Case Numbers: 1802436/2018, 1804811/2018, 1804813/2018,1808742/2018.

EMPLOYMENT TRIBUNALS

Claimants	**v**	**Respondent**
Mr S Sellers		**Servaccomm Redhall Ltd (in liquidation)**
Mr C Morris		
Mr B Sellers		
Mr A Sellers		

Heard at: **Hull** **On:** **20 September 2019**
Before: **Employment Judge Davies**
Ms Y Fisher
Mr G Wareing

Appearances
Claimants: **In person**
Respondent: **Did not attend**

JUDGMENT

1. All claims for unfair dismissal, holiday pay, notice pay, unauthorised deduction from wages, breach of contract and/or other payments apart from protective awards are dismissed on withdrawal by the Claimants.
2. It is declared that the complaints under s 189 Trade Union and Labour Relations (Consolidation) Act 1992 are well-founded.
3. The Respondent is ordered to pay to each Claimant remuneration for a protected period of 90 days from 5 February 2018.

REASONS

1. Introduction

1.1 This was the hearing of the claims for protective awards (and, in some cases, claims for unfair dismissal, holiday pay, notice pay, unauthorised deduction from wages, breach of contract and/or other payments) brought by former employees of Servaccomm Redhall Ltd (in liquidation). The Claimants attended and represented themselves. The Respondent did not attend but Tribunal took into account the written submissions and file of documents that their representatives had helpfully provided.

1.2 The Tribunal heard evidence from Mr S Sellers. Although Mr B Sellers, Mr A Sellers and Mr C Morris had not provided witness statements, there was no dispute that they were former employees of the Respondent and were dismissed on 5 February 2018 without any prior warning or consultation. It was necessary in those circumstances for them to give evidence.

2. The Issues

2.1 The issues to be decided were as follows:

Consultation and special circumstances

2.1.1 When was the Respondent proposing to dismiss as redundant 20 or more employees?

2.1.2 Were there any special circumstances that rendered it not reasonably practicable for the Respondent to comply with the requirement under s 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") to consult affected employees?

2.1.3 If so, did the Respondent take all such steps towards compliance with that requirement as were reasonably practicable in those circumstances?

Remedy

2.1.4 If the Respondent was in breach of s 188 TULRCA, should a protective award be made?

2.1.5 What length of protected period does the Tribunal determine to be just and equitable?

3. The Facts

3.1 We make the following findings of fact, based on the evidence of Mr Sellers and the written documents, in particular the Joint Administrators' Report and Proposals dated 14 March 2018.

3.2 The Respondent was a company providing a turnkey solution for the design, manufacture and installation of modular buildings, predominantly for schools, hospitals and local authority projects. It has traded since 1997. In March 2015 it achieved a profit of more than £50,000 and in March 2016 a profit over £600,000. However, thereafter there was a downturn in performance. By March 2017 the company recorded a loss of more than £200,000. Management accounts for December 2017 identified a loss of £1 million. Management attributed the losses to reduced sales volumes, delays in projects starting and project complications resulting in cost overruns.

3.3 The Tribunal understands that over a period of approximately 2 years up to August 2017, management had been in on and off discussions with a party regarding a sale of the business, but that did not materialise. In August 2017 the Respondent instructed Leonard Curtis Business Solutions Group ("LCBSG") to market the business with a view to a sale of the Company's shares. LCBSG were also instructed to provide a review of the company's financial position, to be presented to it and its bank. The Tribunal has not been provided with a copy of that review. It is said to have included short term cash flow forecasts and longer-term turnaround projections, with the provision of options to the company and its bank.

3.4 The Respondent's written submissions say that there were no plans to close the Respondent's business and that at all material times the objective was to sell it as a going concern. However, no evidence from the owners or directors to that effect was provided to the Tribunal.

3.5 By 22 September 2017 two offers for the business had been received. The company pursued offer A. That offer involved the purchaser making a commitment to settle all existing liabilities to the company's creditors. However, by mid-November the purchaser pulled out on the basis that the transaction was not viable.

