Appeal No. UKEAT/0375/12/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 5 April 2013

Before

HIS HONOUR JUDGE SEROTA QC

MR D NORMAN

MR M WORTHINGTON

AEI CABLES LTD — APPELLANT

(1) GMB
(2) UNITE
(3) INDIVIDUAL CLAIMANTS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D TATTON BROWN (of Counsel) Instructed by: Wright Hassall LLP Solicitors Olympus Avenue Leamington Spa Warwickshire CV34 6BF
For the First & Second Respondents	MS A DAVIES (of Counsel) Instructed by: Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle upon Tyne NE1 1TH
For R Fresia & Mr W Frost	Debarred
	All other Respondents neither present nor represented

SUMMARY

REDUNDANCY – Protective award

It is unreasonable to expect an employer to trade while insolvent to enable it to provide information and consult in accordance with its obligations under s.188 **TULRCA 1992**.

The Employment Tribunal made 90 day protective awards under s.189 TULRCA against the employer for failure to comply with its duties to consult and provide information pursuant to its duties under s.188 TULRCA. However it failed to take account of the fact that the employer was insolvent and could not lawfully carry on trading to enable it to consult for a period of more than 10 days or so. In the circumstances the EAT reduced the protective award from 90 days to 60 days.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from a decision of the Employment Tribunal at Newcastle-upon-Tyne in front of Employment Judge Hargrove and two lay members. The decision was sent to the parties on 18 April 2012. The Employment Tribunal held that the Respondent had failed to comply with the requirement section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** known as TULRCA to consult on the requirement to dismiss 100 or more employees. The dismissal took place on 27 May 2011. The Employment Tribunal concluded that it was appropriate in the circumstances to make a protected award of 90 days wages having regard to the seriousness of the Respondent's default in relation to its failure under section 188.

2. The Claimants were the two trade unions who represented their members and a number of individual employees. Those individual employees are parties, they do not appear today, obviously they will be bound by the decision and they are no doubt wisely content to rely upon the submissions that Ms Davies has made.

The factual background

3. The Respondent's at the material time were manufacturers of copper wiring and cable. They manufactured items predominantly from copper which they purchased on the stock market. As I have said there were essentially two parts to their business; there was domestic wiring and commercial cable which used significantly more copper than domestic wiring, much of which was rubber. The Respondent's business was hit by a steep increase in the price of copper between September 2010 and February 2011 when the price of copper rose from £5,000 a metric ton to £6,250 a metric ton. At the same time as the Respondents were faced with the significant increase in the cost of copper there was downward pressure on prices as a result of

cheap imports and also inferior quality products competing with theirs. It was clear from about February 2011 that the business was in trouble and would have to undergo some form of restructuring and redundancies and general discussions with trade unions began in early 2011 and there were also discussions among the directors as to what might be done. There were some issue for the Employment Tribunal as to when the relevant trigger date was which would oblige the Respondent to consult under section 188. The obligation arises under section 188 when the employer first contemplates, I think that is the language of the English legislation, or proposes, which I think is the language of the European Directive. It does not matter because there is no challenge to the finding made by the Employment Tribunal, which I shall come onto shortly.

4. Various dates were canvassed before the Employment Tribunal as to when the trigger date, as I shall call it, occurred. The Claimants were seeking the earliest date which was about 31 March 2011 and the Respondent was seeking the latest, that is 25 May 2012. The Employment Tribunal however fixed on a date between 17 and 20 May. As there is no appeal against that decision it is unnecessary for us to consider it further.

5. The significance of the dates really is that between 17 and 20 May, having been warned by well known accountants (Messrs Hacker Young) who specialise in what is known as company reconstruction (it used to be called insolvency), that unless the Respondent reduced its costs quickly or presumably acquired new funding there was a risk of it trading while insolvent. The consequences of a company trading while insolvent are of course that the directors of the company incur personal liability for obligations assumed by the company during that period and in addition if the company while insolvent contracts credit in circumstances where it may be unable to secure repayment the directors are at risk of being prosecuted for fraudulent trading.

