



EMPLOYMENT TRIBUNALS

Claimant: Mr K Dhanda & others (as per attached schedule)

Respondents: (1) Simons Construction Limited (in administration)

(2) Simons Group Limited (in administration)

(3) The Secretary of State for Business, Energy & Industrial Strategy

Heard at: Leicester (via Cloud Video Platform)

On: 28 and 29 June 2021 (Reserved to 9 July 2021)

Before: Employment Judge Ahmed

Members: Mr R Loynes
Mr C Goldsmith

Representation

Claimants: Miss Nuala Toner, Solicitor
(save for Mr Dhanda who represents himself but not appearing at this hearing)

First and Second Respondents: No appearance but written representations submitted

Third Respondent: No appearance or representation

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The First and Second Respondents failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992;
2. The Claimant's named in the attached schedule are entitled to a protective award. The Tribunal orders the First and Second Respondents to pay remuneration for a

period of 90 days beginning on 31 October 2019.

REASONS

1. These reasons relate to a group of Claimants whose claims are contested. In an earlier consent Judgment, the parties agreed that a number of other claimants and employees of the First or Second Respondent were entitled to a protective award. Agreement could not be reached in respect of the Claimants in these proceedings. The reasons for that are not clear.

2. This case was originally scheduled for a full hearing from 28 June to 22 July 2021. Upon the Respondent's representatives confirming that they would not be taking part in the hearing but relying on written submissions only the length of the hearing was reduced to 2 days. Unfortunately, due to the legal and factual issues which arose during the course of the hearing it was necessary for the Tribunal to reserve its decision. The Tribunal met on 9 July to complete its deliberations. This decision represents the views of all three members of the Tribunal. In this documents "Construction" refers to the First Respondent and "Group" to the Second Respondent.

Background

3. The Respondent companies were engaged in the construction of commercial buildings at various locations. Their Head Office was in Lincoln. A number of employees of both Respondents were field-based and some were home-based. There were several construction sites in progress at any one time. The projects varied in size. There is no dispute that Group companies for the purposes of these proceedings are separate employers and should be considered as such.

4. On 26 March 2019, the Directors of the Respondents met with FRP Advisory to explore the options available to them in the light of forecasted declining cash balances and to improve the underlying performance of the businesses. Despite efforts to restructure the finances from July 2019 onwards, the position continued to deteriorate. On 29 October 2019 the Respondent companies went into administration. The first of the dismissals took effect on 31 October 2019.

5. There were originally 51 claims for a protective award categorised under several multiples of proceedings. The majority of the Claimants for the present proceedings have been represented by Miss Toner of Nualaw. Mr Dhanda, who is the lead Claimant, has represented himself throughout.

6. It is conceded by the Respondents that there was a failure to engage in collective consultation. The principal issue in this case is whether or not the Claimants were assigned to an establishment at which their employer (in each case either the First or the Second Respondent) proposed to dismiss 20 or more employees. It is agreed that if the Claimants are entitled to a protective award it should be for no less than for 90 days. It is also agreed that there was no recognised body or trade union for the purposes of collective consultation in respect of the obligations under Section 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") or any

elected representatives and so the Claimants are entitled to bring proceedings individually in their own name. The only other issue, in the case of Mr Dhanda only, is whether or not he has complied with the ACAS early conciliation procedure.

7. In relation to 36 of the 51 Claimants it has as indicated been possible to reach agreement between the parties. A consent judgment has been issued separately in relation to those Claimants. As for the remaining 15 Claimants (identified in the schedule attached to this order) the Respondents do not admit that they were assigned to a relevant establishment where the Respondent proposed to dismiss 20 or more employees.

8. The possible range of options as to where the Claimants might be assigned for the purposes of an establishment are:

8.1 the Lincoln Head Office;

8.2 to be 'field-based';

8.3 to be home-based;

8.4 to a scaffolding team;

8.5 to a specific construction site.

9. It is the Respondents' case that none of the disputed claimants were assigned to the Head Office. They say that all bar 4 were assigned to a specific construction site and the rest were all 'field-based'. It is agreed that none of the potential establishments set out in the preceding paragraph, other than the Head Office, had more than 20 employees at any one time.

10. The Respondents, who have been legally represented, have submitted representations in place of attending the hearing. That has no doubt been due to keeping the costs of the administration at a minimum. As such the Respondents representatives could not cross-examine any of the Claimants nor did they challenge the contents of their witness statements. We have however taken their written representations into account in arriving at our decision and we are grateful to them for the careful and detailed way in which they have set out their submissions. We are also grateful to Miss Toner who has produced detailed witness statements for each of her clients and has co-ordinated their appearance via video as well as dealing with questions from the Tribunal. The facts of the case are not largely disputed but where there is a dispute we accept the evidence of the Claimants. Some of the Claimants were unable to join the hearing and where that was the case they gave a reasonable explanation for their absence.