3.6 Mr S Sellers was the Production Manager. He said that there were around 50 to 70 employees, working in three connected factories on one site. He was responsible for

all three and reported to the four directors. He had a good understanding of the state of the company's order book but not the state of its finances. He told the Tribunal that by this stage the company was relying on two or three key clients. Orders were diminishing. They were hoping to secure a big order from one of the key clients (about 3-4 months' work). That possible order was well advanced although nothing was signed. Mr Sellers said that the workforce was quite constant, but the company kept putting them on short time for increasing periods or sending them home with no pay. This went on for a period of about a year. Mr Sellers said that it was "blatant" that the company was "in bother." By the autumn there were potential buyers coming around and he had to email the directors to ask what was going on. His email was forwarded to the owners but he got no reply. Mr Sellers said that he was just waiting for his redundancy. However, that was just him putting two and two together. Nobody ever said anything.

3.7 Meanwhile, on 17 October 2017 LCBSG had been instructed to provide further services including advising the Respondent on cash monitoring and ongoing trading (including insolvency). The Tribunal has not been provided with evidence about the advice given.

3.8 After offer A fell through, the Respondent attempted to pursue offer B. The purchaser remained interested, but was not in a position to proceed until mid-December. Another offer, offer C, was then received. The company pursued both offers. However, offer C fell through by early January 2018. The company behind offer B started a due diligence process in January 2018. That identified an issue with a key contract, and that offer then fell through too. Mr Sellers told us that the key contract was the one he had referred to. The issue with it was that the key client had not signed it. That was their usual way of doing business – they never signed the contracts.

3.9 That meant that all options for a solvent sale of the Respondent had been exhausted. According to the administrators' report, by this stage ongoing contracts had reached a stage where ongoing trading was no longer commercially possible. It was concluded that the Respondent was now insolvent on balance sheet and cash flow bases. LCBSG provided advice and were formally instructed to assist with placing the business into administration on 29 January 2018.

3.10 The administrators' report says that two other potential purchasers were identified but quickly ruled out. A decision was taken to cease trading and staff were told on 5 February 2018 that they were made redundant with immediate effect.

3.11 In fact, Mr Sellers told the Tribunal that he received a call at home on Thursday 1 February 2018 asking him to tell all the workforce not to come into work that day, but to come for a meeting on Monday 5 February 2018. He started phoning round. He said that obviously everybody put two and two together and thought, "This is it." When staff went to work on Monday 5 February 2018 they were all told that they were being made redundant.

3.12 Mr Sellers's view was that the reason the Respondent did not tell staff what was going on sooner was that they were frightened of losing the workforce. In modular building the staff are "everything" and if they left they would have nobody to do the work if the big orders came through.

3.13 The Tribunal noted that according to the administrators' report, weekly paid employees were paid up to 29 January 2018 and salaried employees up to 31 January 2018. However, there were outstanding pension contributions from mid-November 2017 onwards. Mr Sellers said that his pension contributions were paid up to the termination of his employment.

4. The Law

4.1 The duty on an employer to consult in the case of collective redundancies is contained in s 188 TULRCA, which provides, so far as material, as follows:

> **188 Duty of employer to consult representatives**
> (1) 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.
> (2) The consultation shall begin in good time and in any event –
> (a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and
> (b) otherwise, at least 30 days,
> before the first of the dismissals takes effect.
> …
> (2) 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,
> and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.
> …
> (4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives –
> (a) the reasons for his proposals,
> (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,
> (c) the total number of employees of any such description employed by the employer at the establishment in question,
> (d) the proposed method of selecting the employees who may be dismissed,
> (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect,
> (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed,
> (g) the number of agency workers working temporarily for and under the supervision of the employer,
> (h) the parts of the employer's undertaking in which those agency workers are working, and
> (i) the type of work those agency workers are carrying out.
> …
> (7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. …
> …

4.2 The right to complain of an employer's failure to comply with a requirement of s 188 is

provided for by s 189 TULRCA as follows:

> **189 Complaint and protective award**
> (1) Where an employer has failed to comply with a requirement of s 188 …, a complaint may be presented to an employment tribunal on that ground -
> …
> (d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.
> …
> (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.
> …
> (6) If on a complaint under this section a question arises –
> (a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 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.

