



EMPLOYMENT TRIBUNALS

Claimants: Mr J Chera
Mrs M Baker
Mr M Cook
And Others

Respondents: (R1) Plant & Consumables Services Limited
(In Administration)
(R2) Secretary of State for Business, Energy and
Industrial Strategy

Heard at: Nottingham **On:** Thursday 23 November 2017

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimants: Ms Hopkinson of Counsel
Ms Toner, Solicitor

Respondents: No Appearance

RESERVED JUDGMENT

The Employment Judge gave judgment as follows:-

1. The complaint that the first Respondent failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

2. The Employment Judge makes a Protective award in respect of all Claimants who were dismissed as redundant on or after 8 March 2017. The Employment Judge orders that the first Respondent pay to those employees remuneration for a protected period of 90 days beginning on 8 March 2017.

REASONS

Background to this Hearing

1. There are a total of 40 Claimants who have presented their claims to the Tribunal. This is in the form of three separate claims, the first brought by Mrs M Baker and others (the "Baker Claimants") and received by the Tribunal on 1 June 2017, the second by Mr J Chera and others (the "Chera Claimants") received at the Tribunal on 6 June 2017 and the third brought by Mr Cook received by the Tribunal on 7 September 2017. All the claims arise from the closure of the first Respondent's business, Plant and Consumables Services Limited, which was put into administration by its bankers Clydesdale Bank on 6 March 2017. The claims were of unfair dismissal, failing to pay notice pays entitlement to redundancy payment, outstanding holiday pay and unauthorised deduction of wages following the decision made by the Administrators to cease the operation of the majority company's business on or around 8 March 2017.

2. In addition to those claims all of the Claimants say they are entitled to a protective award for failure to consult on the part of the first Respondent, The Secretary of State for BEIS (the second Respondent) has been joined into these proceedings in order that the department can be heard in regard to the allegations, as many of the claims have been or will be resolved by payments from the National Fund.

3. The administrators for the first Respondent have given consent only to the protective award claims going forward. They have not sought to defend any of the claims. They did not file an ET3. The Secretary of State filed an ET3 on 12 July 2017 in respect of the Baker and Chera claimants, The Secretary of State filed an ET3 in respect of Mr Cook on 9 October 2017. I received no further written representations from the second Respondent in respect of the protective awards for the hearing today. It neither supports nor resists the claims.

The Secretary of State has indicated in the responses that I should take into account the following issues;

- Whether the Claimants are eligible to bring the claims
- Whether the employer in this case proposed to dismiss 20 or more employees at one establishment within a period of 90 days or less
- The tribunal should be aware of the limits of arrears of pay that the Secretary of state is liable for
- That I should confine my judgment to a description of employees covered by the award

5. My colleague Regional Employment Judge Swann, at the Preliminary Hearing heard on 9 August 2017 set down this hearing to determine the issue of the protective awards for all the Claimants.

6. To make an order for a protective award I will have to consider the following issues:-

- The eligibility of the employees to make a claim
- The establishment issue described above
- Whether all the claimants can make a claim as some were dismissed more than 90 days after the first dismissal
- What the period of the award should be

The Hearing Today

7. I was provided with a bundle of documents that was agreed between the Claimants' representatives. I heard evidence from a number of witnesses namely:-

- Michael DeRome, Business Development Director based at Unit 4 Willow Farm Business Park, Castle Donington
- Shaun Allsopp, Office Supervisor at Unit 9b, Willow Farm Business Park, Castle Donington
- Christopher Brooks, Senior Buyer who was based at Unit 9b, Willow Farm Business Park, Castle Donington
- Georgina Warbrook, Regional Depot Manager based at Reed Street, Gladstone Industrial Estate, Thornaby, Cleveland

8. I also had the benefit of a witness statement from David Holmes who had been employed most recently as Operations Director and was based at Unit 9b, Willow Farm Business Park, Castle Donington.

9. I heard oral submissions and received written submissions from Ms Nuala Toner, Solicitor for the Baker Claimants and Mr Cook and also from Ms Sarah Hopkinson, Counsel for the Chera Claimants.

10. Each of them provided me with a considerable amount of case law which I will refer to later.

11. I was satisfied with the evidence that I heard and was able to make my findings of fact from that evidence.

The Facts

12. The Claimants were all employed by the first Respondents. The vast majority of them were employed at its site at Willow Farm Business Park, Castle Donington, Derby DE 74 2UD, The Respondent's operated in fact from 4 different premises comprising;

- Unit 9b, Warke Flatt, Willow Farm Business Park which was a warehouse,
- Unit 4, Boundary Court, Warke Flatt, Willow Farm Business Park,
- An additional storage facility at Castle Donington and
- Reed Street, Gladstone Industrial Estate, Mandale Road, Thornaby in Cleveland.

