



EMPLOYMENT TRIBUNALS

Claimants: Mr T Yeoman and others

Respondents: Green North East Trading Bidco Limited (in administration) (1)
Secretary of State for Business Innovation and Skills (2)

Heard at: Middlesbrough

On: 16 May 2017

Before:
Employment Judge JM Wade
Mrs E Sutton
Mrs C Hunter

Representation

Claimants: Mr G Williams (Community the Union solicitor)
First Respondent: No attendance
Second Respondent: No attendance, written submissions

JUDGMENT

- 1 The claimants' complaint in respect of a Protective Award is well founded.
- 2 The first respondent shall pay to the claimants in these proceedings remuneration for the period commencing on 11 November 2016 and ending on 9 February 2017 (ninety days - "the Protected Period").
- 3 The claimants' complaints of unfair dismissal against the first respondent have been dismissed on withdrawal (previously recorded in Orders).
- 4 The recoupment regulations apply to the award above.

REASONS

Introduction

1 In these proceedings twenty four claimants (who have all attended today) seek a protective award, having also presented claims for unfair dismissal. They are represented by Community Union.

2 The unfair dismissal complaints have been withdrawn against the first respondent, which was recorded in an Order but not in a Judgment on the public record and I correct that above. The first respondent has not presented a response but its administrators have given consent for these proceedings.

3 The Secretary of State was added as a second respondent and the issues for this Tribunal are highlighted in its response, by which the Tribunal has been greatly assisted. There was no attendance on her behalf, which was expected.

Did the claimants have standing to bring a Section 188 complaint or was there a recognised trade union or elected employee representatives who should instead have done so?

Was there a failure to provide information and consult in accordance with Section 188?

If so, and the complaint is well founded, what period does the Tribunal consider it just and equitable for the first respondent to pay remuneration to the claimants?

Evidence

4 Those matters in mind, the Tribunal has heard from Mr Walsh, a former logistics controller for the second respondent. He presented a written statement which was taken as read and the Tribunal then posed questions concerning the relevant matters. We were also assisted by a bundle containing a number of relevant documents including the administrators' report and proposals. This was a "pre pack" administration.

Findings of fact

5 The first respondent operated several waste sites, in Teesside and Leeds, selling on derivative products; it was a new company set up in 2013 by a management out.

6 The bulk of its seventy six or so employees worked at the waste transfer site in teesside at Huntsmans Drive, Seal Sands, Billingham ("the site"). The twenty four claimants in this action were all employed there.

7 During the summer of 2016 the respondent was in difficulties due to the loss of its main customer for derivative products. That was apparent to the workforce because of the build up of stock; it became apparent that trading was difficult and reviews were being undertaken as a number of specialists were visiting the site to look at options for the future.

8 The operations manager, Mr Jones came under pressure to answer questions from the workforce about their futures, but was also without information. No information had been provided to the workforce either formally or informally about possible redundancies, numbers, ways of mitigating those or otherwise, despite the signs of strained circumstances.

9 Staff were paid around the end of October, but on 31 October a winding up petition in respect of an unpaid debt to advisers was presented; and the directors applied on 1 November for an administration order.

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10 On 3 November 2016, by which time plant and machinery had begun to be removed from site, Mr Jones secured the attendance of the chief executive officer, Mr Martin, and the workforce were told their pay could not be guaranteed if they stayed at work. They were told that if they could find work, take it. At least one member of staff had been offered a job elsewhere recently but had turned it down.

11 Many went home and received letters from administrators appointed on 10 November terminating their employment summarily and pointing them to the insolvency service for outstanding payments; that was at least the twenty four claimants in these proceedings, and on the evidence more likely to be upwards of fifty employees at the site. That placed a large number of similarly skilled people on the local job market at one time and suddenly.

12 The first of the dismissals took effect on 11 November 2016 (the date the letters were received by post).

13 There was no union recognised for collective bargaining at the site or consultation purpose and no employee representatives had been elected for consultation purposes or any purpose.

14 A very small number of the first respondent's employees secured work at the land fill sites sold on; in total seventy six employees were dismissed across all locations.

15 These claims were the subject of ACAS conciliation certificates issued on 9 February in respect of notification on 8 February. The claims were presented on 9 February 2017; they are in time.

The Law

16 The relevant law is contained in the claimants' pleading and we do not repeat it here (Sections 188 and 189 of the Trade Union and Labour Relations (Consolidation) Act 1992. The joinder of the Secretary of State arose because of the provisions of Sections 182 to 189 of the Employment Rights Act 1996, and reference is made to those in the Secretary of State's submissions. We have taken note of the "Woolworths" establishment point, raised by the Secretary of State, and we are also grateful to Mr Williams for putting before us a very helpful skeleton referring to: Mrs C Smith and Ms A Moore v Cherry Lewis Ltd (in receivership) UKEAT/0456/04/DM and Susie Radin Ltd v GMB and others [2004] EWCA Civ 180.

Applying the law to the facts: our decision

17 The claimants have standing, there were no elected representatives or recognised trade union; there was a total failure to comply with the requirements of section 188 in circumstances in which the respondent proposed to dismiss as redundant twenty (and more) employees at one establishment (the site) within a period of ninety days (by letters received eight days after employees were told they would not be paid further).

18 There is no "special circumstances" defence (the first respondent did not enter a defence); and on our findings there is no material to support that in any

event.