6. On 25 May 2011 a meeting took place between the directors and the company's bankers, the Bank of India. The Bank of India refused to extend the overdraft. A directors meeting took place following the visit to the Bank of India and further advice was sought from Messrs Hacker Young. The directors decided specifically on that date that the cable plant should be closed immediately and approximately 124 employees working in the cable plant should be made redundant. 189 employees were to be retained in the domestic division. A proposal was made in accordance with the advice of Hacker Young for a Creditors Voluntary Arrangement (CVA) and this was formulated on the basis of the redundancies to which we have referred being made. Further advice from Hacker Young was that the company should seek an immediate CVA and the directors were warned of the consequences of continued trading.

7. The following day Mr Scott of the Respondent, I believe he may have been the HR manager or HR director, spoke with Mr Green, a regional officer of the Unite Union, informing him that the company had to make immediate redundancies. This conversation is referred to by the Employment Tribunal at paragraph 5 and we have an attendance note at page 89 of our bundle. On 27 May 2011 letters went out summarily dismissing 124 employees in the cable division; they were made redundant with immediate effect. Throughout the period from 17 to 20 May and 27 May there was very little communication or imparting of information between the Respondent and the Claimants. The only other date that I need to mention is that on 24 June 2011 the CVA was ratified and we have been told that as a result of the CVA the Respondent has remained in business, presumably producing domestic wiring, but none of the men made redundant have been returned to employment.

8. I now wish to say something about the Employment Tribunal's decision. No issues have been raised before us as to its self direction in law. The Employment Tribunal found that there

had been breach of the duty under section 188 of TULRCA to consult with the trade unions and employees about the impending redundancies. There were no special circumstances upon which the Respondent could raise to excuse non-compliance. There is no appeal against either of these decisions so I need say nothing further about them.

9. The issue which is the subject of the appeal is as to the length of the protected award. The relevant statutory provision at section 188(2) provides that as from the trigger date there should be a minimum of 90-days set aside for consultation. Section 184 provides for disclosure of information by the Respondent. By virtue of section 188(5) the Respondent is obliged to individually notify each employee affected of the relevant circumstances.

10. Section 189 of TULRCA provides:

> **"189 Complaint by trade union and protective award**
>
> **(1) Where an employer has dismissed as redundant, or is proposing to dismiss as redundant, one or more employees of a description in respect of which an independent trade union is recognised by him, and has not complied with the requirements of section 188, the union may present a complaint to an industrial tribunal on that ground.**
>
> **(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.**
>
> **(3) A protective award is an award in respect of one or more descriptions of employees–**
>
> > **(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and**
> >
> > **(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,**
>
> **ordering the employer to pay remuneration for the protected period.**
>
> **(4) The protected period–**
>
> > **(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and**
> >
> > **(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer´s default in complying with any requirement of section 188;**
>
> **but shall not exceed 90 days in a case falling within section 188(2)(a), 30 days in a case falling within section 188(2)(b), or 28 days in any other case."**

11. There is authority on how the courts should approach awards under section 189. Both counsel are agreed that the relevant passage, and I believe they both refer to it in their submissions, is to be found in the Judgment of the Court of Appeal in case of **Susie Radin v GMB** [2004] ICR 893:

> **"45 I suggest that employment tribunals, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind. (1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in section 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach. (2) The tribunal have a wide discretion to do what is just and equitable in all the circumstances, but he focus should be on the seriousness of the employer's default. (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. (4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under section 188. (5) How the tribunal assess the length of protected period is a matter for the tribunal, but a proper approach in a case where there has been consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the Tribunal consider appropriate."**

12. I draw attention to the way in which this matter is dealt with by the Employment Tribunal and one finds the Employment Tribunal's conclusion on page 18 of its decision, the latter part of paragraph 9. After the Employment Tribunal has set out the passage to which I have already referred from the **Susie Radin** case the Employment Tribunal went on to say:

> **"In the present case we found that there was a complete failure to consult with either the trade union or with individuals. Calling trade union representatives to a meeting to inform them that a large number of their members are to be dismissed within a day or so does not amount to consultation. We therefore consider that the appropriate starting point is the maximum period and then to consider if there were mitigating circumstances justified a reduction. It is to be emphasised, as was made clear in paragraph 43, that it is not open to an employer to argue that consultation would in the circumstances be futile or utterly useless. In the present case we have found that there was a complete failure to consult with either of the trade unions or with individuals. We therefore considered it appropriate to start with the maximum period. It is correct that it may have been the case that at some stage during the requisite 90 day period circumstances might have been reached which were sufficiently special to have justified dismissal without further consultation, but no information has been put forward to us to indicate when that would have been and we are not prepared to engage in speculation. The evidence goes nowhere near to show that consultation would have been useless or futile, even if that were relevant. In these circumstances we have found that it would be just and equitable to make an award for the maximum period of 90 days."**

13. I pause there just to note that it is apparent that the Employment Tribunal considered that it would have been appropriate for there to have been a 90 day consultation period commencing, one assumes, between 17 and 20 May.

