EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4107830/2019; 4111250/2019; 4109782/2019; 4111874/2019; 4111751/2019; 4112260/2019;4111251/2019; 4111285/20019; 4111114/2019; 4111436/2019; 4111089/2019; 4111241/2019; 4111470/2019; 4111428/2019 and 4111428/2019

Held in Stranraer on 7 January 2020

Employment Judge R Gall

Mr J Partington	**Claimants In Person**
Mr J McCulloch	
Mr A Modrate	**Not present**
Mr D McWhirter	
Mr H Dickson	
Miss H Alexander	
Miss L McCulloch	
Mr N MacMillan	
Mr W Farroll	
Mr M McKie	
Mr M Bryant	
Miss E Williams	
Mr A Gorst	
Mr M Croucher	**Not present**
Mrs G Morgan	
Border Cars Group Ltd (in Administration)	**Respondent Not present and**
E.T. Z4 (WR)	

Not represented

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment is: –

The Judgment of the Employment Tribunal is that: –

1. It is found and declared that the respondents failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and

2. The Tribunal makes a Protective Award in terms of Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of those claimants detailed in the appendix to this Judgment. Those claimants were made redundant. Those claimants were made redundant on the dates set out in the appendix to this Judgment. The respondents are ordered to pay remuneration to the said claimants for the protected period of 90 days, that being the period specified in respect of each claimant in the appendix to this Judgment.

3. The claim brought by Ms H Alexander, although presented late, is permitted to proceed on the basis that the Tribunal is persuaded that it was not reasonably practicable for that claim to be presented within the relevant time.

4. The claim in respect of payments by way of maternity pay said to be due to Ms H Alexander is sisted.

REASONS

1. This case called for hearing at Stranraer on 7 January 2020. All of the claimants, under exception of Mr Modrate and Mr Croucher, appeared and gave evidence. Witnesses spoke to their knowledge of the circumstances of Mr Modrate and Mr Croucher. I was satisfied as to the facts relating to those claimants on the basis of that evidence.

2. As the respondents are in administration, consent of the administrator to bring proceedings was required before the cases could be heard. Each of the

claimants had obtained that consent. The administrator was therefore aware of the claims being made. No form ET3 had been lodged.

3. There was no "testing" of the evidence of the claimants' evidence as there was no challenge to their evidence, given that there was no appearance and no representation for the respondents in circumstances where no form ET3 had been lodged. I found all of the witnesses who gave evidence to be entirely credible and reliable. I was in no doubt as to their honesty.

4. There was no union recognised in the workplace. No employee representatives were elected. There were some 30 employees at the Stranraer outlet of the respondents. There were certainly more than 20 employees there. As there were more than 20 employees there, it was not necessary to determine whether Stranraer was a separate establishment for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

5. All of the employees told essentially gave evidence to the same effect. They had been working for the respondents. Many of them had worked for some time with the respondents.

6. On 5 July 2019 the respondents had sent to their employees an email stating that whilst there were cash flow issues, they were continuing to trade and that no administration had taken place.

7. There was no discussion with any of the employees either before this email or in the days subsequent to it as to redundancies or termination of employment. There was no discussion as to insolvency of the company being a possibility.

8. On the days specified in the appendix in respect of each claimant, that claimant received an email after the end of working hours. That email stated that he/she was redundant as of 6 PM that evening. This came as a shock to each of these individual employees. The emails referred to attempts having been made to speak with as many people in person as was possible. None of

the claimants were aware of any such attempts and indeed none of the claimants had been spoken to by their employers by way of consultation.

9. The 1992 Act contains obligations on employers where redundancies are contemplated. Those obligations, broadly put, are to consult regarding whether job losses are to take place, if so how many job losses are to be involved and whether anything can be done to mitigate the impact of redundancies. This is in terms of Section 188 of the 1992 Act. The obligation is to consult a recognised trade union or alternatively for there to be appointment of employee representatives if consultation is to take place. As stated above, there was no recognised trade union in the workplace. No election or appointment of employee representatives took place. There was no individual consultation. The terms of Section 188 were therefore not adhered to.

