# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Flett

**Respondent:** Vets Now Emergency Ltd

**Heard at:** **Bristol (by video – CVP)** **On:** **29 July 2024**

**Before:** **Employment Judge Livesey**

**Representation:**
Claimant: In person
Respondent: Mr Millar, solicitor

# JUDGMENT

1. The Respondent proposed to dismiss 20 or more people at one establishment at one time within the meaning of s. 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. The remaining issues for determination within the claim will be resolved in accordance with the Case Management Order of even date.

# REASONS

**1. Claim**

1.2 By a Claim Form dated 1 October 2023, the Claimant brought complaints of unfair dismissal and of a failure to consult under s. 188 trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A').

**2. Evidence**

2.1 The following witnesses gave evidence;

- The Claimant;

- Mrs Colville, the Respondent's CEO;

- Mrs Hill, the Respondent's People Director.

2.2 A bundle of hearing documents was produced, R1. The electronic and written page numbers did not match. The bundle also contained a great

deal of email correspondence which was either irrelevant to the issues and/or had been unnecessarily repeated.

## 3. Background and issues

3.1 In her Claim Form, the Claimant suggested that she was one of several litigants, but hers was the only one brought within that claim. Other Claimants issued claims under s. 188 of TULR(C)A in other tribunals and the following six were known to exist;

- Pope; 3311190/2023
- Bryant; 3311237/2023
- Benzie; 3311242/2023
- Salmon; 3311386/2023
- Wall; 2409598/2023
- Nelson; 32077/2023

3.2 The first four of those claims have been case managed together in the Reading Employment Tribunal and are listed for hearing in July 2025. The case of Wall is being dealt with in Manchester and Nelson in both Edinburgh and Belfast (Mr Millar indicated that she had issued identical claims in both locations).

3.3 The issues in this case were discussed, agreed and recorded by Employment Judge Bax as a Case Management Preliminary Hearing which took place on 8 March 2024. Amongst them, two were identified for determination at this hearing (paragraphs 5.1 and 5.2 of the Case Management Order). They involved establishing the numbers of redundant employees within the 'establishment' at which the Claimant had worked.

3.4 The Respondent's case was that fewer than 20 people had been made redundant at one time (it alleged that the number was 19) and it further asserted that the 'establishment' was the district in which the Claimant had worked, not the nationwide organisation as a whole, which was the Claimant's case (see paragraph 64 of the Case Summary).

3.5 Employment Judge Bax had given the Respondent permission to file an amended response which, it was hoped, would have set out its position in greater detail (see paragraphs 62 and 64 of the Case Summary). Sadly, it chose not to do so.

## 4. Facts

4.1 The following factual findings were made. I attempted to restrict my findings to matters which were relevant for a determination of the issues. All facts were found on the balance of probabilities and any page numbers cited within these Reasons are to pages within the hearing bundle, R1, unless otherwise indicated. They have been cited in square brackets and the numbering used relates to the electronic, not the typed, pages.

Introduction

4.2 The Respondent is in business providing out of hours emergency veterinary care at 60 veterinary practices and 2 hospitals across the UK. Its parent company is Independent Vetcare Ltd, trading as IVC Evidensia ('IVC').

4.3 The Claimant was employed from 2 October 2011, latterly as a District Manager.

Organisation before re-structure

4.4 Before the restructure with which this claim was concerned, the Respondent was organised into eight Districts across Great Britain and Northern Ireland; one covered Scotland and the north-east of England (District 1), another covered East Anglia and Northern Ireland (District 7) and the remaining six covered other geographical areas in England, including the Claimant's District which comprised Bath, Bournemouth, Portsmouth, Salisbury, Swindon and Winchester (District 6). The Central Support Office (or Head Office) is in Dunfermline, Fife, Scotland, where the Respondent's finance, HR, marketing, IT and similar functions are based.

