



THE EMPLOYMENT TRIBUNALS

Claimants

Mr J Brown and 16 others
shown on the attached Schedule

Respondent

Renvac Scaffolding Ltd
(in Creditors Voluntary Liquidation)

EMPLOYMENT JUDGE GARNON
MADE AT NORTH SHIELDS

ON 24th September 2018

Appearances

Claimants Ms K Harwood Litigation Executive

Respondent No appearance

JUDGMENT

The respondent having failed to comply with sections 188 (1) and (1A) of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended (the Act) I make a protective award that it pay to the claimants remuneration for the protected period from the date of the earliest dismissal , being 29th March 2018 , for a period of 90 days.

REASONS

1. Sections 188 (1) and (1A) of the Act 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 all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals.
2. Section 189 , so far as material ,says:
" (1) Where an employer has failed to comply with a requirement of section 188 or section 188A, 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."
3. There follow two subsections about the burden of proof :
(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.

Case Numbers 2501416/18 and 16 others shown on the attached Schedule

(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied."

4. Then the Act says what I must do, what I have a discretion to do, what a protective award is and what the protected period means :

*(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"

5. The Court of Appeal's decision in Suzie Radin v GMB [2004] ICR893 has been endorsed on several occasions . Peter Gibson L.J. said

45. 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.

The period is 90 days unless there are reasons for making it less. This applies even where the consultation period is only 30 days because less than 100 are dismissed.

Case Numbers 2501416/18 and 16 others shown on the attached Schedule

6. The respondent's liquidators are aware of the claims and have said they will not be entering a response. The claim is not contested. Rule 21 of the Employment Tribunals Rules of Procedure 2013 empowers an Employment Judge to decide on the available material whether a determination can be made and, if so, obliges him or her to issue a judgment which may determine liability only or liability and remedy. An Employment Judge decided against doing so because although the claim is well pleaded in nearly every respect, one important issue of fact needs to be determined.

7. The claim form says the first of the proposed dismissals took place on 29th March with the last taking effect on 5 April, but it also says that on 29 March the claimants were informed verbally by the respondent it **proposed to dismiss as redundant** all of the employees of whom there were 34. It later says the first correspondence the claimants received was dated 9 April from the liquidators, confirming that due to financial difficulties steps had been taken to place the company into voluntary liquidation.

8. I heard the evidence of Mr Sonny Vincent Russell and am assured there was no recognised Trade Union, more than 20 employees were dismissed at a single establishment and no election of representatives took place, so the individuals dismissed have the right to claim. There is a difference between telling employees they are **going to** be made redundant, and telling them they are actually dismissed. On the evidence I have heard today, I am satisfied the first of the dismissals took effect on 29th March with no prior notice of it having been given and no consultation.

9. It is rare insolvency comes out of the blue. An example would be a business which depended heavily for its income on one customer which paid regularly but late, which itself then suddenly ceased trading because it was insolvent, leaving the business owed months' worth of unpaid invoices. However, as I have stated above, in the absence of any evidence to the contrary, I should assume this respondent could have started consultation earlier than it did and make the protective award for the full 90 day period.

TM Garnon Employment Judge

Date signed 24th September 2018.

Multiple Schedule

Multiple: 6800 - Renvac Scaffolding Limited

<i>Case Number</i>	<i>Case Name</i>
2501416/2018	Mr Jason Brown -v- Renvac Scaffolding Limited (In Liquidation)
2501417/2018	Mrs Lisa Edwards -v- Renvac Scaffolding Limited (In Liquidation)
2501418/2018	Mr Kevin A.e Green -v- Renvac Scaffolding Limited (In Liquidation)
2501419/2018	Mr Terrence Self -v- Renvac Scaffolding Limited (In Liquidation)
2501420/2018	Mr John Cleverley -v- Renvac Scaffolding Limited (In Liquidation)
2501421/2018	Mr Mitchell Donnalley -v- Renvac Scaffolding Limited (In Liquidation)
2501422/2018	Mr Andrew Hyden -v- Renvac Scaffolding Limited (In Liquidation)
2501423/2018	Mr Luke Gibbinson -v- Renvac Scaffolding Limited (In Liquidation)
2501424/2018	Mr Henry Varey -v- Renvac Scaffolding Limited (In Liquidation)
2501425/2018	Mr Sonny Russell -v- Renvac Scaffolding Limited (In Liquidation)
2501426/2018	Mr John William Winton -v- Renvac Scaffolding Limited (In Liquidation)
2501427/2018	Mrs Jillian Green -v- Renvac Scaffolding Limited (In Liquidation)
2501428/2018	Mr Kevin Green -v- Renvac Scaffolding Limited (In Liquidation)
2501429/2018	Mrs Lesley Ann Randle -v- Renvac Scaffolding Limited (In Liquidation)
2501430/2018	Mr Alan Needham -v- Renvac Scaffolding Limited (In Liquidation)
2501431/2018	Mr Carl Harris -v- Renvac Scaffolding Limited (In Liquidation)
2501432/2018	Mr Paul Park -v- Renvac Scaffolding Limited (In Liquidation)