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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr A Robinson & Others **v** **1. Vertu Corporation Limited**
2. Secretary of State for Business, Energy and Industrial Strategy

Heard at: London Central **On**: 10 January 2019

Before: Employment Judge Glennie
Mr S Secher
Dr V Weerasinghe

Representation
For the Claimant: Mr S Lewinski, of Counsel
For the Respondents: Neither present nor represented

REASONS

1. This is a claim for protective awards made by 63 Claimants. The claim is brought with the permission of the High Court, an order being made on 19 February 2018 lifting the stay which had been imposed under the Insolvency Act, so as to enable these proceedings to be continued. Mr Lewinski very properly drew to our attention the drafting of the Order which was put in such a way as to make it sound as though there was a question of law that does not really arise as to the effect of compulsory liquidation on the remedies under the Trade Union and Labour Relations Act 1992, but we are satisfied that this point of detail does not in any way invalidate the lifting of the stay of proceedings.

2. The law that applies to the case arises under chapter II of the 1992 Act. Section 188(1) provides that where an employer is proposing to dismiss as redundant twenty or more employees from his establishment within a period of 90 days or less, the employer shall consult about the dismissal all the persons who are appropriate representatives of any of the employees who may be affected.

3. Sub section (1A) provides that the consultation should begin in good time and in any event (as is applicable here), where the employer is proposing to dismiss one hundred or more employees, at least 45 days before first of the dismissals takes effect.

4. Sub section (2) provides that the consultation shall include consultation about ways of (a) avoiding the dismissals, (b) reducing the numbers of employees to be dismissed, and (c) mitigating the consequences of the dismissals.

5. Sub section (4), in summary, makes provision about the mechanics of the consultation and sub section (7) provides as follows:

If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of sub section (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.

6. Section 188A sets out the requirements for the election of employee representatives where there is no recognised trade union. Section 189 provides in sub section (1) that a complaint of failure to comply with the requirements of s.188 or 188A may be presented to an Employment Tribunal (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 and (d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

7. Sub section (2) provides that if the Tribunal finds the complaint well founded it shall make a declaration to that effect and may also make a protective award.

8. Sub section (3) defines a protective award as an award in respect of one or more descriptions of employees of (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 s.188, ordering the employer to pay remuneration for the protected period.

9. Sub section (4) states that 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 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 s.188 but shall not exceed 90 days.

10. Finally, sub section (6) provides that if on a complaint a question arises (a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of s.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.

11. The position in the present case is that the First Respondent has presented a response pleading special circumstances arising from a plan to sell the business by way of pre-pack administration and the collapse of that plan; and secondly, relying on essentially the same circumstances, urges that those provided mitigating factors. The Second Respondent has presented a response asking the Tribunal to ensure that the Claimants are eligible to bring the claims and to ensure that this is indeed a case where the duty to consult arises. Neither Respondent has taken any further part in the proceedings and neither has attended this hearing.

12. There was witness evidence before the Tribunal in the form of statements, which we read, from the following witnesses:

(1) Mr Nick Briggs, former Marketing Director
(2) Mr Reginald Murrell, Former Head of Product Quality
(3) Mr Mark Pope, Former Certification and Compliance Manager
(4) Mr Cedric Allan, former Product Programme Manager
(5) Ms Denise Palmer, Former Product Development Manager

13. The short background to the case is that the First Respondent's business was in the supply and sale of mobile telephones and all of the witnesses had substantial service in that business. Although there was no evidence presented on behalf of the First Respondent, the response that was presented states from December 2016 to March 2017 the business was undergoing a restructure, or at least an intended restructure, and it is evident that this was because of financial difficulties.

14. The response does not mention, but the witness evidence does, other details such as that from about February 2017, although pension contributions were being deducted from the employees' salaries, they were evidently not finding their way to the pension provider. Other benefits such as health insurance were not being met and by June 2017 the salaries were not being paid.

15. Returning to the response from the First Respondent this states that on 5 May 2017 a winding up petition was presented, and that from that stage on the Respondent sought to sell the business and its assets. The response states that there were negotiations during June and July on the basis that the proposed purchaser would retain 100% of the employees. That leads the First Respondent to say that no consultation was necessary because the employment of all concerned would continue beyond that date. The response continues that the negotiations failed on 11 July 2017 and that on 12 July 2017 the company went in to liquidation. On the same date all of the employees, approximately 182 in number, were given notice of termination of their employment with immediate effect.

16. In outline, this is in some respects broadly confirmed by the evidence given by the Claimants. In summary some of the points that they make are these. Mr Briggs recalls an interim management team being brought in to the business in April 2017, and he expressed his doubts about what these individuals were actually doing. It seemed to him that they were trying to extract information from the business rather than managing it in any true sense. He continued that there were two Managing Directors or CEOs in the course of a month and that he attended the Court hearings when first there was an adjournment of the winding up petition on the basis that it was hoped that the purchaser of the business could take over and the staff could be transferred over, and then he heard that the deal had failed. He was left with the unpleasant duty of telling everyone back at the premises what had happened. He along with all of the other witnesses confirms that there was no trade union and that there was no form of consultation before the dismissal letters were given out on 12 July.

17. Mr Murrell confirms the same matters and also referred to the management team being dismissed in April 2017. He speaks of the failure to pay salaries, make pension contributions or pay health insurance premiums, and he speaks about a grievance meeting which we will refer to again in a moment.

