EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113772/2019 (V)

Held by CVP on 14 July 2020

Employment Judge I McFatridge

Mr Martyn Campbell	**Claimant** **In person**
McGill & Co Ltd (in Administration)	**Respondent** **Not present or represented (no ET3)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

1. 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.

2. 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.

3. 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 respondent is ordered to pay remuneration to the claimant for the protected period of 90 days from 5 February 2019.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that the respondent had failed to comply with their obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended. He sought a protective award. The respondent did not lodge a response within the statutory period. In an email dated 10 February 2020 the joint administrators gave consent for the claim to proceed and indicated that they would not be entering the proceedings. An Employment Judge decided it would not be appropriate to deal with the matter without a hearing under Rule 21 as there appeared to be a time bar issue. Following a preliminary hearing which took place on 14 May 2020 a final hearing was fixed to take place using the Tribunal's Kinly CVP system on 14 July 2020. At that hearing the claimant appeared and gave evidence on his own behalf. He also lodged a small bundle of productions. On the basis of the evidence and the productions I found the following essential facts to be proved.

Findings in fact

2. The claimant was employed by McGill & Co Ltd. He had started employment as an Electrical Supervisor but by February 2019 he was employed as a Project Manager. He was primarily office based working from the respondent's three offices in Dundee, Glasgow and Edinburgh. He also spent a fair amount of time out on site. On or about 1 February he received a telephone call to advise that the company had gone into administration and he was required to attend a meeting which took place in the Hilton Hotel at Edinburgh Airport along with a large number of other McGill employees. He was advised that simultaneous meetings were taking place at other hotels in different locations in Scotland. At the meeting the claimant was advised that the company was in administration and that a substantial number of employees would be made redundant. He was advised that some would be kept on. When he arrived home that evening he was told that he was one of these being kept on. In the event his continued employment only lasted two days and he was dismissed by KPMG on 5 February 2019.

3. The respondent had around 400 employees as at February 2019. More than 20 were employed at the establishment from which the claimant worked. 345 employees were dismissed on 1 February with the remaining 70 or so being dismissed in the following week or so. Prior to the meeting the claimant had been unaware of any financial difficulties in the company 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 all affected employees confirming what their entitlements were in respect of additional payments and that they would provide him with the appropriate forms if required.

4. When the claimant was dismissed on 5 February he was provided with a pro forma document entitled

"Information for employees made redundant".

This document was lodged. It explained the claim process of making a claim to the Insolvency Service. The claimant was advised that he could claim wage arrears, holiday pay, statutory redundancy pay and statutory notice pay. Information was provided as to the maximum amounts which could be claimed in each category. A form was provided to the claimant which he filled in and forwarded to the Insolvency Service. Around a month later the claimant received notice from the Insolvency Service of what he was due to be paid. The claimant thought that he must be due more than was suggested and contacted Jonathan Jones of KPMG. The claimant questioned the amount he was due to receive. Mr Jones told the claimant to take matters up with someone called Michaela who worked at the Insolvency Service. The claimant contacted Michaela by telephone and discussed the issue with her. She confirmed to him the amount he was entitled to. At no time during his conversation either with Jonathan Jones of KPMG or with Michaela of the Insolvency Service was the claimant alerted to the fact that he had a potential claim for a protective award.

5. On or about 24 October 2019 the claimant happened to be in conversation with an individual who had previously worked for McGill's but was now

working at the same company the claimant was working at. This individual told the claimant that he had just received an additional payment which he understood had been negotiated through his union. He used a term to describe this payment with which the claimant was not familiar. The claimant cannot remember exactly what he called it but it was not "protective award". The claimant was very surprised at this. Up to this point he had been completely unaware that employers seeking to make substantial redundancies had a duty to consult and he had been unaware of the possibility of applying for a protective award. The claimant has no legal training. He had never been involved in Employment Tribunal proceedings before. He had not sought to obtain legal advice since he understood that KPMG would have fully advised him of all claims which he could competently make. He also believed that if there had been any other claim he could make then either Jonathan Jones or Michaela would have told him about this at the time of the conversations they had in March 2019.

6. The claimant researched matters on the internet. He then contacted ACAS and submitted an ET1 to make a claim for a protective award on 31 October 2019. Thereafter the Employment Tribunal Service wrote to him explaining that he was missing several pieces of information. The claimant corrected this. The process took several attempts and the ET1 was eventually accepted by the Tribunal on 2 December 2019.

Discussion and decision

Observations on the evidence

7. I had absolutely no doubt the claimant was giving truthful evidence and seeking to assist the Tribunal as best he could. I accepted his evidence that he had understood that the joint administrators would fully advise him what he could claim and ensure that any monies he was due would be claimed at the appropriate time on his behalf.

8. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 states

"(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 maybe affected by measures taken in conjunction with these 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, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect."

Section 189 provides that where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented 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 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 reasonable."

9. Accordingly I first required to decide 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 by 5 February 2019 or at most a few days after this. The claim therefore ought to have been lodged within three months of that date i.e. by 4 May 2019, it was not. In order for the tribunal to have jurisdiction I had to determine that it was not reasonably practicable for the complaint to be presented during that period and that the complaint had been presented within a

reasonable period thereafter. I noted that in this case the claimant was essentially relying on the fact that he was completely ignorant of his right to bring the claim in question until around 24 October when he was told about the existence of protective awards in general terms by a former colleague. The case of ***Dedman -v- British Building and Engineering Appliances Limited [1974] ICR53*** sets out the general approach which the Tribunal should take to such a case. 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. I should say in this case I was in absolutely no doubt that the claimant was genuine in this assertion. The Tribunal must however ask further questions namely what were his opportunities for finding out that he had rights, did he take them and if not, why not. The Tribunal also requires to consider whether he was misled or deceived. It was my view on the basis of the evidence that the claimant's ignorance was itself reasonable. The claimant works in the construction industry. He has no legal training. In my view it was entirely reasonable for him to assume that in a situation such as this he would be fully advised of his rights by the joint administrator. Indeed they provided him with information which enabled him to make various statutory claims. He had every reason to assume that if there was another type of claim he could make they would have told him. The claimant indicated to me that during his researches on the internet he had found it said that often administrators of former employers fail to advise individuals of their rights to a protective award or indeed of the existence of a duty to consult. Whether or not that is the case in my view it does not affect what has happened in this case which was that the claimant clearly thought that he had been told all about his rights by KPMG. I entirely accepted that it never occurred to the claimant that he should seek further legal advice and that it was entirely reasonable in those circumstances for him not to seek such further advice. In my view therefore it was not reasonably practicable for him to have submitted his application during the initial three month period.

10. I also consider that he submitted his claim within a reasonable time thereafter. It appears there was an extremely short delay between the claimant being told of the existence of the right, carrying out the appropriate research and then commencing his claim. There does appear

to have been a short delay thereafter in having the claim registered due to the claimant's failure to complete the form correctly however I accepted this was due to his unfamiliarity with the form and in any event the delay was not particularly excessive and in my view was not unreasonable.

11. With regard to the merits of the claim I 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.

12. The case of ***Suzy Radin Limited -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 a 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. It is clear to me therefore that the appropriate course is to make a protective award of 90 days' pay starting on the date when the claimant was dismissed which was 5 February 2019.

Employment Judge: **Ian McFatridge**
Date of Judgment: **15 July 2020**
Date sent to parties: **16 July 2020**