4.5 The Claimant's original letter of appointment to the role in June 2013 referred to her job as having been "*District Manager for District 7* [as it was then]" [37]. Her Written Statement of Terms and Conditions did not, however, specifically name the District to which she was attached [149], nor did the Job Description [150-2], albeit the job purpose was described as "*driving operational, commercial and nursing clinical standards across the district.*"

4.6 In the Claimant's District, she was responsible for the provision of the Respondent's services across 7 clinics. Before the 2023 re-structure, each District was staffed as follows;

- A District Manager, like the Claimant, who was largely responsible for the operational, day-to-day running of the District. In addition to those assigned to the 8 Districts, there were 2 additional postholders in the Claimant's position when the 2023 re-structure took place. I understood that the two 'spare' worked across all of the Districts;

- A District Vet (Ms Pope in District 6), who was largely responsible for the clinical aspects of the District, but with some operational duties. I had the impression that Ms Pope and the Claimant worked closely together on many of the issues which had to be addressed in the District;

- A District Resource Manager, who was responsible for staffing levels and rotas across the 7 clinics. There were also more District Resource Managers than Districts, with the surplus postholders helping across the Districts.

4.7 As to line management, there were Regional Directors (North and South) who line managed the District Vets. They were also referred to as 'Operations Directors'. The Claimant was line managed by the District Vet according to her contract [149], but she felt that the position drifted over time such that the Regional Director (South), Ms Kennedy, assumed that

role. She did not specifically remember who undertook her appraisals, but remembered that both Ms Pope and Ms Kennedy had been involved.

4.8 On the clinical side, there were a number of Clinical Leads who worked across the Districts.

4.9 The District Resource Managers, however, were managed differently. They were ultimately brought together and managed by the Operational Support Executive (Mr Lee) who also worked remotely.

4.10 There were also a number of Business Relations Managers who were part of the Business Development Team and worked under the Business Relations Director, Ms Dawe. She and they were attached to the Central Support/Head Office. Ms Dawe was specifically responsible for handling the Respondent's relationships with its client clinics and for bringing on new relationships. The managers beneath her handled those relationships on the ground day-to-day.

4.11 The Claimant worked from her home as her base, but travelled within her District to the various clinics that she oversaw from time to time, at least once each month she said. Much additional contact was conducted virtually. At each of the 7 clinics in her District there were Principal Nurses who she line managed.

4.12 The Claimant maintained that she worked closely with those at the Central Support/Head Office. She obviously relied upon them for People Services and IT support but a number of key contracts, she said, were also managed centrally there (PDSA, Cremations and Blood Bank). She attended Head Office in person for Quarterly Meetings and had further, routine virtual meetings. She was required to adhere to policies, guidelines, clinical standards and operating procedures which were set by Head Office. No local, District policies existed. She attended the Christmas party at Head Office on occasion. There were no equivalent District social events.

4.13 The Respondent's witnesses described the Districts as having had 'delegated autonomy' in that they took local decisions independently. They undertook their own recruitment, for example; they designed and placed adverts and set salaries for new starters. These were, however, powers which were exercised within broader constraints; the Claimant had to adhere to the Respondent's salary bands and policies in relation to the provision of other allowances and benefits when offers were made. Centrally set budgetary limits were also applied.

4.14 Whilst the Claimant had not been aware of any profit and loss figures which had been prepared on the basis of her District's financial performance (she had certainly not seen or been responsible for them herself), it was not impossible that they existed at a national, Head Office level. The Claimant was, however, aware that there were profit and loss figures which were prepared and submitted for each clinic within her District.

4.15 Across the Districts, the managers shared information and, to some extent, other resources. Chat channels and groups existed for that purpose. District managers helped in other Districts on issues such as complaints, job

interviews and disciplinary matters. Some permanent staff were shared; the Claimant gave evidence about a roving vet who worked across Districts and an Animal Care Assistant ('ACA') who worked across District 5 and her own District 6.

4.16 Districts also covered each others' rotas. The on-call rota was manned across the Districts, but was broadly organised along Northern and Southern lines. Annual leave and other absences had to be similarly covered. That was a duty which was so important, it seemed, that it was covered in the Claimant's Written Terms and Conditions [149];

> "*You will normally work from home but are expected to travel within your District and the surrounding area to visit Host and Member Practices. You may also, on occasion and in agreement with your District Vet and other District Managers be required to assist in covering shifts outside your own District; this is in addition to your additional contracted clinical shifts.*"

4.17 There was also co-ordination on closures and/or retentions of clinics. If one clinic closed, the need to keep another open close by was recognised and catered for in terms of resourcing.

