EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR G JORDAN (C1) MR I JONES (C2) MR H CHAUDHARY (C3) MR M BASHIR (C4)	AND	T M LEWIN AND SON (IN ADMINISTRATION) (R1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STATEGY (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 4TH MARCH 2022

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **C1 /C2 -IN PERSON**
C3/C4 – NO ATTENDANCE

FOR THE RESPONDENT:- **R1 – NO ATTENDANCE**
R2 – WRITTEN SUBMISSIONS

JUDGMENT

The judgment of the tribunal is that:-

The claimants' claims for a protective award are not well founded and are dismissed.

Reasons

1. By this claim the claimants all bring claims for protective awards arising out of their dismissals with immediate effect on 30th June 2020. The claimants all claim that there was a failure to consult in breach of s188 (1) Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) which provides that:-

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).

Summary

At a case management hearing on 3rd November 2021 I summarised the position then reached in the litigation:

" The administrator has given permission for the claims for a protective award (failure to consult in a collective redundancy) to proceed to hearing; and the claimants have confirmed that there was no trade union representation. A protective award can be made where an employer has dismissed by reason of redundancy, without appropriate consultation, at least 20 employees at a single establishment; and in the absence of collective representation individual employees may bring such claims. In this case the primary question to be resolved is whether the claimants were employed at a single establishment at which more than twenty employees were dismissed as redundant. The claim forms state that some 600 employees nationally were dismissed simultaneously without consultation. The question for the tribunal is whether TM Lewin nationally should be regarded as a single establishment and/or whether the individual stores should be regarded as single establishments and/or whether there is any other local or regional group of stores which can be considered a single establishment."

1. *I gave directions and since then the Secretary of State has been joined as a party but indicated that he will not be actively participating proceedings.*

2. *The tribunal which hears the claim will make the necessary factual findings but the following appears not to be in dispute:-*

   i) The entire workforce of the respondent was dismissed with immediate effect on 30th June 2020;

   ii) There had been no consultation prior to the dismissals;

   iii) There was no union representation;

   iv) No employee representatives had been elected;

   v) The total number of employees dismissed was in excess of 600.

3. *In those circumstances the only remaining factual issue is the identification of the single establishment and the number of employees working/based there. It is not in dispute that none of the individual branches to which these claims relate had more than twenty employees. It follows that if each is regarded as a single establishment that there will be no right to a protective award. Mr Jones (C3) has written stating that TM Lewin nationally should be regarded as a single establishment and Mr Jordan (C1) that the branches worked closely together with over 100 employees reporting to a Regional manager and that at least the region should be regarded as a single establishment. If either of these propositions is correct they will have established the right to a protective award."*

Issues / Evidence

2. The evidence I have comes from Mr Jordan and Mr Jones and they have confirmed that the factual propositions set out in the summary above are correct. The respondent ceased trading on 30th June 2020. All the six hundred or so employees were all dismissed with immediate effect on that day, and there had been no consultation prior to their dismissals. As a result the sole issue for me to determine is the identification of "one establishment" (the single establishment). If each store with which I am concerned (Bristol, Bath, and Cheltenham) is to be regarded as a single establishment the numbers dismissed as redundant are insufficient to attract a protective award. For today's hearing Mr Jones and Mr Jordan have given evidence and provided a relatively small number of documents. As set out above Mr Jones' position is that the respondent nationally should be regarded as a single establishment; and if I am not persuaded of that he adopts Mr Jordan's position that each region should be regarded as a single establishment.

3. There is a significant body of law on the meaning of "one establishment". In *Athinaiki Chartopoiia AE v Panagiotidis and others 2007 IRLR 284, ECJ* the ECJ confirmed that:

i) the term "establishment" is to be defined broadly so as to limit the instances of collective redundancy to which the Directive does not apply;

ii) 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;

iii) the entity in question need not have any legal, economic, financial, administrative or technological autonomy in order to be regarded as an establishment;

iv) it is not essential for the unit in question to be endowed with a management that can independently effect collective redundancies in order for it to be regarded as an establishment.

4. In *USDAW and anor v Ethel Austin Ltd and others (the" Woolworths" case)* The ECJ determined that it was a permissible approach to consider each individual store a single establishment; and in *Lyttle and ors v Bluebird UK Bidco 2 Ltd 2015 IRLR 577, ECJ*, it held that the establishment is the local unit to which the redundant employees are assigned to carry out their duties and that account must be taken of the dismissals effected in each establishment separately. The Directive does not require individual establishments to be aggregated for the purpose of calculating whether the 20-employee threshold has been reached.