19 Adopting Lord Justice Gibson's suggestions, we had in mind that a protective award is a sanction; that we have a wide discretion but our focus should be on the seriousness of the default; that may be from complete failure to technical default; the deliberateness of any failure may be relevant; it is a matter for us but where there has been no consultation a proper approach is to start with ninety days and reduce it only if there are mitigating factors justifying such a reduction.

20 It was clear from the administrators report that the first respondent was unable to pay its debts as they fell due without further lending on 31 October 2017, and that before 10 November 2016 it invited its lender to appoint administrators.

21 More importantly the trading and debt position through the summer was such that advisers were engaged to advise on a restructure or other solutions and the relevant fees were incurred; yet there was no evidence that any steps were taken to comply with the Section 188 obligations, despite pre-pack sales of parts of the business being arranged. The Section 188 obligations are well known to the business recovery sector, but particularly to the large firms instructed by large lenders and those that advise them (as was the case here).

22 Section 188 is not simply about a potential award falling on the secretary of state, that is, the public purse, in these circumstances; it is also about the avoidance, or mitigation of hardship, and the discussion of potential solutions which information and consultation can afford. There was a wholesale failure in this case to provide any information or consult, all the worse a failure because it was being asked for: that is a failure of the worst kind.

23 The only mitigating factor brought to our attention by the Secretary of State is the limitation of the National Insurance Fund to payments of up to eight weeks' arrears of pay in total.

24 To be clear, that state of affairs does not mitigate the first respondent's default in this case; it may be a factor or circumstances affecting our wide discretion, but it would be wrongheaded and outwith the authorities to describe it as a mitigating factor; it is not.

25 Mr Williams has properly advised his clients of the limits of the Secretary of State's obligations and the application of recoupment. In all the circumstances we discount those matters in exercising our discretion to make an award.

26 Given all the circumstances, the complaint is well founded and we consider the first respondent must pay remuneration to the affected employees (in this case the twenty four claimants in these proceedings) for a period commencing on 11 November and ending on Thursday 9 February 2017, that is the maximum period of ninety days. Of course, that will be subject to recoupment.

27 Mr Williams has also confirmed that he does not seek reimbursement of the issue fees or hearing fees in this matter from the first respondent or the secretary of state.

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28 As to the form of our Judgment, this has been discussed and Mr Williams is in agreement. It is only on its making that a debt, as arrears of pay, falls due; having said that, it is a debt arising from proceedings which have the consent of the administrators.

Employment Judge JM Wade

Date ___ 16 May 2017 _____

JUDGMENT SENT TO THE PARTIES ON

30 May 2017

G Palmer
FOR THE TRIBUNAL OFFICE

Multiple Schedule

Multiple: 6616 - Green North East Trading Bidco Limited

<i>Case Number</i>	<i>Case Name</i>
2500207/2017	Mr Thomas Yeoman -v- Green North East Trading Bidco Limited (In Administration) & Others
2500208/2017	Mr Christopher Arnold -v- Secretary Of State For Business Innovation And Skills & Others
2500209/2017	Mr Mark Axford -v- Secretary Of State For Business Innovation And Skills & Others
2500210/2017	Mr Daniel Bone -v- Secretary Of State For Business Innovation And Skills & Others
2500211/2017	Mr Stephen Brunton -v- Secretary Of State For Business Innovation And Skills & Others
2500212/2017	Mr Darren Campbell -v- Secretary Of State For Business Innovation And Skills & Others
2500213/2017	Mr Alan Charles -v- Secretary Of State For Business Innovation And Skills & Others
2500214/2017	Mr Eduardo Da Costa -v- Secretary Of State For Business Innovation And Skills & Others
2500215/2017	Mr Michael Donaldson -v- Secretary Of State For Business Innovation And Skills & Others
2500216/2017	Mr Daniel Gallafant -v- Secretary Of State For Business Innovation And Skills & Others
2500217/2017	Mr Keith Galloway -v- Secretary Of State For Business Innovation And Skills & Others
2500218/2017	Mr Christopher Hampton -v- Secretary Of State For Business Innovation And Skills & Others
2500219/2017	Mr Robbie Hanratty -v- Secretary Of State For Business Innovation And Skills & Others
2500220/2017	Mr David Hedley -v- Secretary Of State For Business Innovation And Skills & Others
2500221/2017	Mr Christopher Martin -v- Secretary Of State For Business Innovation And Skills & Others
2500222/2017	Mr Kevin Ruddick -v- Secretary Of State For Business Innovation And Skills & Others
2500223/2017	Mr Stephen Stainsby -v- Secretary Of State For Business Innovation And Skills & Others
2500224/2017	Mr Raymond Suggitt -v- Secretary Of State For Business Innovation And Skills & Others
2500225/2017	Mr Shaun Turner -v- Secretary Of State For Business Innovation And Skills & Others
2500226/2017	Mr Kevin Wall -v- Secretary Of State For Business Innovation And Skills & Others
2500227/2017	Mr Stephen Walsh -v- Secretary Of State For Business Innovation And Skills & Others
2500228/2017	Mr Jonathan Weir -v- Secretary Of State For Business Innovation And Skills & Others
2500229/2017	Mr Keith Williams -v- Secretary Of State For Business Innovation And Skills & Others
2500230/2017	Mr Thomas Yeoman -v- Secretary Of State For Business Innovation And Skills & Others