EMPLOYMENT TRIBUNALS

Claimants: Mr Gary Cantelo
Mr Craig Ruff
Mr Ryan Cantelo
Mr Jonathan Elston
Mr Michael Hewitt
Mr Simon Green
Mr Nigel Clark
Mr Ian Cavanagh
Mr George Scott
Mr Steve Miller
Mr Jack Crompton
Mr Jamie Fisher
Mr Corin Foster
Ms Phoebe Bevan
Ms Michelle Collett
Mrs Elaine Twynham

Respondent: Perform 365 Limited (In creditors' Voluntary Liquidation) (1)
Secretary of State for Business, Energy and Industrial Strategy (2)

Heard: Remotely, via CVP (Nottingham) **On:** 21 July 2021

Before: Employment Judge Clark
Mrs J Rawlins
Mr C Goldson

Representation

Claimants: Mr G Cantelo, claimant and lay representative for all claimants.
First Respondent: Written representations.
Second Respondent: Written representations.

JUDGMENT

The unanimous judgment of the tribunal is that: -

1. It is declared that the first respondent failed to comply with its duties under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1989 in respect of all the individual claimants named above.

2. The claimants' claims for a protective award succeed.

3. It is just to order the first respondent to pay remuneration to each of the above claimants for a period of 85 days (the protective period).

4. The recoupment provisions apply.

REASONS

1. Introduction

1.1 This is a multiple claim for protective awards, each brought on an individual basis under s.189(1)(a) and (d) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). It arises from wholesale redundancy dismissals upon the first respondent's liquidation. All of the first respondent's employees were affected but we are only directly concerned with the claimants as this is not brought as a representative claim.

1.2 Today is a relisted final hearing. The first listing dealt with a late application by the first respondent, via its appointed insolvency practitioners ("IPs"), for an extension of time to submit an ET3 response. That application was granted but the time remaining was insufficient to deal with the substantive matters. No evidence was heard and it was postponed to today where it comes before a freshly constituted panel (albeit, coincidentally, including the same Employment Judge).

1.3 We have reserved the judgment as the respondents are not in attendance.

2. Issues.

2.1 At the previous hearing, the issues in the case were identified. The live issues for us today are: -

a) Whether the duty under s.188 of the 1992 Act was engaged. In essence, this is a question as to the size and meaning of the "establishment" at which the dismissals for redundancy were proposed. We refer to this as the establishment issue.

b) If the duty was engaged, whether the employer has failed to comply with that duty and if so to what extent. If there was a failure, whether to make a protective

award in addition to making a declaration to that effect. We refer to this as the protective award issue.

2.2 Two other potential issues were previously identified but neither is now a live issue before us. The first was whether the claimants had standing to present their claims. A preliminary assessment of jurisdiction was given at the previous hearing, subject to the matter being argued further before us. Neither respondent has sought to do so.

2.3 We have concluded that we do have jurisdiction to determine the claims. There was some misconception that Mr Cantelo was purporting to act in a representative capacity. He is not and each of the claimants has presented an individual claim, albeit in a multiple claim and following a multiple early conciliation process. The only obstacle to their right to bring an individual claim was if there was in fact any recognised trade union or elected employee representatives who ought to have done so. If there was, then none of the claims could proceed. Mr Cantelo's role is not as a representative claimant but as a lay representative for the other 15 claimants in respect of their, and his, individual claims. That is conceptually different from him bringing a representative claim on their behalf. It puts the claimants in the same position as if they had each presented their own individual ET1 claim form. It also means that if the claims succeed, it will not result in a representative order applicable to a class of employees beyond the individual claimants before us.

2.4 The second potential issue was that the first respondent raised the special circumstances defence in its ET3 but subsequently confirmed that that was not being maintained.

3. Evidence

3.1 The evidence before us is found in various sources. Neither respondent has attended. Each has given advance notice of its intention to rely on their written case found in their respective ET3 responses. The first respondent also relies on the skeleton argument filed by Mr Hignett of Counsel at the previous hearing and a witness statement made by Carolyn Best, a licenced insolvency practitioner of Begbies Traynor, and one of the joint liquidators of the first respondent. They, in turn, refer to two bundles in addition to the bundle prepared by the claimants all of which we have before us. Ms best has not attended this hearing. Both respondents have filed and served their written submissions in compliance with rule 42 of schedule 1 to the Employment Tribunal (Constitution and Rules) Regulations 2013 ("the rules") and we accordingly take into account everything before us. It does, however, necessarily mean that there has been no live evidence before us from the respondents nor has the written evidence been tested. Equally, Mr Cantelo's own live evidence has not been subject to cross

examination. We have kept that in mind when assessing evidence and through our own questions we have required Mr Cantelo to address matters arising in the contemporary documentation and matters raised by the respondents.

