EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr A Hutton-Young and Mr G Park	v	British Midland Regional Limited t/a Flybmi (In Administration)

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Nottingham

On: Monday 16 January 2020

Before: Employment Judge Rachel Broughton (sitting alone)

Appearances
For the Claimants: No Attendance
For the Respondent: No Attendance

JUDGEMENT

The Judgment of the Employment Tribunal is that;

1. The Respondent failed to comply with section 188 of The Trade Union and Labour Relations (Consolidation) Act 1992 and is Ordered to pay each of the Claimants remuneration for the Protected Period of 90 days starting on 18 February 2019.

REASONS

Background

2. Claims were brought by two groups of claimants; the first group (case number 2601840/19) are represented by Unite and those claims were lodged with the Tribunal on 15 May 2019. The second group (case number 2601669/10) are represented by Simpson Millar solicitors and those claims were lodged on the 7 June 2019. Both sets of claimants brought claims for a protective award pursuant to section 188 of the Trade Union and Labour Relations Consolidation Act 1992 (TUL(C)RA) against the Respondent. The claims all related to the same collective redundancy exercise and were consolidated. A previous Judgment was promulgated in respect of all the other claimants, this Judgement relates only to the individual Claimants; Mr A Hutton-Young and Mr G park.

3. The Respondent went into administration on 18 February 2019 and the Claimants were made redundant on or after 18 February 2019. The Claimants case is that the Respondent failed to carry out any consultation with Unite or

employee representatives or in the absence of employee representatives, with the affected employees.

Preliminary Hearing – 18 September 2019

4. At a Closed Telephone Preliminary Hearing before Regional Employment Judge Swann on 18 September 2019, it was determined on the basis of a letter dated 10 June 2019 sent to Simpson Millar solicitors (formerly JWK Solicitors) confirming that the administrators gave consent for the proceedings against the Respondent and a second letter, addressed to the Tribunal which confirmed that neither the Respondent nor the joint administrators would be in a position to have any involvement in proceedings, that consent had been given by the administrators for matters to proceed in respect of all the claims.

5. No defence was filed on behalf of the Respondent company to ether set of claims.

6. It was agreed that the final hearing would be conducted on written submissions only without the need for any representatives or Claimants to attend.

The Evidence

7. Simpson Millar solicitors produced witness statements from the Claimants; Mr. Andrew Hutton – Young who had been employed as stock control of company aircraft parts and based at Bristol Airport and Mr. Gary Park who had been employed by the company as operations controller based at the East Midlands airport. I have read those statements.

The Facts

8. The undisputed evidence of the Claimants is that the Respondent company proposed to dismiss as redundant 20 or more employees at the establishments where they worked and that the Respondent company failed to comply with its obligations under section 188 in that there was a complete failure to consult with the recognised Union (Unite), employee representatives and or indeed the employees themselves in the absence of representatives

9. The date the first dismissal took effect, was 18 February 2019 on the basis that this was the date the company went into administration. That this is the date the first dismissal took effect is undisputed.

10. The Respondent has not sought to adduce any evidence or otherwise make representations regarding mitigating circumstances.

The Law

Liability

11. Section 188(1) TULR(C)A provides as follows;

"*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 those dismissals the persons who are appropriate reprehensive of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken about those dismissals"*

(1A) 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 section (1) at least 45 days and
(b) Otherwise at least 30 days
before the first of the dismissals take effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are-
(a) If the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
(b) In any other case, whoever of the following employee representatives the employer chooses;
(i) Employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purpose purposes for and the method by which method they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissal on their behalf
(ii) Employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)

Remedy

12. Where a Protective Award has been made, remuneration must be paid to all employees who have been (or are to be) made redundant and are of a description specified by the tribunal; section 190 (1) TULR(C) A.

13. The rate of remuneration is one-weeks pay for each week of the Protected Period calculated in accordance with sections 220 – 229 of the Employment Rights Act 1996

14. The purpose of a Protective Award is punitive, not compensatory. The Court for Appeal in **Susie Radin Ltd V GMB and ors 2004 ICR 893** set out guidance on how Tribunals should approach their discretion under section 189 and I reminded myself of that guidance.

15. The fact that the company is in administration and any issue as to the ability of the Respondent to pay, is not a factor that I should consider: **Smith and or v Cherry Lewis Ltd (in receivership) 2005 IRLR 86 EAT.**

Conclusion

16. The employers default was serious, there is no evidence of any attempt to carry out any form of consultation.

17. The proper approach of the tribunal where there has been a complete failure is to start with the maximum period of 90 days and reduce it only if there are mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate. No mitigating factors have been pleaded.

18. The complaint that the Respondent breached section 188 of TULR(C)A is well founded.

19. The Tribunal hereby makes a Protective Award for the Claimants; Mr A Hutton-Young and Mr G Park, for remuneration for the Protected Period of 90 days starting on 18 February 2019.

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Employment Judge Rachel Broughton

Date: 16 January 2020

Sent to the parties on:

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For the Tribunal:

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NOTE: the following statement is given under Regulation 5 (2) (b) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Regulations") and advises the respondent of its duties under regulation 6, and of the effect of Regulations 7 and 8, of the Regulations.

(1) The respondent is required to give to the Benefits Agency in writing:
(a) the name, address and National Insurance number of every employee to whom the above protective award relates; and
(b) the date of termination (or proposed termination) of the employment of each such employee.
(2) The respondent is required to comply with paragraph (1) above within the period of 10 days commencing on the date on which the judgment was announced at the hearing, or, if it was not so announced, the date on which the judgment was sent to the parties.
(3) No remuneration due to an employee under the protective award shall be paid to him until the Benefits Agency has (a) served on the respondent a notice ("a recoupment notice") to pay the whole or part of the award to the Benefits Agency or (b) informed the respondent in writing that no recoupment notice is to be served.
(4) The sum due to the Benefits Agency under a recoupment notice shall be the lesser of:
(i) the amount (less any tax or social security contributions which fall to be deducted by the respondent) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Benefits Agency receives from the respondent the information mentioned at paragraph (1) above; and
(ii) the amount paid by way of, or as on account of, jobseeker's allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date mentioned at (i) above.
(5) The sum due under the recoupment notice shall be paid forthwith to the Benefits Agency. The balance of the protective award shall then (subject to deduction of any tax or social security contributions) be paid to the employee.
(6) The Benefits Agency shall serve a recoupment notice within the period of 21 days

after the date mentioned at paragraph 4 (ii) above, or as soon as practicable thereafter.

(7) Payment by the respondent to the employee of the balance of the protective award (subject to deduction of any tax or social security contributions) is a complete discharge of respondent in respect of any sum so paid.

(8) The sum claimed in a recoupment notice is due as a debt by the respondent to the Benefits Agency, whatever may have been paid to the employee and whether or not there is any dispute between the employee and the Benefits Agency as to the amount specified in the recoupment notice.

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