



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112066/2019

Held in Dundee on 13 February 2020

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Employment Judge I McFatridge

15 **Mr R MacKenzie**

**Claimant
Represented by
Ms Ross,
Friend**

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McGill & Co Ltd (in administration)

**Respondent
Not present or
represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) The Tribunal has jurisdiction to hear the complaint that the respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

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(Two) The complaint that the respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

(Three) A protective award is made in favour of the claimant in terms of section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 and the E.T. Z4 (WR)

respondent is ordered to pay remuneration to the claimant for the protected period of 90 days from 1 February 2019.

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REASONS

1. On 29 October 2019 the claimant submitted an ET1 in which he sought a protective award in respect that the respondent's failure to consult when proposing to dismiss him as redundant in terms of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. This followed early conciliation with ACAS and the early conciliation certificate notes that the date of receipt by ACAS of the EC notification was 23 October 2019 and the date of issue by ACAS of the certificate was also 23 October 2019. The ET1 claim form narrated that the claimant had been dismissed on 1 February 2019 and the claim was therefore on the face of it submitted outwith the three month period within which such claims should be made. Nevertheless the Tribunal accepted the claim on the basis that the issue of time bar would require to be addressed at a future hearing.
2. The respondent did not submit a response to the claim. In an e-mail dated 19 November 2019 the joint administrators gave consent for the claim to proceed and also confirmed that they would not be entering into the proceedings. At the hearing the claimant gave evidence on his own behalf. He also lodged a production consisting of a letter from KPMG the joint administrators to him dated 4 February 2019 together with the fact sheet which they had enclosed therewith. On the basis of the evidence and the productions I found the following essential factual matters relating to the issues I required to determine to be established.

Findings in fact

3. The claimant was employed by the respondent as an apprentice plumber his employment having commenced in 2015. He was based at the respondent's establishment in Dundee. As at February 2019 the respondent had around 400 employees. The bulk of these were employed at the Dundee establishment. More than 20 were employed at the Dundee

establishment. Although based in Dundee the claimant often worked at jobs which required to be carried out elsewhere albeit they were administered from Dundee. On 1 February he was working on a job in Pitlochry. He received a telephone call to come to a meeting at the Apex Hotel in Dundee which was due to take place around an hour after he received the call. The claimant attended there and found that most of the staff of the respondent were there. A meeting took place at which the claimant was advised along with other staff that the company was being put immediately into administration. The workforce was immediately dismissed as redundant. Three hundred and forty five employees were dismissed at the same time as him. Prior to the meeting the claimant had been unaware of any financial difficulties and there had been no consultation with the claimant or other staff or any indication that the firm was in severe difficulties. At the meeting the claimant was told that the joint administrators would be writing to him confirming what his entitlements were in respect of additional payments and that they would provide him with the appropriate forms if required.

4. Following the meeting the claimant's immediate priority was to obtain another post to which he could transfer the unexpired term of his apprenticeship. The claimant was successful in finding another post within a few days.

5. Around 5 February the claimant received a letter from the joint administrators. The letter was dated 4 February and was lodged. They confirmed that the claimant might be entitled under the Employment Rights Act 1996 to make claims up to certain limits from the Redundancy Payments Service in respect of some or all of arrears of pay, holiday pay, pay in lieu of notice and redundancy pay. The claimant was advised how to make a claim and provided with a reference number to enable him to do this. The claimant duly did this and in due course received payments in respect of these.

6. The letter also referred to a fact sheet which was attached. This stated that the claimant could apply for redundancy pay, holiday pay, money you're owed by your employer for example unpaid wages etc, statutory notice pay. Neither the letter nor the factsheet indicated that it was

possible to apply for a protective award or made any reference to s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 It went on to advise

5 “There are two separate applications you have to complete. Both must be completed online.