5. The consequence in the Woolworth's case was that protective awards were only made to employees where more than twenty employees were dismissed as redundant at any individual store, and that most did not receive a protective award as a result. This approach was subsequently applied in a number of high profile national multi-store redundancies (e.g. the "Comet " litigation) where each separate store was held to be a single establishment. It has had the unfortunate effect of creating what is in essence a pot luck entitlement to a protective award for employees employed by the same employer and dismissed on the same day for the same reason, depending entirely on the number of employees who happened to be employed at an individual location. It is impossible not to feel sympathetic to those who find themselves in that situation, but the tribunal is obliged to apply the law as it is.

6. There is only one other judgment of which I am aware in relation to a similar claim arising out of these specific circumstances. In case number 1601702/2020 EJ Ryan dismissed a claim for a protective award for an employee based in the respondent's Cardiff store. He held that the store was the "establishment" and that as the store had less than twenty employees the right to a protective award was not made out. That decision would be persuasive but not binding on me, but in any event I do not know whether the point was argued, and if so on what basis, before EJ Ryan. As a result I will of necessity have to make a decision on the basis of the direct evidence before me.

Facts

7. The respondent was a national business which operated retail stores around the country. It was organised into four geographical regions, North, South, and London City and London West End. The four claimants in this case worked in its retail stores in Cheltenham, Bristol and Bath, all of which were in the South Region. None of the stores with which I am concerned had more than twenty employees, the evidence of Mr Jordan being that the average would be about eight to twelve. However the region consisted of fifteen stores and if it is to be regarded as one establishment it would

clearly have well in excess of twenty. Although I do not have precise numbers even if I take the lower figure of eight per store as an average that would give some one hundred and twenty employees.

8. The stores each had a store manager and each had its own targets and budgets. In addition each region had a Regional Manager and each region had targets. The evidence of Mr Jordan is that although the basic trading unit of the respondent is the individual retail store, the functional organisational unit was the region. Each region carried out regional training, and had monthly regional meetings, in the South alternating between Reading and Bristol, and that meeting the regional targets was significantly more important than each individual store reaching its targets. He gives two specific examples which are that if a customer of a particular store wanted an item that was not in stock the store would check whether a store within the region had it. If it did depending on the customers convenience it could be sent to the first store, collected from the second, or sent to the customer. Whichever those happened might result in the sale being allocated to a different store but there was no inter store budgetary transfer or reconciliation. Equally staff, although having a normal place of work at a specific store, could and would be sent to any store within the region which needed assistance. Mr Jones gave the example that he spent one whole summer at the Cardiff store which was short staffed. This equally would not result in any form of budgetary reconciliation or transfer between stores but would simply be noted by the store manager on his reports to the regional manager. As a result he contends that in reality the region and not the store was the basic operating and trading unit of the respondent.

Conclusions

9. As set out above the fundamental question is the identification of the unit to which the employees were allocated. At first sight this litigation appears essentially indistinguishable from the Woolworths and subsequent cases referred to above; and the individual store would appear to fall squarely within the description of an establishment as set out at paragraph 4 above (in particular paragraph 4 ii)) . The respondent is a national retailer which trades from individual retail stores in individual locations around the country. The fundamental unit is on the face of it the individual store each of which has an individual manager and individual targets. This is the unit to which the employee is allocated as their primary place of work and the place customers attend to make purchases. The question for me is whether the factors pointed to by Mr Jordan in particular are sufficient to displace the obvious inference that the individual store is the “establishment”, and point to the establishment being the region.

10. Sympathetic as I am to the claimants there is in my judgement nothing particularly unusual in the factors relied on by the claimants. The fact that the individual stores are organised into the regional structure with a regional manager in and of itself is a standard organisational structure. Of the other factors the fact that an employee may

be asked or required to work at another store does not alter the fact that his or her primary place of work is the store to which they are allocated; and the fact that there are parts of the structure that are organised regionally, such as training, is in my judgment insufficient to displace the unit to which the claimants were allocated as the individual stores. The regions were geographically very substantial and the links between the individual stores within the region do not appear to me to be particularly extensive. It follows that I am not persuaded on the evidence before me that either the region or the respondent nationally can be regarded as one establishment.

11. Looked at overall I am forced to the conclusion that the “establishment” is the individual store and that in consequence these claims must be dismissed.

Employment Judge Cadney
Date: 18 March 2022

Judgment sent to Parties: 31 March 2022

FOR THE TRIBUNAL OFFICE