4.18 The Claimant's email profile was the same as everyone else's in that it did not identify her by District or otherwise. They were all simply '@vets-now.com' addresses [164-177].

Restructure

4.19 The rationale for the Respondent's restructure in the summer of 2023 seemed to have been twofold; to streamline the business and to replicate the structure which had been adopted by the parent company, IVC. The main structural change was the move from eight Districts (1 to 8) to six larger Areas (A to F). The Claimant's old District 6 grew to absorb Bristol and part of Wales (Newport) and became Area E.

4.20 It terms of job roles, the following changes were implemented;

- The deletion of the District Managers' posts, including the Claimant's, with the creation of six new Area Director posts in their place. As stated above, there had been 10 such roles at the time. The new roles involved greater responsibility and, as stated in the subsequent appeal outcome letter, "*the Area Director role requires a significantly different skill set to the District Vets, District Managers, the Business Relations Managers and the Head of Business Development roles*" in that it held "*a wider span of control, an increased level of ownership and ultimately a higher status within the new structure*" and was therefore "*significantly different to the District Manager role*" [140];

- The deletion of the 8 District Vets' roles. One such postholder, Ms Williams, was on maternity leave at the time, but she was included in the numbers. Area Clinical Manager positions were created in the new structure;

- There were 3 District Clinical Leads whose roles were also lost; Ms Gooseman, Ms Ryan and Mr Wright, who was covering for a District Vet at the time, Ms Williams, who was on maternity leave;

- The District Resource Managers' roles were deleted. There had been 9;

- The Operational Support Executive, Mr Lee, also therefore lost his role;

- The Business Relations Managers' positions were deleted. There were 7.

4.21 As Mrs Colville stated in evidence, having corrected the number of Clinical Leads from 2 in her witness statement to 3, the total number of the proposed redundancies was 38. She accepted that all postholders received 'at risk' letters and that the new roles were sufficiently different such that competitive interviews were required. The difference in numbers between those deleted and the new roles therefore rose from 19 to 20 (see paragraph 13 of her statement).

4.22 There were three other positions (the Regional Directors, North and South, and the Business Relations Director, Ms Dawe) whose roles were 'lost' at around the same time. Mrs Colville stated that they had all left the business on 18 May by mutual agreement. There had been a breakdown in relations which, according to Mrs Hill, had been an ongoing issue for approximately 18 months. Their roles were not reproduced within the new business structure and had, therefore, been deleted too.

Process

4.23 On 22 May 2023, a webinar was led by Mrs Colville. The Claimant was informed at that point that she was going to be placed at risk of redundancy. She received an 'at risk' letter that day [44-6] from which it was clear that the Respondent's plan for the new structure was fully formed, with the deletion of old roles and the creation of new ones.

4.24 A first consultation meeting took place on 1 June 2023. It was chaired by Mr Phillips, the Director of Technology, who was supported by Ms King from People Services. The Claimant attended and was supported by a colleague, Ms Gilbert [47-57]. The new structure was explained and the Claimant was given the opportunity of exploring the rationale for it and other issues. It was clear from the notes that she had quite a few questions which Mr Phillips answered to the best of his ability and knowledge. Even at that early stage, the Claimant asked about collective consultation. It was Ms King who stated that the Respondent had taken the view that the different Districts amounted to separate establishments such that it had no duty to consult under s. 188. The Claimant also had questions about the requirements of the new Area Managers' roles.

4.25 Following the meeting, a list of specific questions was raised by the Claimant [58] to which some answers were provided by Ms King on 5 June [62-3]. She reiterated the Respondent's stance in relation to the issue of 'establishment' and s. 188.

4.26 The Claimant ultimately chose not to apply for the new role of the Area Manager, the interviews for which took place on 7 and 8 June. She considered that the role could not have been undertaken within a 40 hour week by one person with the additional responsibilities that it entailed [69].