13. The Directors were all based at the head office as were the following functions:-

- Human Resources
- Health and safety
- Accounts department
- Credit control and payroll

I am satisfied that 49 staff were based at the two units at Willow Farm Business Park, either in the head office or the warehouse.

14. Ms Warbrook was the Regional Depot Manager at the site at Thornaby and reported to the Managing Director, Chris Eccleshaw who was based at Castle Donington, Her contract of employment (page 123) says that she can be required to work at other locations that the first Respondent may reasonably specify.

15. At one time there were 15 employees based at Thornaby including a Regional Director but he retired in March 2016 and Ms Warbrook became responsible for the day to day running of the depot Eight members of staff were engaged there at the time of the

administration. These were Ms Warbrook, Brian Clark, Regional Sales Manager, a Stores Manager, 3 internal sales persons and 2 drivers.

16. Ms Warbrook travelled once a month to sales meetings at Castle Donington and on a quarterly basis attended meetings with Directors to discuss turnover, new business, cash flow and figures.
17. At the Thornaby depot they had the same contracts, IT, HR, Health and Safety and stores systems, All requisitions for stock were processed, authorised and sent from head office. The accounts department at Castle Donington were responsible for credit control and payroll
18. As described above the first Respondent's had two sets of premises at Willow Farm Business Park, namely its head office and its warehouse and they were located about 100 yards apart. There was some additional office space at Unit 4 which had been acquired at a later date after the first Respondent's outgrew their offices at Unit 9b. The two office spaces though operated as one office spread over the 2 sites and it was common place for staff based at Unit 9b to visit the other office and vice versa.
19. There was no recognised trade union although some members of staff were members of UNITE, the trade union. David Kay was employed as Plant Controller. His situation was different to the other employees because he was based at a client's site, namely Siemens. Siemens had outsourced their stores function to the first Respondent's. The first Respondent's managed all their consumable stock and plant and equipment. There were 11 employees of the first Respondents based at Siemens, Whilst the function was based at the site like Thornaby all management functions were based at the head office Andrew Moore was the Manager of the site and he reported to Mr DeRome.
20. The extract from the administrator's proposals for achieving the purpose of administration sets out the circumstances giving rise to the administrator's appointment (page 157). It says:

"In early February 2017 the Company requested to increase its IF facility limit with the Bank by E0.5m to E8.0m. The Bank asked the Company for financial information to demonstrate the requirement and provide an explanation of the underlying reasons for the increase.

On 27 February 2017 the Bank received correspondence from the Company advising that it identified an accounting irregularity leading to a material reduction in its trade debtors. Consequently, the Company was struggling to pay its debts as they fell due and required ongoing support in order to be able to continue to trade in the short term.

The bank contacted PwC for advice and a meeting was scheduled between the Bank, the Company, PwC and the Company's accountants on 2 March 2017. This meeting was convened to understand the nature of the accounting irregularity, the impact upon the Bank's security position and the overall current financial position of the Company. During the course of the meeting, the Company again advised that it was unable to continue to trade without the support of the Bank and required significant additional funding.

Given the position above, the Bank took steps to enforce its security and as qualifying floating charge holder placed the Company into administration on 6 March 2017."
21. The document goes on to describe the management by the administrators of the company's affairs and business, It said:

"Due to the circumstances leading to our appointment and the lack of any funding to continue to trade the business, we determined that a cessation of the majority of the business was required, with the staged wind down of the business being the most appropriate strategy to maximise realisations for all stakeholders. A limited overdraft facility was provided by the Bank in order to pay for the initial expenses."

22. Mr DeRome told me that he was told that the first Respondent's were to be wound up on 8 March 2017: That is entirely consistent with what was said in the proposals document referred to above.

23. Approximately 40-50 employees were dismissed without notice or consultation on 8 March 2017, including 23 of the Baker Claimants and all the Chera Claimants. The rest of the Baker Claimants were dismissed between the 8 March 2017 and 12 April 2017. As at the date of the proposals, 28 April 2017, the first Respondent's had reduced the 68 employees who had been employed at the time of the appointment of the administrators. By that date there were only 8 employees who remained assisting the administrators with the collection of the debtor's ledger. The others had been either dismissed or had their employment transferred.

24. They did not consider that it was possible to rescue the company as a going concern (page 159). They therefore sought to realise the company's assets to pay a dividend to the secured creditor. They facilitated an orderly wind down of the company's affairs to support collection of the book debts and dispose of the stock and residual assets.

25. The final employee to be dismissed was Matthew Cook on 31 July 2017. He was also dismissed without notice or consultation. He was employed as an Accountant and had stayed on working for the first Respondent at their request He was based at the Willow farm Business Park.

