CASE NO. 2303182//2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Miss J Clapham		**Monarch Holidays Limited (In Administration) (1)**
		Secretary of State for Business, Energy and Industrial Strategy (2)

Watford **3 September 2019**

Employment Judge Smail in Chambers

JUDGMENT

1. In breach of s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, the First Respondent failed to arrange for the election of and failed to consult appropriate representatives in respect of 20 or more redundancies it was proposing to make at its establishment at 17 London Road, Bromley, Kent BR1 1DE. The redundancies took place on or about 2 October 2017.

2. The Claimant, being one of those made redundant at this establishment, 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 Holidays Limited (the First Respondent) went into administration on 2 October 2017. Approximately 60 of the First Respondent's staff were made redundant without notice on the same day. The Claimant brought a claim for a protective award in time, on 8 November 2017, obtaining an ACAS Early Conciliation Certificate as required. The claimant claims the employer did not require the election of appropriate representatives for the purposes of redundancy consultation and there was no consultation whatsoever. There was no recognised trade union at the First Respondent and there was no pre-existing representative forum for consultation of this type. The administrators consent to and do not resist proceedings. There is no need for any hearing. I am able to deal with the matter on the papers.

2. The Claimant was employed along with 71 other people at the First Respondent's site at 17 London Road, Bromley, Kent BR1 1DE. I am satisfied that is an establishment for the purposes of s.188.

THE LAW

3. 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) if the tribunal finds the complaint well founded, it shall make a declaration to that effect may also make a protective award. By s.188(2) the consultation shall include consultation about ways of avoiding the dismissals; reducing the numbers of employees to be dismissed; and mitigating the consequences of the dismissals.

4. 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.

5. By s.188(1B) the appropriate representatives are representatives of the independent trade union, where recognised; in any other case, the employee representatives, at the choice of the employer, are either employee representatives appointed or elected by the affected employees in pre-existing fora; or employee representatives elected by the affected employees for the purposes of the section. The election has to comply with the provisions of section 188A. The First Respondent did not have a recognised trade union and there was no forum, pre-existing or bespoke, to consult about redundancies.

6. 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 MR PREWER

7. As I was aware that Monarch Holidays Ltd, whether by its administrators or otherwise, would not be putting in any evidence in this matter I ordered on 17 December 2018 that a manager of Monarch Holidays provide information about communications that Monarch had with its workforce before it went into administration so as to assist me in applying Peter Gibson LJ's guidance.

8. Mr Prewer, also a Claimant under another case number, was a customer services manager himself. He provided information in a witness statement supported by a statement of truth dated 4 January 2019. I accept the information as accurate. The present Claimant may rely on it.

9. The area of business they worked in was mainly concerned with the package holiday trade together with some accommodation-only bookings. The first indication of financial problems that Mr Prewer noticed was the stoppage of flights to Egypt, owing to concerns about terrorism. Egyptian destinations were withdrawn in 2015 to 2016. Egypt was about 10% of the company's business. At that same time following terrorist activity in Turkey, there was a 60% downturn in business to Turkey. There was a reduction in flights to Tunisia also. Tunisia was about 5% of the business overall. The First Respondent lost around 35% of its business, owing to terrorism concerns. The fall in the value of the pound against the dollar and the euro following the BREXIT vote on 23 June 2016, further, made fuel costs higher.

10. On 11 August 2017 the group CEO warned staff that the pre-tax profit of the Monarch Group was down to £1.6 million from £33 million the previous year. On 22 August 2017 the CEO informed the staff that the Air Travel Organisers Licence ('ATOL') was up for renewal, and he was very positive about the chance of getting it. All the First Respondents holidays were ATOL protected. That said, there was negative news about returns from short haul flights, owing to terror attacks in Barcelona.

11. On 1 September 2017 the CEO issued an email focusing on the apprenticeship scheme of the Monarch group. That was positive. There was an undertone of caution in the final two paragraphs which once again mentioned low yields in the short haul flight market, owing to the impact of terrorism and problems caused by a weak pound. Mr Prewer has examined the joint administrators proposals for the future of the Monarch group and notes that as at 31 August 2017 the group was in serious financial difficulty, reporting a loss of over £138 million of annual revenue. KPMG as 1 September 2017, was engaged to prepare contingency plans to minimise losses to creditors and passenger disruption in the event that a sale or refinancing solution could not be implemented. However, no attempts were made to commence a process of giving information about likely redundancy or engage in any consultation process with employee representatives.

12. An update received on 8 September 2017, stating that the company had seen increases in the number of passengers suggested a positive sign. That said, there was reference to difficulties following the EU referendum.

13. On 18 September 2017, the staff were informed of the impact of a French air traffic control strike. There was reference to financial troubles. The Group's management was examining strategic options. On 25 September 2017 a further email was received asking all staff to continue to work hard for the business but mentioning financial losses, owing to various factors. The email explained that the First Respondent would be moving away from short haul flying.

14. On 2 October 2017, the staff received a final update from Mr Swaffield, the CEO. The email explained that both Monarch Airlines Ltd and Monarch Holidays Ltd had entered administration that day and had lost their ATOL licence. The email also stated that the financial problems stem back to 2015 suggesting that the reality of the situation was a steady decline, owing to outside influences such as terrorist attacks.

15. The first time Mr Prewer and collagues became aware that the First Respondent was to make redundancies was on 2 October 2017 itself. Mr Prewer arrived at work at 9am. He was met by administrators from KPMG. He was asked to leave within 30 minutes with a pack of information on claiming statutory redundancy pay, notice pay and so forth. Approximately 60 employees, including the claimant, were made redundant instantly. There was no consultation with the workforce within 30 days prior to the decision to make the claimant and his colleagues redundant as to how redundancies might be avoided. There was no attempt to start that process. Mr Prewer suggests it was clear that the First Respondent was on a downward spiral for the last two years of its existence.

DECISION

16. There was no consultation at all with the workforce in respect of proposed redundancies. There was no opportunity at all given to the workforce to make proposals as to how the business and jobs might be saved in whole or in part. The First Respondent did not require the election of authorised representatives so that consultation about these matters could take place. It seems that the possibility of redundancies was a feature of the last 2 years of the First Respondent's business providing ample opportunity for the election of representatives and 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. It was not the case that the company's financial position deteriorated so immediately that consultation was not possible. It seems more likely that the workforce was kept out of the loop. 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 the Claimant of 90 days pay. The protected period is 90 days from 2 October 2017.

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Employment Judge Smail 05.09.19

South East Region

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Judgment sent to the parties on

_____05.09.19_____