EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104094/2020

Held via Cloud Video Platform (CVP) on 19 April 2022

Employment Judge B Campbell

Ms P Farmer	**Claimant** **In Person**
Oasis Fashions Limited (in Administration)	**Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant is not entitled to a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992, and the claim is dismissed.

REASONS

Background

1. This claim is brought by a former employee of a clothing retail business which entered into administration. The claimant was made redundant and claims that she should have benefitted from collective consultation by being grouped with other colleagues. The respondent, through its administrators, conceded that no collective consultation had happened, and argued that the claimant was employed at an establishment with too few other employees to trigger the obligation to do so. As an alternative it argued that the consequences of the Covid-19 pandemic amounted to special circumstances which excused any obligation to consult staff as a group.

2. Permission for the claim to be heard was given by the administrators on 24 January 2022.

3. The claimant attended the video hearing and represented herself. She gave evidence, which included explaining her position on various documents in a bundle she had prepared in advance. The administrators of the respondent had elected not to be part of the hearing and there was no presence on the respondent's behalf.

Issues

4. The issues in the claim were as follows:

   a. Was the claimant employed at an establishment where 20 or more employees were proposed to be dismissed through redundancy;

   b. If so, given that no consultation was undertaken with appropriate representatives of those employees, should a protective award be granted under section 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 'Act');

   c. If so, what should be the amount of the award and in particular were there special circumstances under section 188(7) of the Act which rendered it not reasonably practicable to consult to the extent required, or at all (the respondent relies on the Covid-19 pandemic as bringing about special circumstances).

Relevant law

5. An employer has a duty to collectively consult if it proposes to dismiss as redundant 20 or more employees at one establishment within a 90 day period. Consultation should be with appropriate representatives of the affected employees, which may be a trade union, or an existing body of employee representatives, or a group of representatives appointed specifically for that exercise.

6. It has been clarified in case law that the term 'establishment' means the local unit or entity where workers are assigned to carry out their duties. That unit or entity need not have its own management who are capable of carrying out the redundancies.

7. If an employer fails in this obligation an employment tribunal may make a declaration to that effect and also grant a 'protective' award of compensation to each employee to which the failure applied. This award can cover up to 90 days' pay. The employer has the ability to argue that special circumstances existed which meant it was not reasonably practicable for consultation to be followed, whether at all or in full. That may result in a lower award being granted, or none at all. The onus will be on the employer to prove that such circumstances existed, and that they took all reasonable steps to comply as far as those circumstances allowed.

Findings in fact

The following findings relevant to the issues were made.

8. The claimant was employed by the respondent from 19 July 2009 and she was dismissed on grounds of redundancy on 30 April 2020. Her dismissal was communicated on that day by the respondent's administrators, via a virtual meeting.

9. The claimant worked as a Market Manager. This role was essentially one of area manager in nature. She had responsibility to oversee six clothing stores in the west of Scotland. Those were as follows, together with the number of employees (excluding herself) at each:

    a. Glasgow Buchanan Galleries – 11 employees;

    b. Glasgow House of Fraser – 4 employees;

    c. Glasgow Debenhams – 4 employees;

    d. Glasgow John Lewis – this was a concession with no employees of the respondent, only John Lewis staff;

    e. Glasgow Silverburn Debenhams – 4 employees; and

    f. East Kilbride Debenhams – 2 employees.

10. The claimant's responsibilities were to prepare staff rotas, manage stock orders, manage the sales staff, allocate staff to stores and occasionally help with customer sales herself.

11. The claimant reported to a Regional Manager named Laura Hardie. Ms Hardie had two other Market Managers in Scotland reporting into her. There were 8 other Market Managers in England, who each reported into a different Regional Manager.

12. The claimant was issued with an updated set of terms and conditions of employment which were effective from 1 April 2017 onwards (bundle pages 61-63). Under the heading 'Location' it was said: *'Your primary place of employment is Oasis Fashions Limited in: Glasgow Buchanan'*. In practice she worked at each of the stores she oversaw in turn and depending on their needs. She did not spend her time predominantly in any one store. Her salary was split as a cost allocated between five of the six stores (not John Lewis). A proportion came out of the budget for each of the five.

13. Around 24 March 2020 the claimant attended a conference call with Ms Hardie. She was told that the respondent was having financial difficulties but was seeking a buyer.

14. On 14 April 2020 the claimant received an email from the administrators appointed to the respondent. This is the first she knew of the company entering administration.

15. On 30 April 2020 the claimant along with the majority of the respondent's staff attended a 'webinar' as it was described. The administrators confirmed that all employees' service was being brought to an end that day on grounds of redundancy. There was no consultation with the claimant, or on her behalf, of any sort in relation to her redundancy.

Discussion and decision

16. The key issue clearly is whether the claimant was employed at an establishment made up of at least 20 employees. She argues that she was because the proper way to answer the question for her was to treat all of the

stores within her responsibility as one establishment. Doing so would reach a total of 25 employees, or 26 including herself. The respondent's argument was that she should be allocated to only one store, and as there were fewer than 20 employees in each of them, no obligation to consult collectively applied.

17. Deciding what constitutes an 'establishment' under the legal test is a question of fact for the tribunal in each case.

18. Based on the evidence, it is first found that the Glasgow Buchanan store was an establishment under section 188(1). An establishment will often, although not always, have a strong geographical element to it. The store had its own staff, including a manager (the other stores had supervisors in place of a manager). It had its own identity, location, stock and fixtures.

19. It is also found that the claimant was assigned to the Glasgow Buchanan store. This is based on the fact that it was the largest of the stores she oversaw in terms of employee numbers, and again because it had its own manager which the other stores did not. The fact that her contractual statement, which had been updated relatively recently beforehand, assigned her to that store also supported that finding. Although she had responsibility for other stores, there was not the same contractual tie to those. The respondent had intended her to be assigned to one store and not others in some aspect.

20. There was a lack of evidence generally to support the alternative approach of treating all of the claimant's stores as one establishment. Aside from herself there was little to connect them. They were in different locations, in some cases miles apart. It would be artificial to group them together as an establishment, excluding in the process any other of the respondent's stores, simply because the claimant had responsibilities in relation to each.

21. It was also considered whether the Market Manager group could themselves be treated as an establishment. However, there were only three of those in Scotland, and 12 altogether in the UK. There was therefore no value in making such a finding even had there been evidence to support it, because there would be fewer than 20 employees in any group which could be conceived.

22. There was no legal obligation on the respondent to aggregate sites (i.e. stores) together if each was an establishment in itself. It was their choice to do that or not, and they didn't (or couldn't for reasons of time and cost).

23. Therefore, the obligation to undertake collective consultation on the claimant's behalf did not arise and there is need to consider whether a protective award is appropriate, or in what amount.

Employment Judge : B Campbell
Date of Judgment : 04 May 2022
Date sent to parties : 10 May 2022