4.27 A second consultation meeting took place on 15 June [78-83]. Since the Claimant had not sought to apply for alternative roles within the Respondent or IVC, her role was confirmed as redundant, with her termination date being 19 June and with pay in lieu of notice.

4.28 The Claimant appealed against her dismissal on 21 June [100-1] and was part of a collective grievance that was raised a few days later, on the 26th [193-6]. Part of the Claimant's appeal and the grievance concerned the Respondent's failure to accept that it had proposed to dismiss 20 or more employees at one establishment.

4.29 The Claimant's appeal was heard on 4 July by Mrs Colville [127-133]. She was supported by Ms Russell, a People Services Business Partner and the Claimant attended with Ms Pope, her District Vet. The s. 188 issue was explored again and the parties' respective positions were reasserted. The Claimant, however, clearly felt that she was arguing with one arm tied behind her back as she had not been supplied with all of the information necessary to have been able to better understand the Respondent's drawing of the 'establishment' [128].

4.30 The Claimant received a letter of outcome from the appeal on 11 July; it was dismissed [138-143]. The collective grievance was rejected on 26 July, also by Mrs Colville [144-7].

4.31 Finally, the Claimant stated that a similar redundancy process had taken place in IVC this year in which management *had* consulted the workforce collectively because the Areas were all counted as part of one establishment (paragraph 9 of her statement). She was not cross examined on that evidence and, although there was insufficient detail to have been able to draw any direct parallels with the case at hand, it was readily understood how the approach taken by IVC had further perplexed her.

## 5. Legal framework

5.1 An employer who proposes to dismiss from one establishment 20 or more employees at a time, has a duty to consult with those employees or their workplace or union representatives in accordance with the provisions of s. 188 of the Trade Union and Labour Relations (Consolidation) Act 1992:

> "*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...*" (s. 188 (1))

5.2 Employment Judge Bax set out the scope of the duty between paragraphs 70 and 73 of his Case Summary and, in particular, the relevant law on the definition of an 'establishment'.

5.3 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 EC Collective Redundancies Directive. The Court held that 'establishment' was a term of Community law and could not be defined by reference to the laws of the Member States. Rather, it had to be understood in every jurisdiction as meaning the unit to which the redundant workers were assigned to carry out their duties, depending upon the circumstances. It was not essential for the unit in question to have had a management which might have been independently capable of effecting collective redundancies.

5.4 In *Athinaiki Chartopoiia AE-v-Panagiotidis and ors* [2007] IRLR 284, ECJ, the European Court confirmed, among other things, that:

- The term 'establishment' was to have been defined broadly so as to limit the instances of collective redundancy to which the Directive did not apply;
- An establishment, in the context of an undertaking, may have consisted of a distinct entity, having a certain degree of permanence and stability, which was assigned to perform one or more given tasks, and which had a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks;
- The entity in question need not have had any legal, economic, financial, administrative or technological autonomy in order to have been regarded as an establishment;
- It was not essential for the unit in question to have been endowed with a management that could independently affected collective redundancies in order for it to have been regarded as an establishment, nor must there have been a geographical separation from the other units and facilities of the undertaking.

5.5 Both *Athinaike* and *Rockfon* were subsequently followed in two cases that specifically concerned the implementation of Article 1 (1)(a)(ii) of the Directive into UK national law, namely *USDAW and anor-v-Ethel Austin Ltd and ors* [2015] ICR 675, ECJ (commonly referred to as 'the Woolworths case'), and *Lyttle and ors-v-Bluebird UK Bidco 2 Ltd* [2015] IRLR 577, in which the ECJ confirmed that an establishment was the unit to which the redundant employees were assigned to carry out their duties. It specifically noted that, in some cases where an undertaking did not have several distinct units, the 'establishment' and the undertaking could have been the same thing, but otherwise, the establishment will have been part of the larger undertaking.

5.6 The cases also reiterated a point made in the earlier cases; that the word 'establishment' must have been given a uniform meaning across Member States to ensure equivalency of application and thus secure, in economic terms, uniformity of redundancy costs across the Union. However, the Court also held that, in circumstances where the second option in Article 1 (1)(a) had been chosen, it was not necessary to aggregate the dismissals across all of an employer's establishments.