3.2 For his part, Mr Cantelo is not critical of the IP's. In his evidence and submissions, he explained convincingly why the state of affairs at the time the IP's became involved necessarily led to them gaining a limited picture of the business. He took us to evidence supporting the fact some of their advice on informing the employees was not followed as intended. There are actually very few critical disputes of fact between the claimants' evidence and that of Ms Best. Where there is, we accepted Mr Cantelo's evidence.

3.3 At the previous hearing, the use of a lead case was explored and the other claimants were required to confirm, firstly, that they were represented by Mr Cantelo as a lay representative and, secondly, to give express consent to having their claims being determined on the basis of a lead case. Alternatively, they were to attend and adduce their own evidence. All have since confirmed they are content to stand by the decision reached on the evidence adduced on their behalf (albeit this does not deprive them of their right to apply under rule 36(3) of the rules).

3.4 The evidence for the claimants is contained in an updated bundle and updated witness evidence from Mr Cantelo in his statement dated 16 March 2021.

4. The Facts

4.1 The first respondent was formed in 2005 and provided, stocked and maintained vending machines principally set in washroom settings in the hospitality sector and at till areas in the retail sector. It was formed out of an administration of a previous business which was itself formed out of some earlier insolvency process. Much of the workforce is long serving and has lived through those previous two insolvency processes. This was their third experience.

4.2 It is common ground that the respondent employed around 22 employees in total at the relevant time (one post being vacant). There is a difference between the breakdown of staff provided by the claimants and that found in the IP's statement of affairs. We prefer Mr Cantelo's evidence as he organised payroll and was able to explain why there may be differences but nothing of substance turns on the differences. In short, we find there were 8 field engineers at the material time, one having already resigned and left in or around March 2020. There were 13 other staff made up of warehouse, customer services, management and executive directors. There is no dispute those 13 formed one establishment at the Tamworth office. We have included the executive directors in that total as they appear in both party's evidence and, whatever other capacity they held in the first respondent, we accept that they were paid

through the payroll as employees. However the total number is broken down, the critical implication of these numbers is that there are enough to engage the duty to consult if they are all at one establishment, and not enough if they are not.

4.3 We find the first respondent contracted for online HR advice and was provided with template forms and contracts. All employees, whether field engineers or otherwise, worked under the same written terms, so far as is relevant. The key clause being clause 1 of section 1 which states: -

> ***1. You will be based at the Company address shown on page one but you will be expected to work at such other locations as is necessary to fulfil your duties.***

4.4 The address identified on page one to which that clause refers states

> ***14 Darwell Park***
> ***Mica Close***
> ***Tamworth***
> ***Staffordshire***
> ***B77 4DR***

4.5 We accept Mr Cantelo's evidence that this was deliberate for a number of reasons being: -

a) That the geographic patches are not fixed and where engineers worked changed from time to time based on the runs or routes the company had to service across the country.

b) That all staff were expected to work on national roll outs such as the Lidl contract which took the field engineers off their more local work.

c) To provide operational flexibility to cover sickness and holidays.

d) To provide a central focus for team building, team briefs and product training and other collective working.

e) To provide an alternative work base in the rare situations that work could not be planned on the engineer's usual routes so that machine maintenance would be performed on the Tamworth warehouse stock instead.

f) So that engineers could be swapped and directed to work in different areas without contractual restriction. On this point in particular, we accept it was a regular and deliberate part of the way the business was run for the purpose of audit and, in particular, cash and stock control. This is a cash collection business and there is a need to retain the trust in, and integrity of, the lone workers entrusted to collect large values of cash. For that reason, not only are there no

"borders" to what might be thought of as regions or patches, but engineers are regularly and deliberately deployed to undertake work on daily "run" in what might be thought of as another field engineer's area to double check stock and cash takings.

4.6 We find there is no sense of property or ownership in a patch or region. Whilst the local engineer undoubtedly has greater familiarity and connection with the routes they run more frequently, this is not a state of affairs to be seen by analogy to cases involving, say, sales representatives' patches where commission or bonus may be at stake and where boundary disputes arise for that reason.