4.3 According to UK case law, an employer "proposes" redundancies when it has formulated its proposals, in the sense of laying before someone something that it wishes to be done: see *MSF v Refuge Assurance plc* [2002] IRLR 324. In the case of a plant closure, where it is recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point when the closure is proposed. The obligation to consult arises not when closure is mooted as a possibility, but when it is fixed as a "clear, albeit provisional, intention": see *UK Coal Mining Ltd v NUM (Northumberland Area)* [2008] IRLR 1 at paragraph 86. By way of examples:

4.1.1 In *Scotch Premier Meat Ltd v Burns* [2000] IRLR 639 the EAT upheld the finding of the Tribunal that the employers were proposing to dismiss staff once the Board had decided either to sell the business as a going concern or to close it and sell it as a development site. They were proposing to dismiss the employees, notwithstanding that as an alternative option they were considering selling the business as a going concern and no final decision had been taken.

4.1.2 In *Kelly v The Hesley Group Ltd* [2013] IRLR 514 the employer was under financial pressure and began by seeking employees' agreement to contractual changes to save money. By November 2010, it became apparent that there was a possibility of job losses if the proposals were not agreed. The employer subsequently identified the alternative of terminating the original contracts and offering re-employment on the revised terms, and purported to begin collective

consultation with those employees who had not yet agreed the changes in February 2011. The EAT upheld the Tribunal's finding that the obligation to consult had not arisen in November 2010. The employer was not then proposing dismissals.

4.1.3 In *E Ivor Hughes Educational Foundation v Morris and others* [2015] IRLR 969 the Tribunal found that a decision had been taken in February to close a school in April unless numbers increased. At the relevant February meeting the headteacher could not offer any solution that would solve the shortfall in pupils and said that the school had reached the stage where it was no longer viable. The pupil numbers for the forthcoming academic year would be known in early April and the Tribunal found that the governors considered it unlikely that numbers would improve. The EAT held that the obligation to consult arose when that decision was taken.

4.4 As to whether there are special circumstances that render it not reasonably practicable for the employer to comply with the obligation to consult, it is clear that "special" circumstances means circumstances that are uncommon or out of the ordinary. Insolvency alone is not a special circumstance: see *Clarks of Hove v Bakers' Union* [1978] ICR 1076. In *GMB v Rankin and Harrison* [1992] IRLR 514 the EAT held that something out of the ordinary or uncommon meant a something like a sudden disaster or unexpected insolvency. The shedding of employees to make a business more attractive was a common incident of insolvency, likewise the fact that the business could not be sold and that there were no orders. In *USDAW v Leancut Bacon Ltd* 1981 UKEAT 616/80 the sudden failure of the business when a prospective purchaser pulled out and the bank immediately withdrew credit and appointed a receiver did amount to special circumstances.

4.5 Lastly, we turn to the provisions dealing with protective awards. The Court of Appeal in the leading case of *Susie Radin Ltd v GMB* [2004] IRLR 400 made clear that the purpose of a protective award is not to compensate but as a sanction to ensure that consultation compliant with s 188 takes place. As such, there is nothing in the statutory provisions to link the length of the protected period with any loss in fact suffered by all or any of the employees. Rather, the length of the period is to be what the Tribunal determines to be just and equitable in all the circumstances, having regard to the seriousness of the employer's default. The Court of Appeal gave guidance on the matters to be taken into account by the Tribunal, namely:

4.5.1 the purpose of the protective award is punitive, not compensatory;

4.5.2 tribunals have a wide discretion to do what is just and equitable in the circumstances, but the focus should be on the seriousness of the employer's default;

4.5.3 the default may vary from the technical to a complete failure to provide any of the required information and to consult;

4.5.4 the deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under s 188;

4.5.5 how the length of the protected period is assessed is a matter for the Tribunal, but a proper approach in a case in which there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances such as to justify a reduction.

4.6 The EAT in *Todd v Strain* [2011] IRLR 11 reminded Tribunals that the last part of the guidance was directed at the case where the employer has done nothing at all and should not be applied mechanically in a case where there have been some steps towards compliance, albeit without using the statutory procedure. In *Hutchins v Permacell Finesse Ltd* UKEAT/0350/07 the EAT confirmed that there is no link between the length of the consultation period required under s 188 and the length of any protective award.

