CASE NOS: 1807300/2017,
1304499/2017,
2424584/2017,
3352810/2017,
2304043/2017.

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Unite the Union		**(1) Monarch Airlines Limited (In Administration)**
		(2) Secretary of State for Business, Energy and Industrial Strategy

Watford **24 April 2019**
Employment Judge Smail in Chambers

JUDGMENT

1. In breach of s.188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, the First Respondent failed to consult the claimant Union at all in respect of 20 or more redundancies it was proposing to make at each of Leeds/ Bradford, Birmingham, Manchester, Luton and Gatwick Airports. The redundancies took place on or about 2 October 2017.

2. Each relevant employee made redundant is entitled to a 90-day protective award against the First Respondent, the protected period being 90 days from 2 October 2017.

3. In the event that the First Respondent is insolvent, the Second Respondent must meet the First Respondent's liability for the protective awards, subject to its maximum liability under s.184 of the Employment Rights Act 1996.

REASONS

1. Monarch Airlines Limited (the First Respondent) went into administration on 2 October 2017. The First Respondent's staff were made redundant

without notice on the same day. Unite the Union brought group claims for a protective award in time, obtaining ACAS Early Conciliation Certificates as required. The claimants claim there was no consultation whatsoever. The administrators consent to and do not resist proceedings. The reality is that any award will be paid by the Secretary of State, the Second Respondent. The Secretary of State puts the claimants to proof and has made written representations. There is no need for any hearing. I am able to deal with the matter on the papers.

THE LAW

2. By s. 188(1) of the Trade Union & 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 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. By s. 188(1A), the consultation shall begin in good time, and in any event where the employer is proposing to dismiss 100 or more employees, at least 45 days - and otherwise, at least 30 days - before the first of the dismissals takes effect. By section 189(2) the tribunal finds the complaint well founded, it shall make a declaration to that effect may also make a protective award.

3. By section 189(3) a protective award is an award in respect of one or more descriptions of employees who have been dismissed as redundant or who it is proposed to dismiss as redundant, and 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. By section 189(4) the protected period 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 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.

4. Peter Gibson LJ gave Employment Tribunals the following guidance in Susie Radin Ltd v GMB [2004] IRLR 400 (CA) in respect of protective awards cases.

> 'I suggest that ETs, 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 s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.

(2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the 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 s.188.

(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no 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 ET consider appropriate.'

EVIDENCE FROM UNITE THE UNION

5. As I was aware that Monarch Airlines Ltd, whether by its administrators or otherwise, would not be putting in any evidence in this matter I ordered on 11th December 2018 that a trade union official set out information about communications that the Union had with Monarch before it went into administration so as to assist me in applying Peter Gibson LJ's guidance.

6. Paul Bouch of Unite the Union provided information in a witness statement supported by a statement of truth dated 8 January 2019. I accept the information as accurate. He had been an officer of the union since May 2002 and had responsibility for Monarch Airlines since 2010. When he took over there was a system already in place to deal with formal meetings between the company and the Union and this was never changed up until the time that Monarch went into receivership. The system that was in operation was that he would meet all of the shop stewards from each of the bases on a bi-monthly basis. The bases would be Gatwick, Luton, Birmingham, Manchester and Leeds Bradford and they would all meet at the Union's main office at Holborn in London. In the month after, he would then meet the company which meant that he met the company on a bi-monthly basis as well. In this period, he remembered meeting the company in both July and September 2017 and the stewards in August 2017. The meetings with the company took place at their offices in Luton.

7. The company's representative would be headed up by the senior manager of cabin crew and her junior managers supported by HR. These meetings would allow discussions and negotiations in all aspects of the work and so far as it affected cabin crew. The main issues would be day to day operations.

8. They would additionally have annual wage negotiations. These negotiations would take place over meetings that would last about three to four months and would normally start in about March and conclude in the Summer. There were between 6 and 12 meetings about wage negotiations on an annual basis.

9. The senior shop steward would also meet the managing director of the company about four times a year for an update on the business generally.

10. The last meeting with the company that he was present at was on 6th September 2017 and as far as he was aware the last time a senior shop steward met with the managing director was on 27th September 2017.

11. At neither of these meetings was any indication given, he tells me, that Monarch had any serious financial trouble or that there were any or any significant redundancies that were being planned.

12. He attended a meeting with the company in July 2017. At this meeting there was no discussion about Monarch having serious financial difficulties or prospects of any redundancies and certainly no suggestion that the company was at risk of going out of business. Mr Bouch's recollection was that the business updates at these meetings were always very upbeat and there was no way that one would have left those meetings believing that there was any risk of redundancies or problems with the business.

13. He would also have ad hoc meetings with Anne Marie Cottee who was the senior manager at cabin crew about issues that arose. He recalled at least one meeting in the late Summer or early Autumn of 2017 relating to the potential dismissal of a union member and again at that meeting there was no discussion of any redundancies or financial difficulties with the company.

14. The first indication he had that there was any kind of issue at Monarch was a telephone call he received from Oliver Richardson of Unite on the evening of Friday 29th September 2017. Oliver Richardson was a National Officer responsible for aviation. He told Mr Bouch that he had received a telephone call from Andrew Swaffield who was the managing director of Monarch. In that telephone call Mr Swaffield had confirmed to Oliver Richardson that the company was in serious financial difficulties and they had approached the Government with a rescue plan and that required financial assistance from the Government. Mr Richardson's understanding was that if that assistance did not come through, then the company was at risk of going out of business. He was given to understood that part of the rescue plan was that Monarch were trying to move away from short haul flights to long haul flights. Specifically, he was informed that if the Government did not provide Monarch with a bridging loan then they would be going into receivership on 2nd October 2017.

15. There was no further communication from the company over the weekend and on Monday morning, 2nd October 2017 Mr Bouch was informed by shop stewards that the company had gone into receivership as at that date and were dismissing all of their employees. In the event it was administration not receivership.

DECISION

16. Claim no. 1807300/2017 is in respect of the First Respondent's employees based at Leeds Bradford airport; 1304499/2017 the same at Birmingham airport; 2424584/2017 at Manchester Airport; 3352810/2017 at Luton airport and 2304043/2017 at Gatwick airport. I am satisfied that each of those airports constituted an 'establishment' for the purposes of s.188. At each establishment 20 or more employees were proposed to be made redundant within 90 days or less. Unite the Union, the recognised union, was an appropriate representative of the workforce at each of those establishments. There was no consultation at all of the Union in respect of proposed redundancies. There was no opportunity at all given to the Union to make proposals as to how the business might be saved in whole or in part. The union was given 3 days' notice of the possibility of insolvency. There was no consultation.

17. Applying, then, the guidance given by Peter Gibson LJ in the Susie Radin case, on the information I have I can identify no mitigating circumstance justifying a reduction from the maximum. Giving 3 days' notice of a possible insolvency event is not consultation. It is unlikely that the company's financial position deteriorated so immediately that consultation was not possible. It seems more likely that the Union was kept out of the loop. Be that as it may, there is no evidence upon which I can find it appropriate to reduce the maximum award, and so a protective award must be paid in respect of each employee covered of 90 days pay. The protected period is 90 days from 2 October 2017.

Employment Judge Smail

Dated……..25 April 2019

South East Region

____25 April 2019_____
Judgment sent to the parties on