10. All employees were made redundant over the period from 10 July 2019 to 19 July 2019. There was a redundancy of more than 20 but less than 100 employees. In that circumstance, the obligation is for consultation to take place at least 30 days prior to the first dismissal taking place. That did not occur.

11. Although the obligation to consult involves consultation at least 30 days prior to the first dismissal, if that is not adhered to the protective award which is to be made in terms of Section 189 of the 1992 Act proceeds on the basis that the starting point is that an award in respect of 90 days is to be made. That is confirmed in the case of *Newage Transmission Ltd v TGWU & others* EAT 0131/05.

12. Payment in respect of that 90 day period is appropriate. The case of *Susie Radin Ltd v GMB & others* 2004 IRLR 400 makes it plain that an Employment Tribunal should start on the basis of a 90 day award. That period can be reduced depending upon the extent of the default and also depending upon whether any special circumstances exist justifying departure from the 90 day period. That is in terms of Section 188 (7) of the 1992 Act.

13. The case of *Clarks of Hove Ltd v Bakers' Union* 1978 ICR 1076 confirms that a "standard" insolvency does not constitute special circumstances. There was in that case no disaster of a sudden nature or any emergency. It was not said here that there had been a sudden disaster or emergency.

14. There was no consultation whatsoever. On the basis of the evidence I heard, no special circumstances existed justifying departure from the provisions of the 1992 Act and the obligation of consultation imposed. The protective award is therefore made in respect of the 90 day period running in the case of each claimant from the date shown ascribed to them in the appendix to this Judgment.

15. All claimants who had brought a claim in respect of notice pay confirmed that their claim for this element had been met. They confirmed that they no longer insisted on that ground of claim in those circumstances.

16. The claim brought by Ms Alexander is out of time. Ms Alexander received the email confirming termination of employment on 10 July 2019. She was absent on maternity leave at that point. She was completely shocked to receive this email. Ms Alexander applied to ACAS for the Early Conciliation Certificate on 24 July 2019. That Certificate was issued to her on 30 July 2019. The claim form was presented to the Employment Tribunal on 5 November 2019. The delay in presentation of the form was attributable to the fact that Ms Alexander was on maternity leave. Presentation of the claim form by her is not significantly late. I was persuaded on the evidence that it had not been reasonably practicable for the claim to be presented in time. The claim is therefore able to proceed.

17. Ms Alexander also has a claim in respect of maternity pay. She is currently in discussion with HMRC regarding settlement of this claim. She asked that her claim for this element be sisted to enable those discussions to come to a conclusion, whilst preserving her right to proceed with the claim if necessary. The Judgment confirms that the claim for maternity pay is sisted.

Employment Judge: R Gall

Date of Judgement: 09 January 2020

Entered in Register,

Copied to Parties: 10 January 2020

APPENDIX

Employee name	**Date of termination of employment**	**Protected period**
J Partington	15 July 2019	15 July to 13 October 2019
John McCulloch	10 July 2019	10 July 2019 to 8 October 2019
Alan Modrate	19 July 2019	19 July to 17 October 2019
David McWhirter	15 July 2019	19 July 2019 to 17 October 2019

Hugh Dickson	19 July 2019	19 July 20109 to 17 October 2019
Heidi Alexander	10 July 2019	10 July 2019 to 8 October 2019
Ms L McCulloch	10 July 2019	10 July 2019 to 8 October 2019
Neil McMillan	15 July 2019	15 July 2019 to 13 October 2019
William Farrell	15 July 2019	15 July 2019 to 13 October 2019
Murray McKie	10 July 2019	10 July 2019 to 8 October 2019
Mike Bryant	10 July 2019	10 July 2019 to 8 October 2019
Erin Williams	10 July 2019	10 July 2019 to 8 October 2019
Alan Gorst	15 July 2019	15 July 2019 to 13 October 2019
Mark Croucher	15 July 2019	15 July 2019 to 13 October 2019
Gillian Morgan	19 July 2019	19 July 2019 to 17 October 2019