4.7 In *AEI Cables* UKEAT/0375/12 the EAT held that the Tribunal should have taken into

account, by way of potential mitigation, the fact that the employer had been advised that because of its insolvency it was in danger of trading unlawfully and that, on the facts, only 9 days' consultation at most could have taken place. The Tribunal's approach had been on the basis that 90 days' consultation was possible. The EAT substituted a protected period of 60 days for the 90 days awarded by the Tribunal.

5. Application of the law to the facts

5.1 The Tribunal started by considering when the duty to consult arose, doing the best we could on the available material. Applying the principles set out above, we concluded that the Respondent was proposing to dismiss 20 or more employees from about mid-November 2017 onwards. We did not place weight on the assertion that the Respondent did not envisage dismissals by way of redundancy until the end of January 2018. There was no evidence from the owners or directors to that effect. On the contrary, it seemed to the Tribunal that there was a fixed, albeit provisional, intention to dismiss from mid-November 2017 onwards. By that stage, there was an ongoing downturn in orders and the company was making a loss. It had for many months been putting workers on short time or sending them home without pay. It seems that it stopped making some pension contributions for employees. It had, a month earlier, asked for advice about ongoing trading and insolvency. It had been trying to sell the business as a going concern but one potential buyer had pulled out because the transaction was not viable. The other potential buyer at that stage was not in a position to proceed. It was an open secret among the workforce, including the Production Manager, that the company was in trouble. While the preferred option was to sell the business as a going concern, it must have been obvious that this was not guaranteed. The evidence points to insolvency being the other clear, fixed, alternative at that stage. If it was not possible to achieve a sale, it would be necessary to close the business.

5.2 It was not disputed that there was no consultation that complied with any part of s 188 TULRCA. We therefore turn to the question whether there were special circumstances that rendered it not reasonably practicable to consult. We remind ourselves that "special" means circumstances that are uncommon or out of the ordinary and that insolvency alone is not a special circumstance. What is required is something out of the ordinary or uncommon, like a sudden disaster or unexpected insolvency.

5.3 We considered the position from mid-November 2017, when we have found the obligation to consult first arose, to February 2018. The Tribunal found that there were no special circumstances. There was not a sudden event or disaster that brought about the insolvency. As the findings of fact make clear, the situation deteriorated over many months. The order book was down, the company had been making losses, workers had been on short time or sent home without pay, the company had been asking for advice about insolvency as early as October 2017, there had been attempts to sell the company for some time. While offer B fell through in January 2018, that was just part of an ongoing picture. It fell through because of an unsigned contract. That had not suddenly arisen. Further, it was the fourth potential sale that fell through. It must have been obvious that there was no guarantee of a sale of the business. The underlying financial position appears to have remained the same. There was no evidence before the Tribunal of a "sudden onset of the Respondent's dire financial position during January 2018" as asserted in its written submissions. The Tribunal therefore found that there were no special circumstances that made it not reasonably practicable to consult about the redundancies. That consultation could and should have taken place before the company was put into administration. No question of unlawful trading arises.

Remedy

5.4 The Tribunal was quite satisfied that a protective award should be made. No basis was identified suggesting that it would not be appropriate in this case.

5.5 We turn to consider the length of the protected period. This is a case in which no consultation whatsoever was carried out, and we consider it appropriate to take as a starting point the maximum period of 90 days. Given that employees were dismissed on 5 February 2018, consultation would only have had to start in early January 2018 in order to meet the 30 day requirement. In any event, there is no link between the length of the consultation period and the period of the protective award.

5.6 The protective award is punitive not compensatory. There was no attempt whatsoever to carry out any consultation, not even after 29 January 2018. The Tribunal had no evidence about the reasons for the default and we do not assume that it was deliberate. However, it is clear from the joint administrators' report that the Respondent had access to proper, professional advice.

5.7 The Tribunal did not consider that there were mitigating features. Given our finding that the duty first arose in mid-November 2017, consultation could and should have taken place before the decision to place the company into administration. Indeed, even if the duty did not arise until the start of January, it would still have been possible to carry out the full required consultation before the company was placed in administration. No question of insolvent trading arises.

5.8 Therefore, the Tribunal considered it just and equitable to make a protective award for the full period of 90 days.

Employment Judge Davies

20 September 2019