EMPLOYMENT TRIBUNALS

Claimant:	Baylis and others
First Respondent:	Zerpetz Limited (in administration)
Second Respondent	The Secretary of State for Business, Energy and Industrial Strategy

Heard at: Birmingham Employment Tribunal (in Chambers)

On: 21 May 2020

Before: Employment Judge Mark Butler

JUDGMENT

1. In breach of s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('hereinafter ('TULRCA')), 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 Arrow Business Park, Shawbank Road, Lakeside, Redditch, Worcestershire, B98 8YN.

2. The claimants, being 12 (see attached schedule of claimants) of those made redundant at this establishment, are entitled to a 90-day protective award each against the First Respondent, the protected period being 90 days from 08 July 2019.

3. If 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.

4. The First Respondent is reminded of its obligations under regulation 6 of the Employment Protection (Recoupment of Benefits) Regulations 1996 to provide employee information to the Department for Work and Pensions. The tribunal also reminds the first respondent of the effect of regulation 7 of those regulations, namely that the protective award is stayed until the Department serves a recoupment notice or indicates that no such notice is to be served. By regulation 8, the First Respondent will be under a duty to make payments to the Department of the amounts set out in the recoupment

notice. The First Respondent should consult the regulations themselves for their full meaning.

5. This decision does not impact upon other claims that have been brought by the claimants, those being for breach of contract (notice pay), holiday pay, arrears of pay and unfair dismissal, which are currently stayed until 31 July 2020.

REASONS

Introduction

1. The claimants were employed by the First Respondent, which operated as a wholly owned subsidiary of Grinsty Holdings Limited and traded under the name Arrowdale Electrics. The First Respondent was a company that specialised in the design and manufacture of monitoring and recording equipment for the rail industry.

2. The first Respondent entered administration on 08 July 2019 and ceased all operations from that date. The claimants say that they were all summarily dismissed on that same date and now bring claims for protective awards on the basis that the First Respondent, at a workplace with no recognised trade union, did not elect any representatives and did not take any steps to consult with the claimants or any representatives before making redundancies.

3. There are other claims being brought by the claimants, but those are not part of this hearing today. This hearing is concerned solely with the protective award claims.

4. The administrators consent to and do not resist proceedings. The Second Respondent provided written submissions in the form of its ET3 and expressed the intention not to be represented in person at any future hearing. Whilst the claimants consented to this hearing being dealt with on the papers by a judge sitting alone.

5. The claimants' representatives have provided witness statements, a short bundle and written submissions. Which I have considered, alongside the written submissions of the Second respondent.

The Law

6. Section 188 TULRCA 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 employer shall consult with appropriate representatives of employees who may be affected by the proposed dismissals. Importantly, appropriate representatives of any affected employees are defined by s.188(1B), with these being either: 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.

7. Section 188A imposes obligations on the First Respondent in respect of the election of employee representatives. It provides that where there are no appropriate representatives, the employer shall make arrangements for the election of such representatives.

8. Section 189 TULRCA provides that where a complaint that an employer has failed to comply with a requirement of section 188 or 188A is well founded, a protective award of up to 90 days' pay may be made to affected employees.

9. The length of the protected period (and thus award) '…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.' (Section 189(4)(b) TULCRA). Guidance on the protective period was handed down by Peter Gibson LJ in **Susie Radin Ltd v GMB [2004] IRLR 400 (CA)**:

   "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".*

Findings of Fact

10. The First Respondent was, until entering Administration, in the business of designing and manufacturing monitoring and recording equipment for the

rail industry.

11. Following a financial review which had been extended to cover an 18 month period, ending in December 2018, the First respondent identified a loss of £1.18 million, and that it was over exposed under the terms of one of its commercial contracts. This was alongside difficult trading conditions. Together this resulted in financial difficulties, resulting in the use of £250,000 secured overdraft facility.

12. During May 2019, the First Respondent sought to renegotiate the commercial contract in question. However, ultimately this was unsuccessful.

13. By 20 May 2019, the board of the First Respondent had concluded that a formal insolvency process was inevitable and approached Muras Baker Jones Ltd for preliminary advice on their options.

14. There were some discussions with a third party about a potential sale of all or a substantial part of the First Respondent's business. However, none was received.

15. On 28 June 2019, notice of intention to appoint Administrators was filed in court, and on 08 July 2019, Administrators were appointed.

16. Immediately following the appointment of the Administrators, all 49 employees that were employed at a single establishment at Arrow Business Park, Shawbank Road, Lakeside, Redditch, Worcestershire, B98 8YN, were dismissed by reason of redundancy.

17. The First Respondent did not recognise a trade union or have other appropriate representatives for the purposes of informing and consulting on behalf of the workforce. Further, the First Representative had made no arrangements for the election of such appropriate representatives.

Conclusion

18. I am satisfied from the evidence that the number of employees dismissed in one establishment exceeded 20 and that the dismissals occurred without any collective consultation on redundancy. The claimants, who are all named in a schedule attached to this judgment, are therefore entitled to a protective award.

19. Applying the guidance given by Peter Gibson LJ in **Susie Radin Ltd**, on the information that I have before me, I can identify no mitigating circumstances justifying a reduction from the maximum. In this case there has been a total failure to inform or consult so the default, and with no such mitigating circumstances, this tribunal makes the maximum award of 90 days' pay in respect of each claimant.

20. For the avoidance of doubt, the protected period is 90 days from 08 July 2019.

21. The First Respondent is reminded of its obligations under regulation 6 of the Employment Protection (Recoupment of Benefits) Regulations 1996 to provide employee information to the Department for Work and Pensions. The tribunal also reminds the First Respondent of the effect of regulation 7 of those regulations, namely that the protective award is stayed until the Department serves a recoupment notice or indicates that no such notice is to be served. By regulation 8, the first respondent will be under a duty to make payments to the Department of the amounts set out in the recoupment notice. The First Respondent should consult the regulations themselves for their full meaning.

Employment Judge Butler
21 May 2020

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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