5.7 Helpful though the guideline authorities have been, these cases remained fact sensitive. By way of example, in a pre-*Woolworths* and *Lyttle* case, in *Fairhurst v Stephens LLP ET Case No.2406673/09*, the Respondent firm of solicitors proposed to dismiss up to 60 employees across its five offices. It

argued that each office was a separate establishment and that s.188 did not apply. The employment tribunal noted, among other things, that management decisions were made centrally, by a committee attended by senior partners and employees from all the offices, and found that the firm as a whole formed one establishment for the purposes of s.188.

5.8 But in *Madden and ors-v-Comet Group plc (in creditors voluntary liquidation) and anor* ET Case No.1802344/13, which followed *Woolworths* and *Lyttle*, the Respondent operated over 200 stores nationwide, all of which were closed by the end of December 2012 with nearly 5,000 employees having been made redundant. An employment tribunal had to address whether those who had been working at the smaller stores, which had contained 19 or fewer employees, were employed at individual establishments for the purposes of s. 188, or whether all of the Comet stores together comprised a single establishment. The judge found that the separate establishments were the individual stores and that the day-to-day running of each store was handled locally by store managers. The judge also pointed out that a prior liability decision concerning other claimants employed at the larger Comet stores had proceeded on the basis that each store, service centre, call centre and the Group's two head offices were separate establishments. The claims for protective awards were dismissed.

5.9 A similar outcome was reached in *Seahorse Maritime Ltd-v-Nautilus International* 2019 IRLR 286, CA, where the question arose whether the intended lay-off of employees employed as crew members on a fleet of ships operated by a third party had triggered the duty to consult collectively. The employers contended that each ship was an individual 'establishment' and, because there were fewer than 20 seamen on each, the s. 188 duty did not arise. The union argued that the establishment was the entire pool of crew members across the fleet and that the proposed dismissals had to be aggregated across the fleet. It relied upon the fact that the vessels were operated by a single third party company.

5.10 An employment judge found in favour of the union but the Court of Appeal, however, held that all crew were assigned to particular ships because most employees returned to the same ship for repeated rotas, because correspondence to employees habitually referred to 'their' ship, because the crew's standard-form contracts referred to each employee's ship's name, if it was known, which suggested that there was an expectation, in principle, of attachment to a particular ship. Lord Justice Underhill was, however, at pains to point out that the Court's reasoning was specific to the circumstances of the particular case.

5.11 As to the numbers involved, the Act focused upon a 'proposal' to dismiss, rather than an actual dismissal. Account had to be taken of *all* of those affected, which could have included some employees whom the employer had no intention of dispensing with; for example, those whose terms and conditions might have been changed as a result of a reorganisation (*Hardy v Tourism South East* [2005] IRLR 242, EAT), or in cases where all were fired and re-hired on new terms (*GMB-v-MAN Truck & Bus UK* [2000] IRLR 636).

5.12 A ‘proposal’ was an intention in the mind of the employer. An employer did not propose to dismiss until it had reached the stage of having formulated a specific plan (*Hough-v-Leyland* [1991] ICR 696).

## 6. Conclusions

6.1 First, as to the numbers ‘proposed’ to have been made redundant, Mr Millar accepted in his closing submissions that, if the Claimant’s drawing of the establishment was correct, it had proposed to dismiss more than 20 people at the same time.

6.2 Mrs Colville had accepted in evidence that the net loss was 20 once her figures had been corrected but, that aside, the Respondent had actually proposed to dismiss 38 people since that was the number who had been put at risk. The fact that some were re-hired in some of the 18 new, different roles did not detract from the fact that the Respondent had proposed to make their old roles redundant.

6.3 Then there were the two Clinical Directors and the Business Relations Director, Ms Dawe, who were ‘lost’ just before the exercise. Since their roles were not reproduced, they were arguably part of the overall proposed number in the re-structure too, taking the total to 41.

6.4 Mr Millar was wise to have conceded the point, albeit at a late stage. As to the drawing of the ‘establishment’, that was the more difficult question.

