EMPLOYMENT TRIBUNALS

Claimant: **Miss E Dillury and others (see schedule)**

Respondent: **STA Travel Limited (in liquidation)**

Heard at: **London South/Croydon On: 5/10/2022**
(CVP)

Before: **Employment Judge Wright**

Representation:
Claimants: **Some in person**

Respondent: **Did not appear and did not send written representations**

JUDGMENT

It is the Judgment of the Tribunal that the claimants' claim for a protective award under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) fails as the Tribunal finds there were fewer than 20 employees at each establishment.

The claimant Mrs Hayley Barnett's claim (2305003/2020) appears to fall within a different description of class of employees and that her claim should have been considered with those claims. Her claim is not dismissed and has not failed. Mrs Barnett may wish to seek independent legal advice in respect of her position.

REASONS

1. The respondent is a travel business and it operated through high-street branches and electronically. On 19/8/2020 the respondent's staff were informed that the respondent's holding company was filing for insolvency. On the 21/8/2020 the staff were informed that the respondent had ceased trading with immediate effect. On the 28/8/2020 a liquidator was appointed and on 2/9/2020 the staff were told that their employment had terminated by way of redundancy with immediate effect.

2. There was no recognised trade union for collective bargaining, consultation or negotiation with the staff.

3. Based upon the letter produced (addressed to Miss Pinkney) the staff were referred to DfBEIS and the Redundancy Payments Service. The letter referred to notice pay, unpaid wages and redundancy payments. It did not refer to protective awards. The staff were also told to check their eligibility for Jobseeker's Allowance.

4. Prior to the insolvency and due to the Covid-19 pandemic, some staff were placed on furlough and some carried on working, but worked from home.

5. Some claimants presented a claim to the Tribunal in September/October 2020 and some did so later, in February/March 2021.

6. The claims and notice of hearing were served upon the Insolvency Practitioner and the Secretary of State. No representations were received from either.

7. Evidence was provided and it was clear that the claimants were aware of the need to prove that they worked at an establishment where the respondent dismissed as redundant 20 or more employees within 90 days or less.

8. As there was no representation by the respondent, the statements made were accepted and were not challenged.

9. The first issue which became apparent during the hearing was time-limits/jurisdiction to hear the claim. This was not addressed at the hearing as the claimants were not on notice of it. In view of the decision taken at that hearing, this will not be relevant unless this Judgment is overturned on appeal and the case is remitted back to the Tribunal.

10. Seven claims were presented out of time. They are the claims of:

Case number	Names	Dates of early conciliation	Date claim form presented
2300503/2021	Miss E Dearie	3/2/2021-4/2/2021	04/02/2021
2300506/2021	Miss A Gliksman	3/2/2021-4/2/2021	04/02/2021
2300510/2021	Mr J Murray	4/9/2020-7/9/2020	04/02/2021
2300523/2021	Miss C Clay	3/2/2021-4/2/2021	04/02/2021
2300555/2021	Miss C Bartholomew	3/2/2021-4/2/2021	08/02/2021
2300562/2021	Miss L Davey	3/2/2021-4/2/2021	08/02/2021
2300864/2021	Miss C Kidd	2/2/2021-1/3/2021	02/03/2021

11. Also the second claims of Miss E Dillury (2300504/2021) and Ms G Pinkney (2300505/2021) presented on 4/2/2021 are out of time. It is not clear if those are duplicate claims as both of these claimants presented earlier claims which were in time.

12. Those claimants may have to persuade the Tribunal to exercise its discretion under s.192 (2)(b) TULRCA.

13. There was also an issue with the claim of Miss Dillury (2304916/2020). Her claim was presented on 3/9/2020 and it did not contain an Acas early conciliation certificate number. A certificate was subsequently produced and it was dated 4/9/2020. That claim should therefore have been rejected as it did not contain an early conciliation number (Rule[1] 10 (1)(c)(i)). Neither of the two other exceptions were contended for[2].

[1] Of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

[2] Rule 10 (1)(c)(ii) confirmation that the claim does not institute any relevant proceedings; or

14. The claimants were aware of and referred to other first instance Judgments where the respondent's staff were successful in claiming a protective award. In some of these cases, it did not appear to be in dispute that there were 20 or more employees who were made redundant at one establishment (e.g. the 'St George's House claimants' in case 2413632/2020). In others, it appeared there were fewer than 20 employees at the branch where the claimants worked, however the conclusion was that 'each store' was not a separate establishment for the purposes of the TULRCA (e.g. Mr Kerr and Mr McManus in case 1309111/2020). A different Tribunal (case 1602232/2020) found that the Cardiff branch which had five members of staff was a separate establishment (so a self-contained establishment for the purposes of the TULRCA) and those claimants' claims for a protective award failed.

15. There were therefore conflicting first instance decisions.

16. The claimants did not know if any of their colleagues had appealed the Employment Tribunal decision. They said they were made redundant over two years ago and many had lost touch.

17. The issue therefore for this Tribunal to determine was whether the facts led to a finding that each branch was an establishment, or whether the national organisation (as the claimants contended for) was one establishment. If the latter is correct, then the claimants who had presented valid claims, would be entitled to a protective award.

