**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102567/2019**

**Held in Dundee on 27 August 2019**

**Employment Judge I McFatridge**

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| **Mr S Wilson** | **Claimant**<br>**In person** |
| **Land and Building Services Limited (in Administration)** | **Respondent**<br>**Not present and not represented - no ET lodged** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that

1. the respondent Land and Building Services Limited acted in breach of its obligations in terms of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and

2. the respondent shall pay a protective award of 90 days' remuneration to the claimant in terms of section 192 of the 1992 Act.

E.T. Z4 (WR)

## REASONS

1. The claimant claimed that he was entitled to a protective award in terms of section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992. No response was received from the respondent company which is in administration. By letter dated 19 June 2019 the administrators confirmed that they gave consent for the claim to proceed against them. At the hearing the claimant gave evidence on his own behalf. On the basis of that evidence I have made the following factual findings relating to the issue before me.

2. The claimant commenced employment with the respondent in or about August 2016. The respondent are civil engineering contractors. The claimant was employed as a Ganger. In mid-January 2019 the claimant heard rumours that certain of the respondent's clients were in financial difficulty. He spoke to Derek Robertson who he understood to be the owner of the respondent. He was advised that his job was safe.

3. On 29 January the claimant was at home on annual leave. He had taken the day off to assist his wife with childcare as she was ill. He received a telephone call from one of his fellow employees to advise that the employees were all being called in to a meeting. The claimant attempted unsuccessfully to get hold of Mr Robertson and also Mr Fotheringham another of the respondent's managers. At approximately 2:45 he received a telephone call from Mr Fotheringham advising that the company had been wound up and that all of the employees were being dismissed. The claimant subsequently received a telephone call from Mr Robertson confirming this and thanking him for his service.

4. 23 employees were dismissed on 29 January. Their names to the best of the claimant's knowledge and belief were Angus Fotheringham, Craig Cameron, Kenny Robertson, Craig Robertson, David McDonald, Paul McGuigan, Charles Allardyce, Jamie Waterworth, Gordon Yeats, Steven Findlay, Adrian Falconer, Vince ?, Sean Harvey, Dale Fairweather, Derek Mollison, Stuart Robertson, Martin Brown, Grant Buchan, 3 office administrators, Morgan ? and the claimant.

5. The respondent did not recognise a trade union for collective bargaining purposes. There was no consultation whatsoever with the claimant or with his colleagues prior to the claimant and 22 others being dismissed by reason of redundancy. The respondent took no steps to seek the election of employee representatives or to consult with them.

6. Since the date of his dismissal the claimant has received payment of various outstanding sums in respect of holiday pay and notice pay from the Insolvency Service.

**Discussion and decision**

7. Section 188 of the 1992 Act provides that 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 employers shall consult about the dismissals. The legislation goes on to provide the details of the consultation process which should be adopted. I was entirely satisfied on the basis of the evidence that section 188 applied to the claimant's dismissal. The respondent dismissed 20 or more employees on the same day at the same establishment. I was also entirely satisfied on the basis of the evidence that there had been a complete failure to consult in terms of section 188.

8. I required to consider whether in terms of section 188(7) of the 1992 Act there were special circumstances which rendered it not reasonably practicable for the respondents to comply. As was said in ***Clarks of Hove Limited v Bakers Union [1978] ICR 1076*** a special circumstance requires there to be something exceptional, out of the ordinary or uncommon. There was no evidence before me to suggest anything of that nature in this case. I observe that in this case the redundancy appears to be the consequence of adverse financial circumstances leading to insolvency. This is not unusual and in my view would not amount to special circumstances. In terms of section 189(2) where I find that the respondent company has failed to comply with the requirements of section 188 of the 1992 Act I am required to make a declaration to that effect. Accordingly, I have made such a declaration as set out above. In terms of section 189(2) I may also make a protective award. I consider that in this case it is appropriate to do so. So far as the amount of such an award is concerned

I am guided by the Court of Appeal case of ***Susi Radin Limited v GMB and others [2004] IRLR 400***. This suggests that in exercising its discretion to make a protective award and for what period the Tribunal should have regard

(1) to the purpose of the award a sanction for breach by the employers of their obligations to consult;

(2) to exercise the Tribunal's discretion to do what is just and equitable while focusing on the seriousness of the employer's default which may vary from the technical to a complete failure as here to provide any of the required information and to consult; and

(3) to adopt what Lord Justice Gibson described as the "proper approach" in a case where there has been no consultation by starting with the maximum period and reducing it only if there are mitigating circumstances justifying a reduction.

9. In the present case the claimant was not provided with any of the information which he ought to have been. There was absolutely no consultation with the workforce and therefore no opportunity of proposing alternative measures which might have avoided or reduced the need for redundancy. In my view there were no mitigating circumstances which would justify a reduction from the maximum period. I consider therefore that in all the circumstances it would be just and equitable to make a protective award for a period of 90 days.

**Employment Judge:** **Ian McFatridge**
**Date of Judgment:** **27 August 2019**
**Date sent to parties:** **28 August 2019**