4.7 We find all engineers were rostered from week to week to perform certain "runs" or routes to maintain, restock and service vending machines. We find those runs or routes covered the entire country. The recruitment of field engineers who happened to live within what might be thought of as a region or patch was led by the convenience for the employee. Longer driving days could not always be avoided and sometimes were necessary. We find that weekly roster included time at Tamworth on a weekly basis. That was necessary not only for training and team building and other administrative matters but because the stock and machinery was kept there. The engineers would restock from the Tamworth warehouse from week to week. We find that system applied to all field engineers, the only modification being that the engineers living in Kent and Scotland had larger vans than the others so that they could carry roughly two weeks' worth of stock and reduce the frequency with which they had to attend Tamworth. Apart from frequency, their routine was the same as all other engineers.

4.8 A focus of the first respondent's argument is the use of lock ups in which machines were stored. We find that not all engineer's had access to a lock up in their locality. The lock up facility was introduced purely in response to winning one particular major supermarket contract which included a new contractual term that the respondent had to provide a 48-hour replacement to damaged or defective machines. The lock ups were introduced to deal with the fact that some of the more remote parts of the country may not be able to meet that deadline by returning to Tamworth for replacement parts or an entire machine. Spares of that single type of vending machine were therefore kept at strategic locations around the country to facilitate the quick response. Whilst it may appear that engineers had a lock up "in their region", we therefore find that is not really the case. Engineers typically undertaking routes across the middle belt of the country could as easily return to Tamworth and so did not. Additionally, access was not limited to the engineer living in that area. It is also significant that this was specifically linked to one particular contract, meaning they only stocked replacement machines in respect of that supermarket contract. It did not keep replacement parts or machines for the other machines installed in other customer premises nor was it used to hold

supplies of the products sold in the machines. It did not affect the need for the engineer to maintain their regular visits to Tamworth.

4.9 The contracts of employment also record that ***"there is no collective agreement which directly affects your employment".*** We find that trade unions were not recognised to collectively represent any employees of any description and nor were there any elected employee representatives, whether of a general or specific remit.

4.10 We find all administration including leave, pay, hours, holiday etc was organised by the managers at Tamworth and any matter requiring attendance at meetings would take place at Tamworth. We also find the managers and other staff based at Tamworth would themselves be required to cover runs from time to time which could happen anywhere in the country.

4.11 The first respondent has experienced difficult trading over the preceding 4 years or so but it looked as though it may have improved its fortunes with a new significant client coming on line in 2020. Unfortunately, COVID and the associated lockdown hit and had a devastating effect on the company's ability to survive.

4.12 From 30 March 2020, all staff were placed on furlough leave. This was clearly independent of the financial situation but did not help. The relevance of this matter is that we find it was common for company-wide issues to be communicated to staff in writing as was the case with the associated furlough letters and agreements. We find there was also a culture of seeking signed confirmation that official correspondence such as this had been received. We find this is the last example of such a matter before the dismissals. There was nothing else relating explicitly to the employee's dismissal save what might be inferred from what followed.

4.13 On 9 June 2020, the first respondent held a zoom catch up meeting with all staff. It seems all staff were invited but only approximately 11 attended. Neither the notice for that meeting nor the discussion at the meeting itself made any mention of the company's financial difficulties or the possibility of redundancies albeit it was clearly obvious by then to those running the business that they were facing difficulties.

4.14 On 28 June 2020 the directors of the first respondent approached Begbies Traynor for advice about the company's financial position. The advice resulted in a Board resolution that the company was unable to pay its debts and it would, in due course, cease to trade on 28 July 2020. Before then, the financial situation became known to the employees. The focus at that stage was to find a potential buyer. On 1 July 2020 a firm called Eddisons was instructed to value the business and consider potential purchasers. Mr Castelo was involved in those discussions and entered into correspondence with Ms Best about the accounts and assets. Mr Castelo continued his

relationship with Ms Best on the practical implications of what was happening including the need to make payments for fuel cards as one of the First Respondent's bank accounts had been frozen. There was concern that the employees may “fear the worst”. Further operational discussions took place including rent payments for the lockups.

