EMPLOYMENT TRIBUNALS

Claimants: Mrs K Curtis **(**and 45 others)

Respondents: 1. Morgan Tucker Ltd (In administration)

2. The Secretary of State for Business, Energy and Industrial Strategy

Heard at: Nottingham

On: Wednesday 24 January 2018

Before: Employment Judge P Britton (sitting alone)

Representation
Claimants: Miss Nuala Toner, Solicitor
First Respondent: In administration and not defending
Second Respondent: Written representations

JUDGMENT

1. The claim of failure to consult pursuant to Section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 succeeds.

2. A protective award is made whereby the First Respondent is ordered pay each of the Claimants remuneration for a protected period of 90 days beginning on 31 May 2017.

REASONS

Introduction

1. The issue before me is to determine whether the Claimants should receive a protective award pursuant to the provisions commencing at Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA).The first Respondent's administrators are not resisting the application. The second Respondent has asked that its response (ET3) be taken as its representations which primarily are confined to a rehearsal of the jurisprudence.

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2. The scenario can be taken short. The entire workforce of the First Respondent was dismissed on 31 May 2017 by the Administrators, them having been formally appointed the day before.

3. When the workforce was dismissed on 31 May with immediate effect by the Administrators, they had no forewarning and there had been no consultation that they were about to be dismissed, albeit they had to some extent been kept

abreast of the Company's worsening financial situation.

4. That is quite irrelevant because Section 188(2) in terms of the obligation to consult in circumstances such as this requires that "*The consultation shall include consultation of ways of (a) avoiding the dismissals; (b) reducing the number of employees to be dismissed; and (c) mitigating the consequences of the dismissals*". It is self-evident from the bundle before me that none of that happened.

5. Thus, adopting the well-known line of authority apropos ***Susie Radin***[1], the starter under Section 188(1) would be that there having been a failure to consult, that I should make an award of 90 days' pay in relation to all the employees who have brought claims. This would be pursuant to Section 189(4) as the authority to which I have referred makes plain that this is intended to be a sanction that if there has been an outright failure to consult and there are no mitigating circumstances put forward, then the starting point should be 90 days' pay. As I have none of the latter from the First Respondent, it must therefore mean that the consequences are an award of 90 days' pay.

6. As to who it should be awarded to, it is the individual employees in this case as there was not a recognised trade union and the First Respondent took no steps to arrange the appointment of elected representatives.

7. However, the core issue is none of that. It becomes as to whether or not all of these employees were employed at one establishment. Thus, I return to Section 188(1) of TULRCA:

> "***188 Duty of employer to consult representatives.***
>
> *(1) Where an employer is proposing to dismiss as redundant 20 or more employees* ***at one***[2] ***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. "*

8. The only issue that the Secretary of State in his submissions in the ET3 really addresses is whether or not in the circumstances of this case all the effected Claimants were employed at the same establishment.

9. There is extensive jurisprudence on this issue which I do not need to rehearse as it is helpfully put in Miss Toner's written submissions. Thus, suffice it to say that what I have to determine is as succinctly set out by the European Court of Justice in ***Athinaiki Chartopoiia AE v Panagiotidis & others*** as to which see Bailii [2007] ***EU:C:2007:101 (15 February 2007).***This was subsequently followed in what is commonly referred to as the "Woolworths cases"

10. Thus, the determination of what is an establishment as made plain in ***Athinaiki*** is matter for findings of fact by a tribunal Judge and in particular focussing as per paragraphs 26 and 27 and of course remembering that the underlying aim of the European Directive is to give some protection to employees who are facing redundancy and so that they are consulted.

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[1] Susie Radin Ltd v GMB and ors 2004 ICR 893,CA.

[2] My emphasis.

11. In particular, paragraph 27:

"*Thus for the purposes of the application of Directive 98/59 an establishment in the context of an undertaking may consist of 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 the accomplishment of those tasks*"

Findings of fact

13. The First Respondent (now in Administration) was what I would describe as a consulting engineer. At the material time, it operated from four locations; Newark, Nottingham, Leeds and London.

Newark

14. The business was controlled from Newark, which was the HQ. It is where the Board Directors and such as the Managing and Finance Directors were based. It is also where HR was based. In that respect, I have been assisted by the evidence given to me today under oath by Katherine Curtis, who was the HR officer.