26. In their progress report to the High Court dated 25 September 2017 (page 183-207) the Administrators confirmed that 7 of the 68 people employed at the time of the appointment were transferred under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) on 28 April 2017. These were the employees engaged on the Siemens's contract

27. At no stage was there any consultation either on a collective or individual basis with the employees prior to their dismissals. The management of the Respondents did not consult with any of the employees or consider the appointment of representatives. They did their best to ensure that the employees were not aware of the financial situation of the company and that their jobs were at risk. There is no evidence that the administrators had any regard to any obligations to consult with the workforces It is not referred to in any of their proposals.

28. I am satisfied that the first Respondent's were fully aware of its financial problems prior to the first dismissal. As Mr DeRome described there were problems with raising purchase orders and Chris Eccleshaw the Managing Director had confirmed that they were having financial difficulties in February 2017. Ms Warbrook was also aware of these difficulties and she was warned by Mark Evans, Finance Director that her payment for expenses would be later than normal at the end of February. She usually received payment of these at the beginning of each month and was owed in excess of E8,000. She only received payment of these sums by the administrators subsequently. She also described how the first Respondent's had not paid the rent on the premises at Thornaby for the last month. She had received an irate call from the landlord in respect of this.

29. Also at the end of February she attended a meeting which was held to discuss how the overheads could be reduced and business increased These difficulties were also confirmed by Mr Allsopps
30. The first Respondent was therefore well aware of their financial difficulties and took no steps to comply with their duties to appoint representatives or consult with its employees.

The Law

31. The claims are made pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Section 188 provides:

"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 or the persons who are appropriate representatives by any of the employees who may be (affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals):-

1 (A) The consultation shall begin in good time and in any event;

(b) Otherwise, at least 30 days, before the first of the dismissals takes effect.

1 (B) For the purpose of this Section the appropriate representatives of any affected employees are:-

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:---

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)."

32. Section 189 TURCA provides:

"(1) Where an employer has failed to comply with the requirement of Section 188 or Section 188K 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) in 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
- (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 dismissals or proposed dismissal the employer has failed to comply with the requirement of Section 188t ordering the employer to pay remuneration for the protective 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.
- (5) An Industrial Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal:-
- (a) before the date on which the last of the dismissals to which the complaint relates, takes effect, or;
 - (b) during the period of 3 months beginning with that date, or
 - (c) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented (during) the period of 3 months, within such further period as it considers reasonable.
- (5A) Where the complaint concerns a failure to comply with a requirement of Section 188 or 188A Section 292a (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(b).
- (6) If on a complaint under this section a question arises -
- (a) Whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of Section 188, or:

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances, it is for the employer to show that there were and that he did,"

33. In her submissions to me Ms Hopkinson for the Chera Claimants referred me to the case of *Hutchins v Permacell Finesse Limited* [2007] UK EAT/0350/07 which confirmed that:

"...it is now the law that a failure to comply with the consultation regime in respect of any number of affected employees, consideration of the protected period should begin at 90 days. Applying the guidance given in *Susie Radin*, the Tribunal should then work backwards to take account of such consultation or other mitigation, as there was,"

34. Ms Toner in her submissions referred me to a number of cases namely:-

- **Rockfon A/S v Specialarbejderforbundet I Danmark** &449/93, [1996] ICR 673
- **Athinaiki Chartopoiiaae v Panagiotidis** C-270/05 [2007] IRLR 284
- **Fairhurst v Stephens LLP** ET 2406673/09
- **Seahorse Maritime Limited v Nautilus International (a trade union)** EAT 0281/16
- **Renfrewshire Council v Educational Institute of Scotland** [201 3] IRLR 76
- **USDAW v Ethel Austin Limited** [2015] IRLR 577 .
- **Susie Radin Limited v GMB and Others** [2004] IRLR 400

35. I am satisfied that an employee can raise a complaint if there is non compliance with Section 188 and he or she is dismissed as redundant, There is no requirement in the legislation that dismissal must have taken place within the 90 day periods. Section 189(1)(b)(iii) states that the legislation is applicable to those who have been dismissed or whom it is proposed to dismiss and in respect of whom there has been a failure under Section 188.

36. As to the issue of whether there was more than one establishment I am satisfied that the wording of Section 188 TULRCA uses the phrase "assigned to" rather than "work at". The term "establishment" as used in the directive is a term of community law and cannot be defined by reference to the laws of the member state, It is not defined in TULRCA but it should be interpreted in light of the directive The preamble and the second recital of this directive make * it clear that its objective is to provide protection for workers Of course, the definition of establishment in the directive is very broad to limit as far as possible the case of collective redundancies which evade the protection of the directive. An establishment has a degree of permanent stability and performs one or more given tasks and should have a workforce, technical means and a certain organisational structure allowing for accomplishment of a task or tasks, It does not have to be a physical unit; it may be an organisational unit set up to provide labour at a particular location, In such circumstances the establishment will be the unit within the employees organisation to which the employees are assigned.