Findings of fact

18. It was accepted that apart from Mrs Barnett[3], the claimants worked in one of five branches. They were:

	The claimants' estimate of the number of employees on 2/9/2020
Bluewater	10
Brighton	10/11
Canterbury	4

(iii) confirmation that one of the early conciliation exemptions applies.
[3] Mrs Barnett was a Care Executive, was part of a different Head Office Team and was a home worker.

Clapham	5
Kingston	8

19. They said that it was not clear to them how many staff there had been as the ones that were not on furlough were working from home.

20. That difficulty for the claimants is understandable, however it does not detract from the fact that there were fewer than 20 staff working in the five individual branches.

21. The claimants set out their unchallenged and accepted evidence on how the respondent operated.

22. They said they worked at an establishment where the respondent dismissed as redundant 20 or more employees within 90 days or less:

> *'i. The claimants were employed by STA Travel Limited of Priory House, 6 Wrights Lane, London W8 6TA. Clause 6 of the employment contract included a usual place of work which was the assigned store location. There was also the requirement to work at other branches/ locations without notice.*
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> *ii. Although claimants were based physically in one store the whole STA travel team across the UK worked collectively. Staff regularly covered shifts at different store locations. There was a central customer booking line which was picked up by the first available agent, it was not branch specific. Bookings were often split and shared between different branches and customers could call any advisor at any branch and book/receive assistance. Furthermore, not all branches had the same opening days/times so advisors were required to support other branches' customers when another store was not open. When calls came in from customers oversees the queries were dealt with by the advisor who answered the calls, regardless of their branch location.*
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> *iii. All bookings needed to be authorised by a manager before they could be ticketed. As individual store managers did not work every day, were absence, or took holidays; this meant that agents would often have to contact other store managers to get their bookings authorised.*

iv. The process of 'ticketing' flight bookings was carried out by a large team based in Romania. Agents were also required to contact this team to resolve any ticketing, IT, or hotel issues.

v. Branches often grouped together to hold events. Staff training and incentives/sales targets and competitions were managed centrally or regionally and were not branch specific. Familiarisation trips (where agents were taken on group tours of countries, they have not previously visited), happened several times annually; these groups tours were made up of individual agents from different store across the UK and other STA locations worldwide.

vi. All marketing was done companywide; each branch had the same prices and offers. Employees would collect data from all branches and collaborate with other branches working as a team on projects throughout the whole company.

vii. During period of Covid 19 pandemic, some STA staff continued to work (approx. 20% of whole workforce) the rest on furlough. Branch teams were dissolved, and new teams were established with employees managing bookings across the whole country/across all stores.'

The Law

23. The TULRCA at s. 188 sets out the respondent's obligation to consult representatives:

> 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.

24. S. 189 TULRCA provides that a complaint may be made to an Employment Tribunal:

> (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) 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.

It is not in dispute that the relevant section is s. 189 (1)(d).

25. In Rockfon A/S v Specialarbejderforbundet i Danmark 1996 ICR 673 ECJ, the ECJ considered the meaning of 'establishment' in the context of Article 1(1)(a)(i) of the Collective Redundancies Directive. The ECJ held that 'establishment' is a term of Community law and cannot be defined by reference to the laws of the Member States. Rather, in every jurisdiction it must be understood as meaning, depending on the circumstances, the unit to which the redundant workers are assigned to carry out their duties. It is not essential for the unit in question to have a management which can independently effect collective redundancies.

26. Rockfon was subsequently endorsed in Athinaiki Chartopoiia AE v Panagiotidis and ors 2007 IRLR 284 ECJ, where the ECJ confirmed, among other things, that:

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

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;

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

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.'

27. The EAT's Judgment in USDAW and anor v Ethel Austin Ltd and ors 2013 ICR 1300 EAT ('the Woolworths case'), held that the words 'at one establishment' in s.188(1) should be deleted to ensure compliance with the Collective Redundancies Directive. The recognised trade unions brought claims alleging that the administrators failed to comply with their duty under S.188, which were upheld by employment tribunals. The Tribunals treated each individual store as a discrete 'establishment' for the purposes of S.188 and decided that there was no duty on the administrators to consult on redundancies at any store with fewer than 20 employees. The Tribunal only made protective awards where 20 or more employees were dismissed at one store.

28. On appeal the EAT's view was that the duty to consult over collective redundancies arose where 20 or more employees were to be dismissed, irrespective of where they worked. The result was that, all employees, including those working in stores where fewer than 20 redundancies took place, were entitled to protective awards for breach of the TULRCA.

29. The case went to the Court of Appeal who referred the case to the ECJ who confirmed the Directive does not mandate all 'establishments' to be aggregated for the purpose of the 20-employee threshold. The Directive requires that account be taken of the dismissals effected in each establishment be considered separately. The ECJ was also concerned that aggregation could potentially mean that a single worker assigned to one of the establishments in question, possibly located in a town separate and distant from the other establishments of the same undertaking, would be brought into a collective consultation process. That would be contrary to the ordinary meaning of the term 'collective redundancy'.