THE LAW

11. Section 188 of TULRCA states:

“(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.

12. The word “establishment” in section 188 of TULRCA is not defined by legislation and we have been taken to authorities which have set out the meaning of that word. It is now well established that the meaning of the term in domestic law is the same as that in European law through the EU Collective Redundancies Directive (98/59).

13. In **Rockfon A/S v Specialarbejderforbundet I Danmark [1996] ICR 673** the European Court of Justice held that ‘establishment’ means a unit to which the redundant workers are assigned to carry out their duties. It is not essential for the unit in question to have management which can independently effect collective redundancies.

14. In **Athinaiki Chartopoiia AE v Panagiotidis and others [2007] IRLR 284** the European Court of Justice confirmed that:

- The term ‘establishment’ is to be defined broadly;
- An establishment, in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks, and which has a workforce, technical means and certain organisational structure allowing for the accomplishment of those tasks;
- The entity in question need not have any legal, economic, financial, administrative or technological autonomy in order for it be regarded as an establishment;
- It is not essential for the unit in question to be endowed with a management that can independently affect collective redundancies in order for it to be regarded as an establishment.

15. In **MSF v Refuge Assurance [2002] IRLR 1365**, an Employment Tribunal found that whilst insurance field workers were assigned to their local branch offices, the establishment in question was the entire field staff. The EAT however overturned the decision because it did not accord with the principle laid down in **Rockfon** that ‘establishment’ means the unit to which workers are assigned. It held that as the Tribunal had found that each member of staff was assigned to a particular branch office, the relevant establishment was the branch office.

16. In **USDAW & another v Ethel Austin Ltd and others [2015] ICR 675** [the so-called ‘Woolworth’s case] the European Court of Justice confirmed, contrary to the view expressed earlier by the EAT, that the Collective Redundancies Directive (98/59) did not mandate that all establishments must be aggregated for the purposes of the 20 employee threshold. In other words, the definition of establishment in Directive

98/59 requires that account must be taken of the dismissals in each establishment considered separately.

Can being 'field-based' amount to an establishment?

17. The only case cited to us (or which we are able to identify) where it has been found that being 'field-based' could potentially amount to an establishment was **MSF v Refuge Assurance Plc**. However, the finding by the Employment Tribunal that the establishment of the employees was 'field-based' was overturned on appeal. There is therefore no decided case cited to us where being field-based amounts to an establishment.

18. We conclude that being 'field-based' does not amount to an 'establishment' either in law or on the facts of this case. Quite apart from the absence of authority we also rely on the following factors:

18.1 Being field based does not have the required degree of permanence or stability;

18.2 'To be field-based is more of a description of a role, not an establishment.

18.3 It is not something which has a workforce, technical means, organisational structure or any legal economic, financial, administrative or technological autonomy.

19. We should add that the term field-based is not utilised here to suggest that the employee is working from home as that is defined as a separate category.

20. If being field-based is not an establishment, we recognise that it does not necessarily follow that the default position must be that the claimants were then assigned to the Lincoln Head Office. We have therefore considered the facts of each claimant's case.

Mr Steven Deakin

21. Mr Deakin was the Senior Site Manager employed by "Construction". His employment was TUPE transferred in 1991 when the York office where he was based was closed and he was transferred to an office at Lincoln. He worked at various locations during his employment. The Respondents say he was assigned to the Angel project but that was only the last 10 months of an otherwise long career. He also worked on other projects, for example in Poole and in Ilford. He undertook training at Head Office where he worked regularly from time to time or between projects. We are satisfied he was assigned to the Lincoln Head Office.

Mr Paul Anderson

22. Mr Anderson was employed as a Site Manager by "Group" for a little over 2 years. Mr Anderson lived in Lincoln and was only 2.8 miles from the Head Office which he visited regularly although his contract of employment identified his place of work as being 'any site or workshop in the UK'. He travelled to various locations regularly including Hemel Hempstead and Braintree. The Respondents say that Mr Anderson

was assigned to Braintree but that was only a more recent project. The Claimant spent considerable periods of time on other projects at other locations. The Braintree project was only 10 months in duration and did not constitute the majority of his time with the Respondent. Mr Anderson regularly attended Head Office to deliver time sheets and expense records, to attend training courses and to attend meetings between projects. We are satisfied that Mr Anderson was assigned to the Head Office.

Mr Paul Ayres

23. Mr Ayres was a Site Manager with “Construction” also living in Lincoln, some 2 miles from the Head Office. Mr Ayres worked in different locations on fairly short duration projects lasting between a few days and 4 weeks. Mr Ayres’ line manager was based at Head Office. He regularly visited the Head Office for the purposes of IT and other duties. In between one project completing and another starting he would be based at Head Office where he would be given details on the next project. Thus, the return point was always Head Office. He was provided with a key fob and pass card to access Head Office facilities. We are satisfied that he was assigned to the Head Office location.

