



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101600/2022**

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**Held via Cloud Video Platform (CVP) in Glasgow on 17 August 2022**

**Employment Judge M Kearns**

10 **Mr V Bamboat**

**Claimant  
In Person**

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**Dawnfresh Seafoods Limited (in administration)**

**Respondent  
Represented by:  
Mr R Alexander -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Judgment of the Employment Tribunal was that prima facie, it has jurisdiction to consider the claimant's claim.

### **ORDERS OF THE EMPLOYMENT TRIBUNAL**

- (1) A one day final hearing will be fixed to take place by Cloud Video Platform. Date listing stencils will be sent out to the parties.
- (2) Within 21 days from the date this Judgment is sent out to the parties, the parties are directed to notify each other of any further documents they require in the hearing bundle and to update the index.
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### **REASONS**

1. The claimant was employed by Dawnfresh Seafoods Limited as a production operator. On 20 September 2021 the claimant was elected as an employee

representative under section 188A Trade Union and Labour Relations (Consolidation) Act 1992 (“the Act”) for the purposes of a collective redundancy consultation. On 28 February 2022 the respondent went into administration. The claimant was one of 216 employees dismissed by reason of redundancy on 1 March 2022. The claimant presented an application to the Employment Tribunal on 22 March 2022 in which he claims a protective award on the ground that the respondent has failed to comply with a requirement of section 188 relating to employee representatives. The respondent resists the application and denies that it failed to comply with its obligations under section 188 of the Act.

2. At a Preliminary Hearing on 30 May 2022, the claimant accepted that collective consultation had taken place but argued that it was not meaningful. It was unclear what he meant and he was ordered to provide further and better particulars of the respects in which he contends that the respondent failed to comply with a requirement of section 188. He has identified the following as the alleged failures:

- (i) Did the respondent not send the HR1 Notification of 12 February 2022 to employee representatives? If so, did this breach the respondent’s duty to consult representatives contrary to section 188 of the Act?
- (ii) Was the consultation process not closed? If so, did this breach the respondent’s duty to consult representatives contrary to section 188 of the Act?
- (iii) Were some employees still employed after the majority of employees were made redundant? If so, did this breach the respondent’s duty to consult representatives contrary to section 188?
- (iv) Did the respondent make the following statement at the 8th consultation meeting on 7 December 2021: “*there is lots of value in the company as a going concern and that should reassure the employees*”? If so, did this breach the respondent’s duty to consult representatives contrary to section 188?

**Preliminary Issue**

3. Today's preliminary hearing was fixed at the respondent's request to determine whether the Tribunal has jurisdiction to consider the claimant's claim for a protective award.

5 4. The respondent's position is that while the claimant was an elected employee representative, he was elected to represent a group of employees of which he was not part. The claimant is bringing the claim on his own account. The respondent's position is that the claimant was represented in the consultations by the Bakers Food and Allied Workers Union and in those circumstances he does not have standing to bring a claim in terms of any alleged failures in relation to section 188 in relation to his own position. The respondent submits that the union was recognised in respect of 'all hourly paid employees' [except Engineers] at their Uddingston site. The claimant was an hourly paid employee at Uddingston and he was therefore covered by the union recognition even though he was not a union member. The respondent argues that the employee representatives were elected to represent those employees at Uddingston who were not hourly paid.

15 5. The claimant's position is that he was not a member of the BFAWU and that he was elected as an employee representative for all employees. His interpretation of his remit was that he was representing all those employees who were not union members including himself. There is a factual dispute between the parties on this point.

**Evidence**

25 6. The parties had prepared a joint bundle of documents (J) and referred to them by page number. The claimant gave evidence on his own behalf. The respondent did not lead any evidence. Whilst I understood the respondent's reluctance to incur expense by leading evidence, that meant that I was unable to make findings in fact except in respect of matters admitted by the claimant either in his pleadings or in cross examination. I have done my best, but unfortunately, the facts are not entirely straightforward.

