements for the election of employee representatives are that the employer shall make such arrangements as are reasonably practical to ensure that the election is fair."

31. From the respondent's perspective they sent a letter via email to their employees informing them they could nominate an employee to represent their group of workers, and it gave time to reply. We find the respondent received only two nominations Aimee Withrington and Florence Simons. (The only employee who suggested another nominee said if that was for "the whole group", whereas the letter from the company clearly referred to nominations from "one employee representative per group of workers". That employee went on to nominate Aimee "if the groups are in departments".)

32. We therefore find that the respondent had 2 nominees for 2 positions, 1 nominee for each group of workers.

33. The respondent says, relying on the authority of **Phillips** they did not need to hold a formal election because they had 2 nominees for 2 positions ,1 for each group of employees (1 for revenue generating teams and 1 for non revenue generating teams) and therefore a formal ballot was not required.

34. The claimants argue the employer failed to make "such arrangements as are reasonably practical to ensure that the election is fair". First of all, two of the claimants Ms Burr and Miss Hayes said they did not get the embedded DocuSign document, only the covering email and so did not know about the election process.

35. The claimants also say the respondent did not properly explain the groups which were referred to in the letter. They also say the reference to the nomination process was in a very lengthy letter which itself was an embedded document in an email, and it was rather tucked away with a lot of other information. They also say that the next steps to be taken after nomination in any election process, were not made clear. Finally, they say that the timescale was too tight. (2 days).

36. We go back to remind ourselves of the legal test. It is not whether the employer adopted best practice, it is whether they made such arrangements as are reasonably practical to ensure that the election is fair.

37. We have borne in mind that this was done at a time of a pandemic and accept the evidence of Mr Rushworth that the respondent, a small business was in a dire situation. We find the redundancy consultation was urgent. We have taken

into account that the respondent communicated with its workforce, many of whom were on furlough, by personal email. We have taken into account that email is a prompt method of communication and these were employees used to working with emailthey worked remotely around the country.

38. We have taken into account the purpose of the legislation: that an employer should consult its workforce over the collective nature of this redundancy process.

39. The fact is at least ten employees did participate in the process to nominate a representative and we find this is consistent with the respondent's evidence that all affected employees were sent both the covering email and the DocuSign document.

40. We understand the claimants' frustration. In terms of best practice, it probably would have been better to have sent a separate email headed "consultation", giving a slightly longer timescale with a clear explanation of the groups, in other words sales and non sales, and the process after nomination had been completed. But that is not the legal test. The legal test is to make such arrangements as are reasonably practical to ensure the election is fair.

41. We find the respondent has discharged this duty. We find the employer had contacted its employees and received two nominations. There was no suggestion in this case that the process was fraudulent or rigged, and we rely on the emails from the other ten members of staff, some of whom were from the sales team, that there was a process in which employees could participate.

42. We rely on our finding that two of the claimants admitted they received both the covering letter and the DocuSign document giving details of the nomination process to find the respondent had attempted to contact all affected employees.

43. We find the time to reply was relatively short-2 days- but given the communication was via email and the situation was urgent, and the claimants were used to communicating via email,we find that is reasonable.

44. We remind ourselves of the authority of **Phillips**.Once the respondent had 2 nominations for 2 representatives, there was no obligation to proceed to a ballot. We remind ourselves that none of the claimants objected to the 2 employee representatives once they were informed of this despite the opportunity been given. On 11:25 on 29 May Mr Rushworth informed the staff that Aimee and Florence had been nominated, and he added "If you have any questions or concerns please get in touch". We find that no-one did.

45. We are therefore satisfied the respondent has discharged the obligation at s188A(1)(a).

46. We turn back to the legislation and to the second requirement at s188A(1) (b) which is that the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees. We find the respondent has discharged this obligation because it decided it would have two representatives, one for sales and one for non sales, and we find Aimee Withrington and Florence Simons were nominated one for non sales and the other for sales.

47. The next requirement at s.188A(1)(c) is very similar: the respondent should determine whether the affected employees should be represented either by representatives of all the employees or by representatives of a particular class. We rely on our findings above that the respondent asked for nominations from representatives from particular classes i.e. a representative for sales teams and a representative for non sales teams. We find the respondent has shown it complied with this section.

48. The next requirement at s188A(1)(d) is that the employer should determine the term of office of employee representatives, so it is sufficient length to enable information to be given and consultations under section 188 to be completed. We consider that is clearly aimed at a situation where representatives might be made redundant or leave partway through the process. We find the two individual representatives Ms Withrington and Ms Simons remained employed and were in employment throughout the consultation process. Accordingly, we find they had a term of office of sufficient length to enable information to be given and consultations under section 188 to be completed.

49. The next requirement at s188A(1)(e) was that candidates for election as employee representatives are *affected employees* on the date of the election. We looked at this very carefully. Mr Rushworth said that both Aimee Withrington and Florence Simmons were within the pool at risk of redundancy. We did not have a copy of any letter sent to them showing that they were at risk of redundancy although we did have their names in the redundancy scorecard document at the back of the bundle which is evidence to show they were at risk.

50. However, we find whether or not the representatives were at risk of redundancy is not relevant.

51. It is not relevant because section 196(3) of TULR(C)A defines "affected employee" and it defines it very widely. "Affected employee" means any employee affected by the proposed redundancy. In a business of 45 employees where 36 employees were placed at risk and 26 of them were made redundant, over half the workforce, we find it is very clear that Aimee Withrington, who was the Marketing Manager, and Florence Simons, a Product Manager, would have been affected by the proposed redundancies even if they were not in the pool. The whole business was clearly affected by the proposed redundancies, and accordingly the respondent can show that that Section 188A(1) (e) is satisfied.

52. The next section is section 188A(1)(f) – that no affected employee is unreasonably excluded from standing for election. There was no suggestion of that by the claimants other than Miss Hayes and Ms Burr both saying that they did not receive the embedded document giving details of the election process, but even if that is right there was no suggestion that the respondent had done that intentionally or deliberately. If they did not receive the embedded document, and it is not clear whether they did or not (there was evidence going both ways), we are satisfied that they were not unreasonably excluded. The respondent had clearly made efforts for them to receive those documents and had intended them to do so. In addition, Mr Rushworth contacted all employees including Ms Burr and Ms Hayes notifying them of Ms Withrington and Ms Simons nomination and inviting anyone with concerns to get in touch. No one did so. We are therefore satisfied no affected employee was unreasonably excluded from standing for election.

53. We move on now to sections 188A(1)(g), (h) and (i). We find that these clauses are not applicable because they are about the process of the election if it proceeds to a ballot, and of course it did not in this case because the 2 nominated individuals became the 2 elected representatives as described above.

54. Accordingly for these reasons we are satisfied that the respondent has shown that the requirements in section 188A(1) for the election of the employee representatives have been met, and for that reason the claimants' claims must fail.

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Employment Judge Ross

Date: 25 March 2021

REASONS SENT TO THE PARTIES ON

05 May 2021

FOR THE TRIBUNAL OFFICE

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