Mr Mark Bond

24. Mr Bond was employed by “Construction”. Mr Bond worked in various locations during his employment with no specified location. He regularly returned to Head Office between sites. It cannot be said that Mr Bond was assigned to any one of the particular sites. He worked in projects in Hastings, Grimsby, Birmingham and Basildon amongst others. He was in touch with Head Office almost every day and attended Head Office for training and meetings. Mr Bond lived a little over 6 miles from the Head Office and had a short journey to base which he attended regularly. We are satisfied he was assigned to the Lincoln Head Office.

Mr Michael Calcott

25. Mr Calcott was a Senior Project Manager with “Construction”. He lived some considerable distance from the Head Office but frequently worked on more than one project at a time. He has worked on projects in Sheffield, Horsham and Cambridge. His line manager was based at Head Office. Mr Calcott routinely attended and organised project meetings from Head Office and spoke to someone at Head Office almost every day. He was provided with an identification badge and had access to Head Office to use equipment if necessary. He received a car allowance and mileage to site and for travelling to Head Office. We are satisfied he was assigned to the Lincoln Head Office.

Mr Brian Edwards

26. Mr Edwards was employed by “Construction” for 11 years. During his time he worked at various locations. He appears to have spent the majority of his time at five locations working at construction sites for M&S, EE, John Lewis, Vodafone and Co-op. It does not appear that he spent a disproportionate amount of time at any one of those sites. His base was always Head Office where he would return between projects. We

are satisfied he was assigned to the Lincoln Head Office.

Mr William Lawler

27. Mr Lawler was employed by “Construction”. His home address was just 4 miles from the Head Office which he visited regularly. There is nothing to suggest, as the Respondent contends, that he was assigned to the ‘Buttermarket’ establishment which was a refurbishment project in Ipswich. There is no documentation or evidence in support of that proposition. The Buttermarket project had been ongoing for 4 years but Mr Lawler had been in employment since 2006 and had worked on many other projects in his time. Mr Lawler would work at Head Office between projects and no doubt when Buttermarket was completed he would have gone back to Head Office for the next assignment. He would sometimes spend up to 6 months at Head Office. He was always in regular contact with Head Office which he properly regarded as his base. His line manager was based at Head Office and when he left, his successor was also based at Head Office. Mr Lawler regularly relied on Head Office for all support functions. We are satisfied he was assigned to the Lincoln Head Office.

Mr David Lever

28. Mr Lever was employed by “Construction” as a Senior Project Manager. He spent the first three months of his employment exclusively at Head Office. Whilst at the time of the dismissal he was working from Braintree, this was simply the last project he was working on when the Respondent went into administration. During his employment he moved around between offices but his base was always Head Office. All of the administrative support he received was from Head Office. We are satisfied he was assigned to the Lincoln Head Office.

Mr Stuart MacPherson

29. Mr MacPherson was an employed by “Construction” as a Senior Site Manager. He regularly attended Head Office for training and meetings and was given a key fob to access Head Office. He is said by the Respondents to have been assigned at the Circle establishment, but no details are given as to how that could constitute an establishment within the meaning given in **Rockfon** and **Athenaika**. We are satisfied he was assigned to the Lincoln Head Office.

Mr Shaun Martin

30. Mr Martin was employed as a Senior Site Manager by “Construction”. He was said to belong to the UNA establishment which was a holiday village in St. Ives. This was an ongoing project at the time of administration but there are no details as to the infrastructure of the project given by the Respondents. Mr Martin was regularly at Head Office at the beginning of his employment and other than sometimes working from home the only other regular place of work was Head Office. He spoke to Head Office on a daily basis where his own line manager was located. All his time sheets, expenses and payroll services were provided by Head Office. We are satisfied he was assigned to the Lincoln Head Office.

Mr Andrew Matthews

31. Mr Matthews was employed by "Construction". He was a Site Manager having been employed since 1998. Although he lived some considerable distance from Head Office, he would regularly attend Head Office between projects, for meetings and training courses. He was regularly in touch with Head Office and in particular with HR for support. He is said to have been assigned to the 'Angel' establishment but no details are given of how or why Angel amounts to or could amount to an establishment. It simply happened to be the last project he was working on. Mr Matthews had worked at various projects including Cheshire Oaks, at the aforementioned Buttermarket project, at Hemel Hempstead amongst others but always returning to Head Office as his base for meetings, training and HR support. He had a key fob for access to Head Office. We are satisfied he was assigned to the Lincoln Head Office.