4.15 It is common ground that nothing was therefore said to the employees at this stage to inform them that their employer was contemplating redundancy dismissals. As a fact, however, we find Mr Abrams had completed the HR1 notice to the Secretary of State the day before on 30 June. Its content is illuminating. Box 3 requires the employer to identify the establishment at which the redundancies are proposed. The associated guidance states that “*If you operate from more than one site, each one is treated separately for notification and consultation purposes*”. We do not know whether Mr Abrams had guidance that but, on balance, this seems more likely than not he did or that he received advice in like terms from those advising the first respondent. In any event he identified the single establishment at Tamworth only. The form then invites details of other addresses which is not completed. At this time dismissals were said to be proposed to take effect on 13 July 2020 and the reason for not giving the 30 or 45 day “notification period” (which we understand to mean notification to the Secretary of State, and not the employees although it reflects the same consultation periods) is said to be insolvency of the business. The number and types of employees proposed to dismiss by reason of redundancy “at <u>this</u> establishment” (our emphasis) is then set out identifying all 22 employees. Section 10, which deals with consultation and notification to employee representatives has been left blank.

4.16 By this time the employees were aware of the serious financial situation the first respondent was in. We have no doubt that the fact one’s employer is in financial difficulties would lead any employee to fear redundancies and that this was unsettling and worrying times. However, it needs to be seen in context of the history of this business. Many of the staff had been through this already, many twice before. They knew that cash businesses such as this were often viewed favourably by potential purchasers and there were, in fact, already interested buyers. All that meant the absence of explicit notice of potential redundancies resulted in a degree of reassurance to this particular workforce, at least relatively speaking.

4.17 On 15 July there were further discussions about the lock ups. Mr Castelo and Mr Abrams were advised not to seek the return of keys to the lock ups as this would be counterproductive and would likely create a panic amongst the staff that, we infer, was therefore not yet arising. In an email at this time, Mr Cantelo agreed that the engineers did not know about the detail of the present situation. Mr Cantelo himself was not at this time arguing that the employees ought to be warned about the risk of redundancies and consulted.

4.18 The prospect of a successful sale began to look increasingly less likely and on 22 July 2020, the IP advised the first respondent's MD to give notice to the staff. We find that did not happen. There is contemporaneous correspondence from him confirming to the IP that he "did it yesterday", that being 23 July, but we are satisfied that is not the case. It may be that there was notice of the state of the company and sale of the business, it may be that he was confused as to what he had been asked to do, it may even be that he simply misled the IP. We do not have to resolve anything more than the fact it did not happen. The later email correspondence from Mr Cantelo on behalf of the workforce and seeking information on what was happening confirms to us that they had not by then already been told they were at risk of redundancy.

4.19 On 29 July 2020 the IP wrote to all known creditors. That category included the staff with all of whom had potential claims for wages and notice other payments against the respondent. They were informed that the first respondent had taken steps to enter into a creditors' voluntary liquidation. It is a generic letter to creditors and says nothing about their individual employment situation.

4.20 There were emails between the IP and Mr Cantelo on 29 July and 30 July confirming that staff were

> ***still on notice of possible redundancy and that we would be contacting them over the next couple of weeks to arrange a conference call following the Liquidators appointment.***

4.21 Ms Best was mistaken about the staff "still" being on notice of possible redundancy based on what the MD had told her. Nevertheless, Mr Cantelo was told that he could inform the staff of this and we find he did.

4.22 Nothing material happened for around 4 weeks. On 20 August 2020 the IP sent a further letter to all known creditors. It enclosed the statement of affairs for the company as dated the previous day. Summarising, it identified a deficiency of around £2.2m.

4.23 A resolution to wind up and appoint liquidators was confirmed at a general meeting on 25 August 2020 and Mr Buttriss and Ms Best were subsequently formally appointed as the joint liquidators.

4.24 On 26 August 2020 all staff were invited to a further virtual meeting. The IP attended along with Mr Abrams, the MD. We find all employees were verbally informed they were all being made redundant with immediate effect.

4.25 A discussion about notice and consultation followed. We find the IP referred to the fact that they should all have had a letter from the first respondent. We find no such

letter had been sent. We find there was an exchange between IP and the MD about what should have happened which the MD did not answer.

4.26 In short, we find that whilst the staff will undoubtedly have known of the perilous financial circumstances since June, and whilst they will have known through Mr Cantelo's informal discussions at the beginning of August that redundancy was a real possibility if a sale could not be concluded, this was the first clear indication that redundancy was not only contemplated but actually happening and it was happening immediately.