30. The cases show that despite the fact that the total numbers of employees proposed to be dismissed were substantial, their assignment to separate establishments meant that the consultation duty was not triggered because it was envisaged that fewer than 20 employees would be dismissed at each of the individual establishments concerned.

31. In the more recent case of Seahorse Maritime Ltd v Nautilus International 2019 IRLR 286 CA, the Court of Appeal held that each of 25 ships was a separate establishment, as each was clearly a self-contained operating unit.

32. In these claims, there is clearly a head office function which deals with matters such as marketing. That is the meaning of a ***head*** office. As with many national organisations, with high street branches, certain matters will be centralised, such as the payroll, paying of expenses and organisation of training courses. Some matters may be delegated to a regional area, which results in a further regional level of delegation.

33. As the claimants have said, the branches operated different opening hours and this will have been dictated by local considerations. For example, the Bluewater branch can only be open when the Bluewater shopping centre itself was open. If the Bluewater shopping centre does not open until 10am on weekdays, the Bluewater branch cannot open at 9am. Whereas, a branch such as Brighton, which was located in the town centre, on a 'high street' location, could open at 9am or even 8am, if local conditions warranted it.

34. Even if the opening times were decided centrally by (say) the Operations Director at head office, that does not mean that each individual branch was not an establishment of itself. The branch is the unit to which the workers were assigned to carry out their duties.

35. In accordance with the Employment Rights Act 1996, a claimant's[4] contract of employment stated 'either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer'. The contract stated the following:

> 6. Place of Work
>
> Your usual place of work is detailed in Schedule 1. However, the Company may require you to work at such other of its premises as notified to you from time to time. In particular, the Company may require you, from time to time and without notice, to work at any of its premises on a temporary basis (i.e. for not more than 3 consecutive months). Any permanent relocation to any of the Company's premises will only take effect on the Company giving you at least one month's prior written notice.
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> Schedule 1 provided:

[4] The Tribunal was only referred to one contract, that of Miss Pinkney.

Position and place of work:	Your job title is Travel Expert – Canterbury, reporting to [GB] & Store Manager. In addition to your normal duties, you may be required to undertake additional or other duties from time to time as necessary to meet the needs of the Employer's business.

36. Clearly, this employee (Miss Pinkney) was assigned to the Canterbury branch.

37. It is accepted that during the pandemic for this respondent, that staff may have been placed on furlough or may have switched to home working. That however happened to multiple employers who wished to survive during the pandemic. Employers and staff had to be adaptable and had to make adjustments. Many had to use their own devices (telephones, laptops, iPads, printers, etc) at least initially, to enable them to work from home. It was in all parties' interest to keep the business going and to survive the pandemic/lockdown. If the employer did not survive, the employee would lose their job as happened in this case. Many employers did not survive and so the competition for vacancies was acute. The employees' adaptability in attempting to assist this respondent to survive, did not alter the fact, that they were assigned, contractually, to individual branches, which this Tribunal finds to be establishments. The particular circumstances of the pandemic did not alter the established law.

38. That finding also takes into account the authorities. Technology may have moved on since the previous cases were considered at the level of the ECJ, however, technology does not, of itself conflate individual establishments/branches, into one national 'establishment'. To do so would be contrary to the authorities.

39. The fact several matters were centralised (for example training) or that a particular task-force was set up, does not detract from the fact that it is cost effective to centralise and then cascade certain aspects of the business. The same would apply to promotions or special offers. That has always been the case with organisations which have many sites. It would have applied in the Woolworths case and it is no different here.

40. The fact there was flexibility and that personnel moved around, does not detract from the fact that the legislation provides that a place of work has to be specified and in this case the respondent specified one of its branches for each claimant (save for Mrs Barnett).

Conclusions

41. Save for the claim of Mrs Barnett who it would seem is assigned to a different grouping of employees, the claimants who have valid claims were each assigned to an establishment which had fewer than 20 employees. S. 188 was not therefore engaged and they have no claim to a protective award.

Employment Judge Wright
31 October 2022

	CASE NO:	CLAIMANT:
1	1405270/2020	Ms M Cable
2	2304916/2020	Miss E Dillury
3	2304923/2020	Miss M Hughes
4	2304956/2020	Miss B Caine
5	2304999/2020	Miss B Adam
6	2305003/2020	Mrs H Barnett
7	2305053/2020	Mr T Spencer
8	2305133/2020	Miss N Mifsud
9	2305162/2020	Miss G Pinkney
10	2300503/2021	Miss E Dearie
11	2300504/2021	Miss E Dillury
12	2300505/2021	Ms G Pinkney
13	2300506/2021	Miss A Gliksman
14	2300510/2021	Mr J Murray
15	2300523/2021	Miss C Clay
16	2300555/2021	Miss C Bartholomew
17	2300562/2021	Miss L Davey
18	2300864/2021	Miss C Kidd
19	2305182/2020	Mrs C Harrison
20	2304915/2020	Miss R Danneau