Mr Marat Mugttinov

32. Mr Mugttinov was employed by "Construction" as a Senior Project Manager. He worked in various locations but regularly attended the Lincoln Head Office and at least once a week where he had a desk allocated to him. He worked on many projects since he began employment in 2005 such as those at Braintree, Barnstaple, Milton Keynes and Scunthorpe. He was quite clearly assigned to the Head Office.

Mr Paul Samways

33. Mr Samways was a Site Manager employed by "Construction". He was employed for 4 years. His base was Head Office where his Line Manager was and then the Line Manager after him. He had a key fob to access Head Office where he attended regular meetings on a monthly basis and pre-start project meetings to new projects. He was engaged in various projects during his time. He spent nine months on three projects none of which were permanent or stable. We are satisfied he was assigned to the Lincoln Head Office.

Mr Robert Thorpe

34. Mr Thorpe was employed by "Construction" as a Senior Site Manager. Mr Thorpe lived in Leicester, which was some 50 miles from Head Office. He worked in various projects during his time and could not be said to be based at any one of them. He is said by the Respondents to be assigned to the Circle establishment, which was a 77- week project for health services Birmingham. However this project only lasted a year in the 10 years that the Claimant was employed overall. Mr Thorpe spent his time at Head Office on a regular basis in between projects and to obtain instructions from Head Office. He was in touch with Head Office on almost daily basis by telephone or email. All his admin was dealt with by Head Office. We are satisfied he was assigned to the Lincoln Head Office.

Mr Carl Lee

35. Mr Lee was employed by "Construction" for over 29 years and worked at various locations. It appears to be admitted that Mr Lee was assigned to the Head Office. Their

objections as to Mr Lee are not clear. After the reserved decision meeting but before this decision was signed the parties agreed Mr Lee's claim.

Mr Dhanda

36. In addition to the establishment issue, Mr Dhanda's claim is opposed on the basis that he has not complied with ACAS early conciliation. That objection is misconceived because Mr Dhanda has in fact emailed the Tribunal and the Respondent with a copy of his ACAS early conciliation certificate. What appears to have happened is that he made an initial error and his form was rejected. He then subsequently corrected the error and his claim form was accepted.

37. Mr Dhanda has not produced a witness statement. However, there is an email from him to the Respondent's representative of 13 November to which we attach the appropriate weight. Mr Dhanda was employed by "Construction". We are satisfied that whilst he spent time at different sites he always reported to Head Office. All the administration relating to his employment was undertaken at Head Office where he submitted his time sheets. We are satisfied he was assigned to the Lincoln Head Office.

Employment Judge Ahmed

Date: 16 September 2021

JUDGMENT SENT TO THE PARTIES ON

16 September 2021
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FOR THE TRIBUNAL OFFICE

Covid-19 Note

This has been a remote hearing by video which has not objected to by the parties. The form of remote hearing was by telephone. A face to face hearing was not held because it was not practicable due to the present Covid-19 Pandemic. All the issues could be determined in a remote hearing.

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claimant(s) and respondent(s) in a case.

SCHEDULE OF CLAIMANTS

	Title (Miss, Mrs, Mr etc)	First Name	Second name	Case number
1	Mr	Stephen	Deakin	2600499/2020 2600455/2020 2600411/2020 2600367/2020
2	Mr	Paul	Anderson	2600495/2020 2600451/2020 2600407/2020 2600363/2020
3	Mr	Paul	Ayres	2600496/2020 2600452/2020 2600408/2020 2600364/2020
4	Mr	Mark	Bond	2600497/2020 2600453/2020 2600409/2020 2600365/2020
5	Mr	Michael	Callcott	2600498/2020 2600454/2020 2600410/2020 2600366/2020
6	Mr	Brian	Edwards	2600502/2020 2600458/2020 2600414/2020 2600370/2020
7	Mr	William	Lawler	2600514/2020 2600470/2020 2600426/2020 2600382/2020
8	Mr	David	Lever	2600518/2020 2600474/2020 2600430/2020 2600386/2020
9	Mr	Stuart	MacPherson	2600521/2020 2600477/2020 2600433/2020 2600389/2020
10	Mr	Shaun	Martin	2600524/2020 2600480/2020 2600436/2020 2600392/2020
11	Mr	Andrew	Matthews	2600526/2020 2600482/2020 2600438/2020 2600394/2020
12	Mr	Marat	Mugttinov	2600527/2020 2600483/2020 2600439/2020 2600395/2020
13	Mr	Paul	Samways	2600531/2020

Case Number: 2603463/2019 and others

				2600487/2020 2600443/2020 2600399/2020
14	Mr	Robert	Thorpe	2600535/2020 2600491/2020 2600447/2020 2600403/2020
15	Mr	Kaldeep	Dhanda	2603463/2019