14. The case for the Respondent has been put forward, in his usual lucid way, by Mr Tatton Brown. He submitted that a study of the facts of **Susie Radin**, and the language that was used, by the Court of Appeal suggested that even though in that case there had been a complete failure to comply with the section 188 and 189 duties it would nonetheless have been open to an Employment Tribunal to have properly awarded less than 90 days. Mr Tatton Brown also relied upon the judgment of Burton J, the former President of the EAT, in the case of **Amicus v GBS Tooling Ltd** [2005] IRLR 683 at paragraph 20 of the Judgment:

> **"…Peter Gibson LJ directs the tribunal to address the seriousness of the breach. It appears to us clear that where, as here, there was no consultation and no information provided, after the date of the proposal, it must be relevant, in order to sanction or punish a company which is in breach, to look to see what the nature of that breach is, what the consequence of that breach is, and what the state of mind lying behind the breach is. Peter Gibson LJ explained, by way of example, in the passage to which we have referred at subparagraph 45(4), that the deliberateness of the failure may be relevant. A company which has deliberately set out to be secretive would appear to fall into a different category from a company which has completely failed to disclose information through negligence or misguidedness, or, as here, a company which has not completely failed to disclosed information but has simply failed to disclose it at the right time and in the right context. An assessment of the seriousness of the breach must include those kind of questions."**

15. As I say, there is no issue between Ms Davies, who appeared on behalf of the Claimants and Mr Tatton Brown as to the appropriate law in this case, and indeed both relied upon the same passages.

16. Mr Tatton Brown also referred us to the decision in **Todd v Strain** [2011] IRLR 11; a decision of the former President, Underhill P who stated that the guidance in **Susie Radin** should not be followed mechanically. Mr Tatton Brown submitted that the Employment Tribunal had conflated the issue of special circumstances that would have provided a defence for failure to comply with sections 188 and 189 with what might loosely be described as mitigation which is relevant effectively to the period of protective award. Ms Davies has persuaded us that that is in fact not the case. Looking at the passage as a whole it is quite clear that there was some overlap in the facts relevant to both matters but the Employment Tribunal clearly had in mind that it was considering the issues of what we might describe as mitigation.

17. Mr Tatton Brown went on to submit that what the Employment Tribunal had failed to do was to consider the seriousness of the default. The Employment Tribunal found that there had been a complete failure to comply on the part of the Respondent with its statutory obligations. However, it was necessary for the Employment Tribunal to consider why this was so; what were the Respondent's intentions and what, again to follow the analogy of the criminal law, was its *mens rea*. The Employment Tribunal had failed to consider if the breach was deliberate and what explanation was given by the Respondent for carrying out the dismissals when it did rather than at a later date. Mr Tatton Brown said the answer is quite clear and is not really contentious. The Respondent had been advised by its insolvency advisers that was in danger of trading unlawfully while insolvent and that it should apply at once for a CVA, as it did, and to reduce its costs by the immediate redundancy of the 124 employees in the cable division.

18. The Employment Tribunal has nowhere said why the Respondent acted as it did submitted Mr Tatton Brown. This issue was highly relevant to the issue of the Respondent's conduct but was not considered by the Employment Tribunal as it should have been. Although Mr Tatton Brown was not challenging the findings of the Employment Tribunal that the communications that did take place on 26 May were not in compliance with the statutory obligations arising under sections 188 and 189. They were relevant because it showed that the Respondent's immediate reaction after the meeting with the bank was to line up meetings with the trade unions for 26 May. He submitted that these were not the actions of an employer who was deliberately flouting its statutory obligations to consult but rather the actions of an honest employer doing what he conceded was its incompetent best to inform the trade union. This was a matter that the Employment Tribunal should have had regard to.