Application 1 is for:

- Redundancy pay
 - Holiday pay
 - Other money you’re owed, including wages, overtime, bonuses, commission, etc
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Application 2 is for:

- statutory notice pay”

It then goes on to state that with regard to application 1 one should apply online ‘from today’ by visiting a particular website. With regard to application 2 it went on to state

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“If your employer doesn’t pay you your statutory notice pay, you can apply for it using application 2. However, you can only apply once your notice period ends.

Don’t worry about keeping track of when your notice period ends. We will contact you when you can apply.

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Each person’s notice period is different, so don’t worry if we contact some of your colleagues before you.”

7. In accordance with what he considered he ought to do the claimant completed the application online for redundancy pay, holiday pay and unpaid wages. The claimant did not have any familiarity with employment law nor was he familiar as to how one might obtain advice on employment law. The claimant saw no reason in any event to seek advice since his understanding was that KPMG would be arranging for him to be paid all the sums which he might be due.

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8. The claimant was not a member of a recognised trade union. His job was not of a description in respect of which an independent trade union was recognised by the respondent.

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9. The claimant knew a number of his fellow apprentices at McGill's through attending college together. He was in a group chat facility which many of them were members of and which he would occasionally visit. In around September 2019 he became aware that other apprentices who had been made redundant at the same time as him had received additional payments. He and his aunt checked the factsheet and noted that with regard to what he understood to be statutory notice pay the joint administrators had indicated that they would be in contact with him when the time became appropriate for him to make an application. They had not done so but nevertheless the claimant arranged for his aunt to telephone KPMG on his behalf and speak to them. His aunt had some difficulty in contacting anyone who was prepared to give her information but she was eventually told that the claimant's name had been omitted from a list. She was unaware of specifically what this list was. In any event, KPMG advised the claimant that the appropriate step for him to take was to submit a Tribunal application form. The claimant was given this information around the second week in October. He then took immediate steps with the assistance of his aunt to contact ACAS by e-mail and submitted his ET1 on 29 October.
10. Prior to the claimant's dismissal there were no representatives appointed or elected and there was no provision made by the respondent for the election of any employee representatives.

Observations on the evidence

11. I had absolutely no doubt that the claimant was giving truthful evidence and seeking to assist the Tribunal as best he could. It was clear that he relied to an extent on his aunt to assist him with the paperwork. I entirely accepted his evidence that he had understood that the joint administrators would "keep him right" and ensure that any monies he was due would be claimed at the appropriate time on his behalf.
12. It was unclear from the evidence whether the claimant has in fact received payment of any statutory notice pay which he may have been due. The claim submitted did not refer to statutory notice pay and in the

circumstances I considered that it was not possible for the Tribunal to make any finding in respect of this.

Discussion and decision

13. Section 188 of the Trade Union and Labour Relations (Consolidation) Act
5 1992 is in the following terms

“(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
10 be affected by the proposed dismissals or may be affected by measures taken in connection with 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 subsection (1), at least 45 days,
15 and
- (b) otherwise, at least 30 days,
before the first of the dismissals takes effect.”

14. Section 189 provides that where an employer has failed to comply with the requirement of section 188 or section 188A a complaint may be presented
20 to an Employment Tribunal on that ground and the Tribunal may make a protective award. Section 189(5) however provides that

“An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

- (a) before the date on which the last of the dismissals to which the
25 complaint relates takes effect, or
- (b) during the period of three months beginning with that date, or
- (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months within such further period as it considers
30 reasonable.”

15. Accordingly, the first matter which required to be determined was whether the Tribunal had any jurisdiction to hear the matter at all. It was clear to

me that all of the dismissals to which the complaint could relate had taken effect on 1 February 2019. The claim therefore ought to have been lodged within three months of that date i.e. by 30 April 2019. It was not.