6.5 The Respondent argued that, in order for the establishment to have been limited to the District, it was not essential for there to have been autonomous, internal management (see *Rockfon* and *Athinaiki*) but here, there actually was; each District had its own internal management structure and delegated autonomy to conduct its day-to-day functions. The Claimant’s offer letter had ascribed her to a particular District, but that point was diluted by the other contractual documentation which was unspecific (the Written Terms and Conditions [149] and Job Details/Description [150-2]).

6.6 The notion of delegated autonomy was also not as strong a point, in my judgment, as Mr Millar made out. The Districts had the power to advertise, hire and fire, but always within the constraints which were imposed upon them by Head Office in terms of budget, salary and allowances. A District’s autonomy did not extend to issues such as IT, HR, advertising and finance, all of which were managed centrally. Key supply contracts were managed there too. Districts did not create their own standard operating procedures or policies, all of which were created and disseminated centrally. The Claimant was required to attend Head Office regularly, she attended additional regular virtual meetings and looked to it for the organisation of matters of a social nature.

6.7 The Claimant’s arguments on collaboration, overlap and sharing between Districts were important and powerful; the requirement for her to work in other Districts was recognised in her Written Terms and Conditions [149], which supported the operation of the on-call rota. The manner in which the Districts supported each other was further illustrated by the use of electronic

chat groups and, in more practical terms, the provision of assistance for complaints, interviews and disciplinary matters. The business as a whole was reactive to demand if a clinic closed, with extra resource diverted to other proximate clinics, irrespective of District.

6.8 The lines between the Districts were also blurred by the fact that some permanent staff worked across more than one. There were more District Managers and District Resource Managers than there were Districts and the latter, although seemingly attached to a District in terms of responsibility, were not part of its management structure and were managed by a separate Operational Support Executive, Mr Lee. Then there were the Business Relations Managers who managed the relationships with each of the 7 clinics within the Claimant's District, but who were not embedded within that District, but were managed centrally by the Business Relations Director, Ms Dawe, in Head Office.

6.9 The establishment might actually have been drawn on different lines to those contended for by either party. The Claimant worked from home. Could that have been an establishment? The separate clinics within each District contained dedicated staff, Principal Nurses at least, and were separate accounting units for budgetary purposes. Could they have been establishments? Neither argument was run by either side and evidence about them as possibilities was not properly explored.

6.10 Whilst it was not necessary for there to have been a store, ship or other physical unit for the Respondent's definition of 'establishment' to have succeeded, it did not help that there was little more than a map which might have served to identify it here. It was reasonable to assume that, as the Claimant had initially been assigned to District 7 [37], the Districts had changed and been re-drawn over time. District 7 included East Anglia and Northern Ireland at the point of the restructure according to paragraph 14 of Mrs Colville's statement. The Claimant was made redundant from District 6.

6.11 What the evidence revealed overall, in my judgment, was that there was insufficient autonomy, delineation and independence within the Districts for them to have been properly regarded as separate establishments within the meaning of s. 188. In essence, the Claimant was a home worker who worked in a part of the Respondent's undertaking which was organised geographically for convenience, but she and the District received primary direction, assistance and support from Head Office and/or others attached to it. The Districts were little more geographical units where some, but not all, resources were pooled and with some overlap and co-operation between them.

6.12 Applying *Athinaiki*, the 'establishment' ought to have been defined broadly. The Districts were not distinct entities because of the degree of overlap, co-operation and sharing of resources and the blurred lines referred to above. Whilst they appeared to have had a certain degree of permanence, their existence, as geographical units could have been rearranged or swept away in a restructure, as it was in 2023. Their stability also shifted as different management lines were draw (the District Resource managers, for example) and, although each District had some of the technical means and

an organisational structure which allowed it to manage the clinics, the powers and resources which they used were given to them by Head Office, to which they looked for many other support mechanisms.

6.13 Accordingly, the establishment was properly understood to have been the undertaking as a whole and the Respondent had proposed to dismiss more than 20 people at it within the meaning of s.188.

_____
Employment Judge Livesey
Date 29 July 2024

Judgment & reasons sent to the Parties on 06 August 2024

For the Tribunal Office