18. Mr Pope has some knowledge of discussions about a new investor being planned but not taking effect. He confirms that the salaries were not paid after

May 2017 and that the other benefits were not being met, and he says that numerous suppliers were going unpaid. Mr Allan again confirms many of the same matters, but he in fact raised a formal grievance which led to the grievance meeting that was at page 190 in the bundle of documents. That was a grievance on behalf of the employers about not being paid etc, and that produced a response. The grievance was on 21 June 2017: the response to it on 30 June 2017 was apologetic, but perhaps not a great deal more, except that the response referred to the hope for pre-packaged sale and repeated that the employees would have their contracts transferred to the new entity.

19. Turning then to the issues that we have to decide, so far as the outline requirements of liability are concerned we are satisfied that there was a single establishment. That is evident from the information sent by the First Respondent to the insolvency service referring to a single set of premises in Hampshire and 178 employees being engaged there. Clearly it was proposed that more than 20 employees would be made redundant because whether the number was 178 or 182, that number were made redundant, and it must follow that immediately before that happened that it was proposed that it would happen.

20. Secondly, we are satisfied that there was no recognised union and therefore the employees are entitled to bring the claims in person.

21. There are essentially two issues that arise from the First Respondent's response. The first of these is whether there were special circumstances within the meaning of s.188(7) such as rendered it not reasonably practicable for the First Respondent to consult.

22. We have already set out what it is that the First Respondent relies on. The principles to be applied are set out in the decision of the Court of Appeal in **Bakers' Union v Clarks of Hove [1978] IRLR 366**. The passages that we have relied on are these. In upholding the Industrial Tribunal's Judgment, the Court of Appeal said this:

"What they said in effect was this that insolvency is on its own neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company making it necessary to close the concern then plainly that would be a matter which was capable of being a special circumstance, this is so whether the disaster is physical or financial. If the insolvency, however, was merely due to a gradual run down of the company, as it was in this case, then those are facts on which the Industrial Tribunal can come to the conclusion the circumstances were not special".

23. Then also in upholding the judgment of the Industrial Tribunal, the Court of Appeal quoted these words from the Tribunal's judgment:

"The hope that money will be raised by sale of assets or loan on the security of the assets to meet higher overheads and wages and to reduce a large indebtedness is not a special circumstance any more than is the failure of that hope to materialise".

24. Those words are closely applicable to the broad circumstances of the present case. It is not the case here that the insolvency came as a bolt out of the

blue, either on the evidence given by the Claimants or on the assertions made by the First Respondent in its response. It is clear on the Claimants' evidence that there was financial trouble of a very serious nature from at least February 2017 when the pension contributions were going elsewhere than to the pension providers. Indeed, on what is said in the First Respondent's response is asserting that there was financial difficulty from at least December 2016. The sort of event that might be a bolt from the blue, it seems to us, might be a physical event such as a factory catching fire and being rendered inoperable, or a financial event such as a sudden withdrawal of supplies by the supplier on which the whole business depends. That is not the situation here because we find that there was more of a gradual run down of the company's solvency and its business.

25. We have also considered whether it could be said that the particular circumstance of there being a pre-pack administration set up which, as asserted by the First Respondent, was expected to involve the preservation of the employees' employment, and then that failing in the way it did, might amount to a special circumstance. We do not find that it does. Applying our knowledge of employment cases and of industrial and business working, it seems to us that in this sort of situation where a company is in serious financial difficulties and where it is seeking to relieve those by a pre-pack administration or something of that nature then it is inherently possible, if not probable, that those attempts will not succeed. The collapse of an attempted resolution of the situation in this sort of way is not, we find, a special circumstance. It is one that arises quite often when there is an insolvency situation of this nature.

26. The test being one that requires special circumstances such as to render it not reasonably practicable to consult, we find that these were not special circumstances, and so that defence fails. The second point raised by the First Respondent is that of mitigating circumstances, really relying on the same factors.

27. This is also the subject of a Court of Appeal decision in **GMB v Suzie Radin [2004] IRLR 400**. Peter Gibson LJ said this:

"How the Employment Tribunal assess the length of the protected period is a matter for the Employment Tribunal. 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 Employment Tribunal consider appropriate."

28. In the present case there was no consultation, and we have started with the maximum period and asked whether there were mitigating factors. The First Respondent relies on **AEI Cables Limited v GMB UK EAT /0375/12**. We find the situation there to be different from that in the present case. In that case there was evidence and there were submissions from the Respondent explaining why it had acted as it did. This amounted to saying that a matter of about ten days before the termination of employment of the relevant employees the Respondent had been informed by insolvency practitioners that it was trading illegally because it was insolvent and it therefore had to take urgent steps, this occurring as a result of failure by the bank to extend a credit facility.

29. That, as described, is a different situation. It is a different situation moreover in that in the present case we have no evidence from the First Respondent about what was happening at the material time. We have its pleaded case but there is no witness evidence and there has been no disclosure of documents. This means

that it is difficult for the Tribunal to engage with the question of why the Respondent acted as it did, when we have no evidence from the Respondent to explain what was going on, we have only assertions. But beyond that, and repeating what we have said already about how it is apparent that the company was heading towards insolvency for some months before the liquidation occurred, it could not be said the Respondent company suddenly found itself suddenly in a situation where it had to take urgent steps.

30. We would also agree with the submission made by Mr Lewinski that it would be curious if attempts to avoid the liquidation of the company could taken to amount to mitigating circumstances for not consulting about the situation. Put broadly, we agree with the proposition that one of the intentions behind the obligation to consult is to consult about proposed ways of avoiding the redundancies, of which this pre-pack administration is an example: but that, rather than being a reason not to consult, was if anything one of the reasons why there should have been consultation.

31. For these reasons we find that there should be a protective award and that it should be for the maximum period of 90 days in the case of each of the Claimants.

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Employment Judge Glennie

Date 13 May 2019

JUDGMENT SENT TO THE PARTIES ON

16 May 2019

FOR THE TRIBUNAL OFFICE