5. The law

5.1 The principal domestic provision setting out the duty to consult in certain circumstances is section 188 of the 1992 Act. It provides, so far as is relevant: -

> ***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.***
>
> ***(1A) The consultation shall begin in good time and in any event—***
> ***(a)where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days , and***
> ***(b)otherwise, at least 30 days,***
> ***before the first of the dismissals takes effect.***
>
> ***(1B) 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).***
>
> ***(2) The consultation shall include consultation about ways of—***
> ***(a)avoiding the dismissals,***
>
> ***(b)reducing the numbers of employees to be dismissed, and***

(c)mitigating the consequences of the dismissals,
and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a)the reasons for his proposals,

(b)the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c)the total number of employees of any such description employed by the employer at the establishment in question,

(d)the proposed method of selecting the employees who may be dismissed, F7. . .

(e)the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect. F8[F9...

(f)the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.

(g)the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h)the parts of the employer's undertaking in which those agency workers are working, and

(i)the type of work those agency workers are carrying out.

…

(8) This section does not confer any rights on a trade union, a representative or an employee except as provided by sections 189 to 192 below.

5.2 Section 188(1B) is supplemented by s.188A which sets out the requirements for the election of employee representatives.

5.3 The focus in this case is the meaning of establishment. We have directed ourselves to the general principles on the meaning of establishment confirmed in USDAW v WW Realisation 1 Limited: C-80/14, [2015] IRLR 577, and its associated domestic judgments.

5.4 We have been referred to MSF v Refuge Assurance plc [2002] IRLR 324, by analogy to the situation in regional field staff where the establishment was held to be at the local office level. This is said to support the first respondent's contention that the

field engineers were assigned to regions, albeit not “branches” in those regions. It says the fact that there are no branches in the regions is merely a function of the size of the business and that it does not detract from its case that each region was an establishment. It relies on Rockfon A/S v Specialarbejderforbundet i Danmark: C-449/93, [1996] IRLR 168, per the ECJ at [33] for the proposition that 'the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy'

5.5 As to the protective award issue, the relevant part of s.189 of the 1992 act provides

> ***(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied.***
>
> ***(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.***
>
> ***(3) A protective award is an award in respect of one or more descriptions of employees—***
>
> ***(a)who have been dismissed as redundant, or whom it is proposed to dismiss as redundant,***
>
> ***And***
>
> ***(b)in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,***
>
> ***ordering the employer to pay remuneration for the protected period.***
>
> ***(4) The protected period—***
>
> ***(a)begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and***
>
> ***(b)is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer’s default in complying with any requirement of section 188;***
>
> ***but shall not exceed 90 days. . . .***

5.6 The law on quantifying any protected period is relatively settled. We have had regard to the guidance found in GMB v Susie Radin Ltd [2004] EWCA Civ 180 and accept the proposition advanced by the first respondent that this is meant to be punitive, that any award should be proportionate to the degree of fault or failing; that the starting point in a case of total failure is the maximum, with adjustment to reflect any features justifying a reduction and that it is a matter for us, assessing the facts and applying our just and equitable discretion.

6. Discussion and Conclusions

The Establishment Issue

6.1 Is it correct, as the claimants assert, to interpret these facts to mean all employees worked at a single "establishment"? Alternatively, is it correct as the first respondent argues, that there were a number of different "establishments" within this undertaking? Whilst it is arithmetically possible that a conclusion that there were two, or even three, establishments might still leave one establishment with the necessary 20 employees, the practical reality in the facts of this case in this small workforce is that a conclusion that there was more than one establishment will mean none of the affected employees' claims will succeed as none will have been working in an establishment "at which the respondent was proposing to dismiss as redundant 20 or more employees".

6.2 The factual focus for this issue has been on the team of field engineers. The question is whether they could be said to be part of the establishment operating out of Tamworth along with the other 13 staff or do the facts show their own geographic "regions" around the country amount to individual "establishments"? If the latter, not only will their individual claims fail because they will each have been working in an establishment of only one employee, but so too will the claims of all the other Tamworth staff as they will number only 13.

6.3 The meaning of establishment is sometimes difficult to pin down. The authorities provide guidance, typically by indicating matters of fact that are not necessarily required to exist before a situation could be said to amount to an establishment nor that they are necessarily determinative of the question if they do exist. It remains a matter for us to assess in the light of all the evidence and falls into that category of concepts which is often easier to recognise than to define. The concept of an establishment can be seen more easily when referring to a place or building occupied for a purpose. It can also refer to a collection of individuals working to a common aim or purpose or within some broader structure, whether physical or organisational. It usually comes with geographical separation but there may be cases where there is more than one establishment at the same geographical location. Where there is only one employee in each of the putative establishments and no meaningful physical presence by which it can be defined, the concept of an "establishment" becomes strained but we would accept the first respondent's submission, purely as a matter of law, that that does not necessarily preclude a separate establishment being found to exist where all the other surrounding facts supported that conclusion.