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**Findings in Fact**

7. The following material facts were admitted or found to be proved:
8. The respondent is a processor of fish and seafood based in Scotland. On 28 February 2022 Thomas Campbell MacLennan, Callum Angus Carmichael and Michael Elliot of FRP Advisory Trading Limited were appointed joint administrators of the respondent by virtue of a Notice of Appointment by the directors filed at the Court of Session on that date. The claimant was employed by the respondent from 19 September 2019 until 1 March 2022, when he was one of 216 employees of the respondent dismissed by reason of redundancy.
9. The administrators have consented to these proceedings in accordance with paragraph 43(6) of Schedule B1 to the Insolvency Act 1986.
10. In or about June 2017, the respondent entered a recognition agreement with the Bakers, Food and Allied Workers Union. The agreement states that it is effective from 1 July 2017 and terminable on three months' notice by either party. The Recognition Agreement was signed in the late Autumn of 2017. Section 2 of the agreement is entitled "Scope of the Agreement". It contains the following statements:
- "This agreement applies to all hourly paid employees of the Company who are based at the Company's site at Uddingston, Lanarkshire, with the exception of Engineering staff."...*
- "The Company accords exclusive rights of Union recruitment and recognition to the Union to represent its members collectively on matters relating to wages and the Terms and Conditions of Employment which are detailed in section 2 of this agreement".*
11. Section 3 of the Agreement is entitled "Purpose of the Agreement". It states:
- "The purpose of this working agreement is to:-*
- (a) *Enable and promote fairness and consistency, satisfactory relations between the Company and its employees in an environment of healthy*

*employee relations and to provide the means for the prompt resolution of grievances as early and as near to the point of origin as possible.*

*(b) Provide the means for satisfactory working conditions of employment for those employees covered by the Agreement.”*

- 5 12. In or about September 2021 the respondent announced to the employees at its site in Uddingston that it was proposing to close the site and it initiated a collective consultation. On 9 September 2021 the respondent issued an ‘FAQ’ document (J56) to affected employees with information about its proposals. It explained that jobs at the Uddingston site had been classified as ‘at risk’ of  
10 redundancy and that there would be a consultation process with union and elected employee representatives which would last a minimum of 45 days.
13. The claimant was not a member of the trade union. On or about 20 September 2022 the respondent held elections for the appointment of four employee representatives to represent employees for the purposes of the collective  
15 redundancy consultation. The claimant was one of those elected. He received a letter dated 21 September from Ms Muir, the respondent’s HR Director confirming his election: *“Dear Vispy, I refer to your recent election as an employee representative for the purposes of consultation on the Company’s proposals for redundancies at the Uddingston site to secure the future of  
20 Dawnfresh for many years to come and provide a stable platform for growth in the future.”* The letter invited the claimant to the first meeting of the Employee/Union Representative Committee and the Management Team on 23 September 2021 and notified him of the information required under section 188 regarding the proposals to be discussed.
- 25 14. By email to staff dated 21 September 2021 (J65) with the subject heading ‘Employee Representatives’, Fiona Anderson, Senior HR Advisor stated: *“Good Morning, the election to appoint the Employee Representatives to represent all employees during the consultation period has closed and I can confirm that the following have been elected: Vispy Bamboat [three other  
30 names]. We will also have 2 union representatives. [two names]. If you have any questions you would like raised, please speak to one of your employee*

*representatives who will raise these on your behalf.*” The claimant attended around nine consultation meetings in his capacity as an employee representative. His understanding of his remit was that the union were negotiating on behalf of its members and the employee representatives were negotiating on behalf of everyone else.

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15. On or about 29 September 2021 the respondent’s Head of HR Ms McCusker sent a completed HR1 form to the Government Insolvency Service (J70). On the form, she gave the total number of employees at the site as 313 and the number of proposed redundancies as 246. In the consultation section of the form, she stated that the Baker, Food and Allied Workers’ Union were recognised and represented weekly paid employees. She also stated that the claimant and three other elected named representatives were representing “*All employees*”.
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16. On 12 February 2022 a further HR1 form (J99) was sent to the Insolvency Service, this time by Ms Muir. It named the representatives of the recognised union and stated that they were representing hourly paid employees. It did not list the employee representatives. It notified the Insolvency Service that the number of possible redundancies was 313 out of 313 employees citing “potential insolvency proceedings”.
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17. Administrators were appointed to the respondent on 28 February 2022. They conducted information and consultation meetings with 216 affected employees at the site on 1 March 2022. On that date the employment of 216 employees, including the claimant was verbally terminated by reason of redundancy. On 3 March 2022 confirmation letters were sent to the employees whose employment had been terminated directing them to the Redundancy Payments Service for outstanding payments owed to them.
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### **Applicable Law**

18. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) provides (so far as relevant):-

30       ***'188      Duty of employer to consult ... representatives***

5 (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 –*

10 (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 –*

15 (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: -*

20 (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*  
25 *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).*

19. Section 189 states so far as material:

5 **'Complaint ... and protective award**

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

10 (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,*

15 (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."*

**Discussion and Decision**

20. Mr Alexander's argument is a technical one based on the terms of section 188  
20 of the Act. Section 188 provides that 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  
25 connection with those dismissals." [My emphasis].

21. Section 188(1B) states so far as relevant: "*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.”* The second choice relates to employee representatives elected by the affected employees for the purposes of section 188. Thus Mr Alexander’s point is that because the claimant was an hourly paid employee, and because the respondent had a recognition agreement with the Bakers, Food and Allied Workers Union (BFAWU) that applied to all hourly paid employees (J43) the ‘appropriate representatives’ in relation to the claimant were the BFAWU trade union representatives and that the claimant therefore has no locus to bring the claim under section 189.

22. Section 189(1) deals with who may present a complaint that an employer has failed to comply with section 188 to the Tribunal. It provides at 189(1)(b) that in the case of a failure relating to employee representatives, the complaint can be brought by any of the employee representatives to whom the failure related. It provides at 189(1)(c) that in the case of a failure relating to representatives of a trade union, the complaint can be brought by the trade union.

23. Mr Alexander referred me to Harvey on Employment Law (paragraphs 1002 to 1006) and to the case of Governing Body of the Northern Ireland Hotel and Catering College v NATFHE [1995] IRLR 83 NICA. I accept his submission that the question of whether the union were “appropriate representatives” of the claimant for the purposes of section 188(1B) comes down to whether the union were recognised by the respondent to negotiate on behalf of employees of his description and not whether he was in fact a member of the union. Unfortunately, the facts are not completely straightforward here. There was no witness to speak to the 2017 Recognition Agreement and to confirm that it was still in force in those terms. Under the heading ‘Scope of the Agreement’, the agreement says two different things about recognition. On the one hand it says ‘This Agreement applies to all hourly paid employees based at Uddingston’ and on the other hand it says that the respondent ‘accords exclusive rights of .... recognition to the union to represent its members collectively on matters relating to wages and the terms and conditions of employment’. For the purposes of the section 188 consultation which is the subject of this claim, the

respondent then arranged for employee representatives to be elected and informed staff and the Insolvency Service that they had been elected to represent “all employees” in the redundancy consultation. The claimant’s evidence was that at the consultation meetings (of which there were nine), the union represented its members and he and the other employee representatives represented all the employees who were not members of the union. Thus while membership of the union is normally irrelevant, it is mentioned under ‘scope’ in the recognition agreement in this case.

24. The second point is that the claimant’s complaint (as set out in paragraph 2 above) appears to be that there were alleged failures of consultation relating to employee representatives. He does not complain of failures relating to trade union representatives. Under section 189(1)(b), ‘any employee representative to whom the alleged failure related’ may present a complaint to the Tribunal. Since the claimant was an employee representative and his complaints are that there were alleged failures to consult him, the Tribunal appears - prima facie - to have jurisdiction to consider the complaint under section 189(1)(b).
25. In the circumstances, I propose to fix a one day final hearing by CVP. Date listing stencils will be sent out. I presume the existing bundle of documents can be used for the final hearing but the parties should add any further documents they require within the next 21 days.
26. The respondent is not precluded from leading evidence relating to jurisdiction at the final hearing should it choose to do so.

**Employment Judge: M Kearns**  
**Date of Judgment: 18 August 2022**  
**Entered in register: 19 August 2022**  
**and copied to parties**

*I confirm that this is my Judgment in the case of Mr V Bamboat v Dawnfresh Seafoods Ltd (in administration) 4101600/2022 and that I have signed it by electronic signature.*