- 5 16. Accordingly, the Tribunal would only have jurisdiction if satisfied that it was not reasonably practicable for the complaint to be presented during the three month period and that the complaint had been presented within a reasonable period thereafter.
- 10 17. There is a considerable body of case law which deals with the issue of how a Tribunal should interpret the words 'not reasonably practicable'. The case of ***Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53*** sets out the general approach which a Tribunal should take to a case such as this where the claimant states that he was completely ignorant of his right to bring the claim in question. It is clear that it is not enough for the Tribunal to simply accept the fact that the claimant was ignorant of the right to make a claim for a protective award. 15 The Tribunal must ask further questions "what were his opportunities for finding out that he had rights, did he take them, if not, why not, was he misled or deceived?"
- 20 18. In this case I was entirely satisfied on the evidence that the claimant was as a matter of fact unaware of his right to make a claim for a protective award. It was also my view on the basis of the evidence that the claimant's ignorance was itself reasonable. The claimant is an apprentice plumber. He is not a lawyer. At the time of his dismissal he was 21 years of age. He had no-one he was in regular contact with who could have provided 25 him with advice on the subject. I accept that the claimant lives in an area where it might have been possible for him to seek advice from a solicitor under the Legal Aid Scheme or from the CAB. In practical terms however I accepted the claimant's evidence that he did not seek out such advice because he had absolutely no idea that it might be appropriate for him to do so. This leads me on to the second aspect of the matter which I 30 consider to be relevant namely that it does appear to me that the claimant was genuinely misled by the information which was provided to him by the administrators. The administrators represented to him and his colleagues at the meeting that they were providing comprehensive advice regarding

his rights and that they would “keep him right”. They provided him with information in the form of the letter and accompanying fact sheet. The claimant assumed that the information which he had been provided with set out all of his potential entitlements in respect of the termination of his employment. There is absolutely no mention in either document of the administrator’s duty to consult nor any mention of the potential for an employee to claim a protective award in certain circumstances. Furthermore, it is clear that this particular claimant was also misled by the section relating to statutory notice pay which specifically said that he would be contacted once he could apply.

19. I consider this to be a case where the claimant was entirely ignorant of his right to claim a protective award not simply ignorant of the fact that there was a time limit for bringing such a claim. I find that his ignorance was reasonable. In my view, given the circumstances it was not reasonably practicable for the claimant to bring his claim within the initial three months period because during that period he remained entirely unaware that he had the right to bring a claim and his ignorance of that right was reasonable given his own personal circumstances.

20. I am also satisfied that the claimant submitted his claim to the Tribunal within a reasonable time after that. The claimant’s evidence was that he discovered from others in the chat room that they had been paid. In my view it was natural for him to assume that what they were being paid was the statutory notice pay referred to on the second page of the fact sheet. The second page of the fact sheet specifically says that others might be paid first and not to worry about it. Nevertheless, the claimant arranged for his aunt to telephone KPMG and it is clear that as soon as he received the advice through her of how to proceed the Employment Tribunal application was submitted within a matter of days thereafter. It is therefore my view that the Tribunal does have jurisdiction to hear the claim.

21. I entirely accepted on the basis of the evidence that this was a case where there had been no consultation whatsoever and there had been no attempt to elect employee representatives. The claimant is therefore entitled to a declaration to this effect in terms of section 188. With regard to the protective award, there was nothing before me to suggest a special

circumstance defence in terms of section 188(7) of the Act. The proceedings were undefended.

22. The case of ***Suzy Radin Ltd v GMB and others [2004] IRLR 400*** sets out the approach which a Tribunal should take in cases where there has been a failure to comply with the duty to consult. The starting point is that a protective award of the full 90 days ought to be made unless there are any mitigating circumstances. In this case there were no mitigating circumstances. There was absolutely no attempt at consultation whatsoever. It is clear that the appropriate course is to make a protective award of 90 days' pay starting on the date all the dismissals took place which was 1 February 2019.

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35 **Employment Judge:**
Date of Judgment:
Date sent to parties:

Ian McFatridge
20 February 2020
21 February 2020