6.4 However, the factual basis on which the first respondent puts its case is not how we have found it to be. Moreover, there are other relevant facts missing from the picture it advances which when added to the totality, do not cast the same light on the situation as it seeks to portray. The contemporaneous documentation shows a divergence in how those running the business viewed the interrelationship between field engineers

and Tamworth and how the IP's have interpreted it. Of course, they interpret it not only at the time of crisis in the last few months of the business, but in any event at a time of turmoil arising from covid, lockdown and furlough. We make no criticism of them for that and nor does Mr Cantelo, but the findings we have reached paint a picture of a very small employer providing a national service to customers. The field engineers were so integrated into the single operation directed from and out of the Tamworth office and warehouse that there would have to be something significant to alter the balance of the picture created of what otherwise looks like a single establishment. When we look for the facts to support separate establishments in each region or patch they simply aren't there, either at all or certainly with sufficient weight to displace the notion of a single establishment. In fact, it is telling that there has been no attempt by the first respondent to define the regions themselves amounting to each establishment. So far as we can see, the reason for that being that they do not exist as such. The absence of any attempt to define with certainty what the alternative establishment is does not help the first respondent's argument. It is certainly the case that the person who would typically undertake the "runs" in, say, the Southeast of the country would be the field engineer who happens to live in Kent, but not exclusively so. It is also true that there are lock ups strategically placed at major conurbations to service the national supermarket contract but that is not to be equated with an office, branch or store at which a particular employee works and does not apply in the areas closer to Tamworth. The business and its managers and directors saw themselves as a single establishment in their day-to-day operation of the business and in how the redundancies were reported. That is not determinative but is a powerful sense check on our own independent conclusions of what these facts show.

6.5 Consequently, we are satisfied that the balance of the total factual picture before us is one of a single establishment. As a result, there was a sufficient number of dismissals proposed at the establishment within the necessary time frame for the duty to consult to become engaged.

The Protective Award Issue

6.6 In respect of that duty, there is no issue before us that the first respondent proposed to dismiss all of its staff, that is the necessary "20 or more", by reason of redundancy. There is no issue before us about the wider definition of redundancy in this case. There is no issue before us that all the claimants were employees and, more particularly, affected employees.

6.7 They each have standing to bring their individual claim by virtue of the fact there were no recognised trade unions and no elected employee representatives. That informs the nature of the statutory duty against which we assess the extent of failure to arrive at a protected period.

6.8 The first consideration is the election of employee representatives. It is for the first respondent to show that did in fact happen and it has not done so. That is not surprising as it is clear it did not in fact happen. However, when we look at the total picture, we note redundancy was contemplated by the first respondent by 30 June 2020 at the latest when Mr Abrams completed the HR1. This is not a case argued under special circumstances but we note there was ample time for that to happen, particularly in view of the small-scale workforce and the likely candidate for election in the form of Mr Cantelo. There is complete failure in this regard although we do recognise Mr Cantelo adopted some role in communicating with staff where he could.

6.9 The fact there was no election means the individual claimants also have standing to advance their claims under s.189(1)(d) in respect of any other failings. It is incumbent on us to consider whether anything that did in fact happen could be said to form part of what the law obliged the first respondent to do. If for no other reason than this provides a basis on which we might step back from the maximum protected period.

6.10 In that regard we cannot identify very much at all in the facts that could be said to have gone towards discharging that statutory duty. The duty is set out in section 188(2), above. In the absence of a special circumstances defence, the futility of embarking on satisfying those aims carries little weight. The most we can say is that the employees were on notice of the perilous state of the business from around June; that from August they became aware, of what they must have at least suspected before, that redundancy was possible and that they were then told of their dismissals at a meeting which would take immediate effect. There are cases that we have experience of where even those slim facts are not present such as where employees have turned up to work to find the locks changed on the premises completely out of the blue. It follows that we can conceive of more serious cases. In the context of what is in essence a penal provision with an explicit maximum sanction, the judicial principle always applied is that the maximum should be reserved for the most serious of cases. That therefore means we can and should step back from the maximum 90-day protective period in this case but the scope to do so does not allow us to step back very far. We have come to the conclusion this remains a case of a very significant failure which stands out by virtue of the fact there did appear to be time to engage with those duties. For those reasons we set the protected period at 85 days.

Employment Judge Clark
26 July 2021

Sent to the parties on:
13 August 2021

…….