Case No: 3306451/2020
3306674/2020
3307321/2020
3307076/2020
3307303/2020

EMPLOYMENT TRIBUNALS

Claimants: Mr M Riley
Miss Beata Skrypczak
Mr Christopher Perry
Miss Chrisel Foster
Miss Leena Gudka

Respondent: T M Lewin & sons Limited in administration

Heard at: Reading Employment Tribunal via CVP

On: 17 February 2022

Before: Judge Bartlett

Representation

Claimants: Mr M Riley and Miss Beata Skrypczak in person
No other claimants attended

Respondent: no attendance

JUDGMENT

1. All the claims of all the claimants are dismissed for want of jurisdiction.

Reasons

The Hearing

2. The hearing was listed for an open preliminary hearing to decide the following issue:

"To decide whether and to what extent the tribunal has jurisdiction to decide each claimant's claim for a protective award."

3. On 5 July 2021 notice of the hearing and that this issue would be considered was sent to the parties.

4. The hearing took place via CVP. Both Mr Riley and Miss Skrypczak had difficulties initially participating in the hearing. They both had difficulties with others being able to hear them and in the case of Mr Riley being able to see him. My clerk took some time to offer them assistance and by 10:36 both Mr Riley and Miss Skrypczak were able to fully participate in the hearing they could be seen and heard and they could see and hear everybody else. There were no other problems with communication or connection during the hearing.

The issues

5. I said to Mr Riley and Miss Skrypczak that their ET1s set out that they were only bringing a claim in respect of a protective award and asked them to confirm if this was the case. They both confirmed that they were only seeking a protective award.

6. I explained that this preliminary hearing had been listed so that it could be decided whether or not the tribunal had jurisdiction to hear the claims.

7. I said that I had seen correspondence on the file where the tribunal had asked the claimants how many employees had worked at the shops in which they worked. The number of employees at each shop each of the claimant worked at was in the region of 5 to 6 employees.

8. I asked Mr Riley how many employees worked at the Reading shop at which he worked and he said six employees.

9. I asked Miss Skrypczak how many employees worked at the shop at which she worked (which was the Oxford shop) and she said six or eight employees.

The law

10. S188 of Trade Union and Labour Relations (Consolidation) Act 1992 sets out the following:

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…

11. S189 of Trade Union and Labour Relations (Consolidation) Act 1992 sets out the following:

189 Complaint and protective award.

(1)Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground–

(a)in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b)in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c)in the case of failure relating to representatives of a trade union, by the trade union, and

(d)in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

12. In USDAW v WW Realisation 1 Ltd: C-80/14, which concerned redundancies following the liquidation of Littlewoods, the ECJ set out the following:

"46 The Court has already interpreted the term 'establishment' or 'establishments' in Article 1(1)(a) of Directive 98/59.

47 In paragraph 31 of the judgment in Rockfon (C-449/93, EU:C:1995:420), the Court observed, referring to paragraph 15 of the judgment in Botzen and Others (186/83, EU:C:1985:58), that an employment relationship is essentially characterised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties. The Court therefore decided, in paragraph 32 of the judgment in Rockfon (C-449/93, EU:C:1995:420), that the term 'establishment' in Article 1(1)(a) of Directive 98/59 must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential in order for there to be an 'establishment' that the unit in question is endowed with a management that can independently effect collective redundancies.

48 It is apparent from paragraph 5 of the judgment in Rockfon (C-449/93, EU:C:1995:420) that the Kingdom of Denmark — the Member State of the court

which made the request for a preliminary ruling in that case — had opted for the approach set out in Article 1(1)(a)(i) of the directive.

49 In the judgment in Athinaïki Chartopoiïa (C-270/05, EU:C:2007:101), the Court further clarified the term 'establishment', inter alia by holding, in paragraph 27 of that judgment, that, for the purposes of the application of Directive 98/59, 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 a certain organisational structure allowing for the accomplishment of those tasks.

50 By the use of the words 'distinct entity' and 'in the context of an undertaking', the Court clarified that the terms 'undertaking' and 'establishment' are different and that an establishment normally constitutes a part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units.

51 In paragraph 28 of the judgment in Athinaïki Chartopoiïa (C-270/05, EU:C:2007:101), the Court held that since Directive 98/59 concerns the socio-economic effects that collective redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'.

52 Consequently, according to the case-law of the Court, where an 'undertaking' comprises several entities meeting the criteria set out in paragraphs 47, 49 and 51 above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment' for the purposes of Article 1(1)(a) of Directive 98/59…

70 In the present case, it is apparent from the observations submitted to the Court that because the dismissals at issue in the main proceedings were effected within two large retail groups carrying out their activities from stores situated in different locations throughout the United Kingdom, employing in most cases fewer than 20 employees, the employment tribunals took the view that the stores to which the employees affected by those dismissals were assigned were separate 'establishments'. It is for the referring court to establish whether that is the case in the light of the specific circumstances of the dispute in the main proceedings, in accordance with the case-law recalled in paragraphs 47, 49 and 51 above.

71 In those circumstances, the answer to the first question is that, first, the term 'establishment' in Article 1(1)(a)(ii) of Directive 98/59 must be interpreted in the same way as the term in Article 1(1)(a)(i) of that directive and, secondly, that Article 1(1)(a)(ii) of Directive 98/59 must be interpreted as not precluding national legislation that lays down an obligation to inform and consult workers

in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers."

Decision

13. Mr Riley and Miss Skrypczak and other claimants in correspondence confirmed that the establishment at which each of them worked, which is the shop at which they work, had less than 20 employees. I find that the shop at which each claimant worked was an establishment. I recognise that the respondent had hundreds of employees at numerous different locations across the country. However following USDAW v WW Realisation 1 Ltd above the establishment at which an employee works is the unit to which they are assigned to carry out their duties.

14. Following Rockfon (C-449/93, EU:C:1995:420) which explains that to qualify as an establishment *'the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy'* and that *'it is, moreover, in this spirit that the Court has held that it is not essential, in order for there to be an "establishment", for the unit in question to be endowed with a management which can independently effect collective redundancies'.* I find that each shop was a separate establishment. Each shop had less than 20 employees. Therefore I find that no duty arose on the respondent under section 188 of TULCRA to consult and the Tribunal has no jurisdiction to make a protective award under section 189 of TULCRA.

15. The claimants' claim are dismissed in their entirety for want of jurisdiction.

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Employment Judge Bartlett

Date__17 February 2022__

JUDGMENT SENT TO THE PARTIES ON

18/3/2022

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FOR THE TRIBUNAL OFFICE

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