15. What the business delivered was across the range of what I might describe as civil engineering undertaking work for both private and the public sectors. Thus, it had civil engineers, structural engineers, surveyors and transport planners. Having won a contract, it would provide the necessary design and the expertise in that respect. Thereafter, if so appointed, it would manage the aspect of the project that it had provided the designs for, albeit not employing other than its own professional staff in respect thereof.

16. At Newark it had 28 employees at the time of the Administration. All the organisational aspect of the business worked essentially from Newark; so approval of costings and quotations, cashflow monitoring, invoicing, IT and HR to name but a few of the core functions. The staff at any one of the four locations had what I would describe as mobility contracts. That is perhaps not surprising as the nature of the work of the engineering side in particular would be peripatetic; in other words they would need to go wherever it was the project was being worked; or they may very well need to input from one branch so to speak to another in terms of the skilled resource required for instance for the getting of the business or the designing of the ensuing project.

17. Thus I have no doubt that Newark itself is clearly an establishment applying the definition to which I have gone.

Nottingham

18. What about Nottingham and Leeds? Are they to be viewed as separate establishments? I take them in turn and I have again heard the evidence of Miss Curtis but also under oath Joanna Ward from whom I have also got a witness statement and who was a transport planner based at Nottingham.

19. Newark is close to Nottingham. They are about 20 miles apart. Nottingham of course is a city with a considerable population of commercial professionals based in it, such as large law firms and major branches of banks. Newark, with great respect to the citizens of that proud town, is on something of a geographical limb and perhaps not to be seen as fashionable in terms of a

commercial address in comparison to an office in the commercial and professional centre of Nottingham. So the Nottingham branch had been set up really so that the expanding business would have a more prestigious address from which to network and thus gain work particularly across the midlands. But the permanent population at the office was only nine the main complement of which was the transport planning team. And they reported to Newark. Any ensuing meetings that took place meant they would have to go to Newark to take part. When engaged on projects they would have to utilise resources from the other branches, particularly Newark. So it can be seem that Nottingham had no real autonomy. It did not have a separate budget. Thus I find that those employees were part of the Newark establishment. Thus, the nine employees who were based at Nottingham go into the complement of Newark, meaning that 37 effected employees were not consulted. Thus the 20 person threshold pursuant to TULCRA has been exceeded.

Leeds

20. Albeit it did have a Director (not Board level) in charge of it, there were only five staff. Leeds again was about expansion. An office in a smart part of Leeds was obtained and the small team based there. But cross referenced to the list of employees before me and the description of what they did and which is appendixed to the statement of Miss Curtis, and is self-evident that apart from trying to get a foot in the door for work which would then have to be financially and otherwise approved by HQ at Newark, they would not be able to function as a separate establishment because they would not have the necessary staff to undertake even the functions of putting together a design, let alone the carrying out of the same. So they would need to utilise the overall team in the business.

21. It follows that I therefore find that this was not a separate establishment; and so the five effected employees at Leeds go into the pool, so to speak, of effected employees as part of the Newark establishment.

London

22. London is somewhat different. It was an altogether larger operation. There were distinct elements of it which could be seen as constituting in some ways an establishment. For instance, undertaking consultancy in the water industry was only based upon London. Also the larger complement with the range of skills that was deployed at the London office was because a considerable volume of work was won in London, whether it be in the private or the public sector.

23. However, there are key issues where I come back to where I was before, although may I say it would not matter because if I did not find, as I am now going to do, that London was part of the Newark establishment, I would have alternatively obviously have found that it was a separate establishment and because as it was the base for 23 employees at the time of the administration they would still be protected by s188.

24. The reason I come to the conclusion that it was not a separate establishment is as follows:

24.1 No financial independence at all.In fact, tightly controlled in all respects from Newark.

24.2 No HR team.

24.3 Being required to utilise the IT resources based at Newark.

24.4 Providing as and when required professional support to for instance Nottingham or Leeds for the reasons I have gone to.

24.5 If for instance there was a major briefing, or such as the Christmas party, then the London employees came up to Newark.

Conclusion

25. Thus all the employees, including the Claimants, made redundant formed part of a single establishment.

The protective award

26. I take this very short. Applying ***Susie Radin***, I have decided given the complete absence of consultation and no mitigation put forward by the First Respondent as to why not, that the appropriate award should be 90 days' pay. As is usual in the circumstances I do not quantify this and would only do so if in due course the parties could not.

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Employment Judge P Britton

Date: 27 February 2017.

JUDGMENT SENT TO THE PARTIES ON

10 March 2018

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FOR THE TRIBUNAL OFFICE