19. Mr Tatton Brown drew our attention to the written submissions that were put before the Employment Tribunal by the Claimants. At page 59 of our bundle one finds the Claimants submitting that it was not in dispute between the parties that the Respondent had met its bank on 25 May with the intention of requesting an extension of its credit facility but the bank refused to extend that facility and:

> **"As a result of the failure to extend the credit facility the Respondent was technically trading while insolvent and subsequently applied for a Creditors Voluntary Arrangement."**

20. Mr Tatton Brown also submitted, and again this is probably not contentious, that where a company is of doubtful solvency the directors have an additional duty to bear in mind that the interests of the creditors of the company should be treated as paramount and he drew attention to two authorities **West Mercia Safetywear v Dodd** [1988] BCLC 250 at 252-253 and **Brady v Brady** [1988] BCLC 20 and **Roberts v Frolich** [2011] EWHC 257 (Ch). He submitted that the 90 days in the circumstances was excessive and it should be reduced to four weeks, or 28 days that is, or perhaps even as low a period as 7.

21. Ms Davies relied, of course, on the Employment Tribunal's decision and submitted that we should not interfere with that decision unless it was plainly wrong. She submitted that the Employment Tribunal must have had the importance of considering mitigating factors in mind and the extent to which the breach was deliberate. The Employment Tribunal was fully entitled to conclude that the attempts to consult were made, if that is what they were on 26 May, were not in any sense adequate and they did not mitigate the effect of the seriousness of the breach. However, Ms Davies conceded, very properly, that the period for consultation would have started between 17 and 20 May and lasted until 26 May. It could not, therefore, have lasted for more than nine days. She submitted by reference to the facts of the **Amicus** case that it was very similar and in that case the Employment Appeal Tribunal had reduced an award of 90 days

to 70 days. She submitted in that the **Amicus** case the employers had complied rather more than the Respondents in the present case with its obligations to consult and disclose information. She submitted that the Employment Tribunal was justified in concluding that the Respondent could have communicated with trade unions and employees between the trigger date and either 26 or 27 February. However, Ms Davies, in our opinion, very properly conceded that the Employment Tribunal in the passage that we have read towards the end of its Judgment was wrong in envisaging that there could have been a 90 day consultation period. Were this to be have been so the Respondent would have, of necessity, had to trade while insolvent and accordingly the approach of the Employment Tribunal in our opinion was flawed.

22. I now turn to our conclusions. In general we prefer the submissions of Mr Tatton Brown. We very much bear in mind that the purpose of making a protective award is penal, it is not compensatory. It is penal in the sense that it is designed to encourage employers to comply with their obligations under sections 188 and 189. We also bear in mind that the starting point in considering the length of a protective award is 90 days. Nonetheless Employment Tribunals are bound to take account of mitigating factors and are bound to ask the important question why did the respondent act as it did. Had the Employment Tribunal asked this question it could not possibly have ignored the fact and the conclusion that the company simply was unable to trade lawfully after the advice it had received on 25 May. In those circumstances, it is clearly wrong for the Employment Tribunal to anticipate that a 90 day consultation period could have started.

23. My colleagues between them have great industrial experience and they are both of the view that a good employer in circumstances where it is unable to consult or provide information within a meaningful period would have "pulled out all the stops" to do what it could to consult as best it could and to provide information as best it could. The Employment Tribunal found that in this case the Respondent's failure was complete, there was no consultation and no real

provision of information. Some consultation could clearly have taken place in the limited time from 17 and 20 May or even from 25 May, bearing in mind it was only on 27 May that the dismissal letters went out. However, because in our opinion the Employment Tribunal failed to have sufficient regard to the insolvency and the consequences of trading and that a consultation period of 90 was simply not possible, the award of 90 days cannot stand. Very sensibly the parties have agreed that we should assess the appropriate level of the protective award rather than remit the matter to the Employment Tribunal. We are of the opinion that in order to meet the gravity of the claims of the Respondent's failures that at the same time to take account the circumstances relating to its insolvency that we have mentioned that the appropriate level of award should be 60 days and that is the order that we make.

24. Before I conclude this Judgment we would like to express our sincere thanks to Ms Davies and Mr Tatton Brown. They not only produced excellent and very clear skeleton arguments but also made their submissions fully but at the same time crisply and within a very acceptable time frame. We are grateful to you both.