37. In cases where there is a fine balance I should make sure that the Claimant's are given the protection afforded by the TULRCA.

38. Affected employees are "employees who may be affected by the proposed dismissal or may be affected by measures taken in connection with such dismissal". So where an employer has an establishment with more than 20 employees who were made redundant, employees in smaller work places would be affected by the dismissals and so the duty to consult collectively would arise.

39. The protected period commences when the first of the dismissals takes effect. And subsequent dismissals can be accumulated with the first dismissals for the purposes of head count.

40. As found in the case of **Susie Radin**, which has been subsequently approved in the case of **Hutchins** the starting point should always be that 90 days should be awarded. It is for the Respondent's to show that there are special circumstances which mean that the award should be for a lesser period.

My Conclusions

Eligibility to bring claims

41. I am satisfied that all these Claimants have standing. All of the Claimants were employees who were affected by the dismissals or measures taken in connection with them under Section 188 TULRCA They were all dismissed There were no appropriate representatives, nor was there a recognised trade union, I am satisfied that there is no requirement that all the dismissals must take place within the 90 day period. The protection given is to all those who have been dismissed or whom it is proposed to dismiss and in respect of whom there has been a failure under Section 188 TULRCA.

42. In this case more than 20 Claimants were based permanently at the head office and in the warehouse which were in any event effectively on the same site. There were fewer than 20 employees working at Thornaby and similarly in respect of the Siemens' site. I am satisfied in the circumstances of this case that the undertaking of the first Respondent's was an establishment and all of the staff were assigned to that establishment

Establishment

43. In this case all the business functions were controlled by head office That is particularly relevant to the depot at Thornaby, Ms Warbrook was the Depot Manager and I am satisfied that that is what it was. It was a depot not an establishment. Ms Thornaby reported directly to the Managing Director who was based at the head office and her contract of employment made it clear that she could be assigned to other offices. She also attended sales meetings on a monthly basis and Directors meetings on a quarterly basis.

44. All the employees at Thornaby had the same contracts as those at head office and the warehouse and she had the same IT, HR, stores and health and safety systems. It did not act independently and any requisitions for stock, processed, authorised and sent from head office.

45. In this case all of the employees were subject to management decisions made at head office. Those meetings were attended by management from the warehouse at Thornaby and the other sites. This leads me to finding that the entire firm comprised a single establishment.

46. This also applies to those employees who provided their services to Siemens. I am satisfied that the circumstances of this case are such that those engaged in the Siemens' contract were assigned to the head office

47. In any event all these employees were affected by the proposed dismissals that took place at the Willow Brook Business Park or were affected by measures taken in

connection with such dismissals. They were all affected by the decision made by the administrators to close the business and this included the Head Office at which at least 20 employees were dismissed.

Timing

48. I am satisfied that the first of the Claimants were dismissed on 8 March 2017 and the majority of the Claimants were dismissed before 12 April 2017. Matthew Cook was only dismissed on 31 July 2017. He is still provided with protection despite his dismissal taking place over 4 months after the first dismissal took place. He was also affected by the decision to close the business and to dismiss all the employees of the business. He therefore also has standing to make a claim for a protective award. I am satisfied that the protected period commenced on 8 March 2017 which was when the first of the dismissals took effect.

49. Given that no consultation was undertaken in respect of any of the employees dismissed on 8 March 2017, or any of those dismissed subsequently, I am satisfied that these dismissals can be accumulated with the first dismissals under Section 188(3) TULRCA for the purpose of head count under Section 188 TULRCA.

The period of the award

50. I am satisfied in this case that consultation could have taken place at an earlier stage and that there was no consultation at all with the Claimants.

51. It can be seen from my findings of fact that over a period of time the reality of the situation was kept from the Claimants and that they were misled as to the circumstances of the first Respondent's. I particularly note the accounting irregularities which led to the bank's decision to place the first Respondent's in administration and the non payment of the rent in Thornaby. I am satisfied on the evidence I have heard that those in charge at the Respondent's knew of the difficulties but took no steps at all to inform their employees or consult with them There was a clear abrogation of their responsibilities under the TURLCA.

52. I also note that no evidence has been given to me by the first Respondent's of any special circumstances which would justify any reduction from the 90 days. On the basis of the evidence I have heard there are no special circumstances at all in this case. I am satisfied that in all the circumstances of this case that 90 days is the correct period for the award.

Employment Judge Hutchinson
Date 13 December 2017

JUDGMENT SENT TO THE PARTIES ON