Case: 1800898/2020 (P)

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Drake**
Respondents: **(1) Total Polyfilm Limited (in administration)**
(2) The Secretary of State for Business Energy and Industrial Strategy

AT A HEARING

Heard at: **Leeds** **On: 2nd June 2020**
Before: **Employment Judge Lancaster**

This has been a hearing on the papers which has been consented to by the parties. A face to face hearing was not held because no-one requested the same and all issues could be determined on paper. The documents that I was referred to are the submission on behalf of the Claimant together with a witness statement. The administrators for the First Respondent have notified the Tribunal that they are taking no part in the proceedings. The Second Respondent has elected to rely solely on his Response, although this does not address the specific issues for consideration at this hearing.

JUDGMENT

1. The claim for a protective award is in time.

2. The complaint that the First Respondent has failed to comply with the requirements of sections 188 and/or 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

3. The Claimant is entitled to receive a protective award for a period of 90 days from 18th September 2019

4. The Employment Protection (Recoupment of Benefit) Regulations 1996 regulations 6 7 and 8 apply to this award.

5. The First Respondent is accordingly advised of its duties under the Regulations and any award made will be postponed pending any service of a recoupment notice by the Secretary of State in respect of relevant benefits received by the Claimant in the prescribed period and only the balance of any remuneration due will then be payable directly to the Claimant.

REASONS

1. This claim, although ordered to be consolidated with the case of Abdalla and others (1807432/2019 & others), which was heard 0n 6th April 2020 and in which protective awards have already been made, was submitted separately.
2. The claims in Abdalla and others were all submitted in time on 17th December 2019.
3. This Claimant was, together with 188 others including nearly all the 93 claimants in the Abdalla multiple, dismissed on 18th September 2019.
4. He only commenced ACAS early conciliation on 31st December 2019, a certificate was issued on 3rd January 2020 and the claim form (ET1) was presented on 3rd February 2020.
5. Because on the face of it this claim for a protective award, as well as any other potential claims arising from the dismissal is therefore out of time the case was adjourned for further representations to be made.
6. The relevant statutory provision is section 189 (5) of the Trade Union & Labour Relations (Consolidation) Act 1992. This 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."
7. The requirement to enter into ACAS early conciliation before commencing proceedings applies to this complaint, and the three month time limit will accordingly be extended in appropriate circumstances.
8. The words "*the date on which the last of the dismissals to which the complaint relates takes effect"* were added by amendment under the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.
9. The original wording in the 1992 Act, reproducing the earlier legislative provisions, referred to "*the proposed dismissal"* or *"the dismissal"* (emphases added).
10. I consider that the wording of the statute does not represent a happy marriage between provisions that are primarily directed at collective consultation and those that also permit an individual complaint: cf the purpose of the Collective Redundancies Directive, as later interpreted in Mono Car Styling SA v Odemis and others [2009] 3CMLR 4& ECJ, is not principally to allow enforcement by individuals rather than by representatives.
11. The legislative history from the Employment Protection Act 1975 is summarised in Commissioners of the European Community v United Kingdom [1994] ICR 604 ECJ, following which the 1995 Regulations were enacted in order to give proper effect to the then relevant Council Directive on Collective Redundancies. Initially the UK legislation had only provided for consultation with a voluntarily recognised trade union. However I note that section 99 (1) of the 1975 Act also provided that:
    "*An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of that trade union about the dismissal in accordance with the following provisions of this section"* (again emphases added).

This may explain the persisting reference in the 1992 consolidating statute to "*the dismissal".* In any event the 1995 extension of the requirement to consult to appointed representatives as well as to a trade union, and the removal of any possible requirement to consult the union in respect of a single dismissal as opposed to collective redundancies has resulted in the wording which I have to apply.

12. Accordingly the time limit for an individual claimant bringing a case under section 189 (1) (a) or (d) of the 1992 Act (as amended) is now the same as it would be for a collective representative. That is that time only begins to run from the date of the last of the dismissals to which the complaint under section 188 (or section 188A) relates.
13. That is, where there is a proposal to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less such as to trigger the right to collective consultations with appropriate representatives, a claim arising from the failure to consult runs from the date of the last of those dismissals.
14. Following Independent Insurance Company Ltd v Aspinall and another [2011] ICR 1234 EAT the award "*in respect of one or more descriptions of employees*" must – once again exposing the infelicity of the statutory language in these circumstances – be construed as referring only to the individual employee who has brought the complaint. However that does not mean that the phrase "*the last of the dismissals to which the complaint relates"* is to be construed as meaning only the date of his own actual dismissal.
15. The phrase "*the dismissals to which the complaint relates"* also appears in section 189 (4) (a). The protected period of the award begins to run from the date of the first of such dismissals. It is the usual practice that the date of the first dismissal in the sequence is used, even where an individual claimant brings a complaint and where his own dismissal was after that date. That was the form of the judgments I gave in the relevant case in the Abdalla multiple. I did not allocate separate protected periods only commencing on the actual date of an individual's termination. It would be wholly inconsistent to apply a different interpretation to this phrase in the matter now before me.
16. Frequently an individual claimant may not know the date of the last of the collective dismissals of which his comprises part, so that he would be well advised to commence proceedings assuming that time runs from his effective date of termination. This is, however, no different from the position of collective representatives who have not been properly consulted. They may not, because they have not been informed, know when the last dismissal takes effect. Even trade union may not have the means of ascertaining this fact if the last dismissal if of an employee in a category of worker whom they represent under a collective agreement but who is not a member of the union.
17 However where that later date is identified any claimant, representative or individual, may take advantage of it. In this case, in fact, the Claimant expressly seeks to combine his claim with those in the Abdalla multiple and the ET1 in each refers not only to the initial round of mass redundancies on 18th September 2019 but also to the smaller number of further dismissals over the following months of those who were kept on by the administrators to help with the closing down of the business. The final dismissal was on 29th November 2019 so that the claim presented on 3rd February 2020 is in time.
18. I accordingly make the same protective award for the same protective period as I did in the Abdalla multiple, in respect of the same failure to appoint representatives or to consult.
19. I would not have allowed the alternative application to amend the Abdalla multiple claim to add Mr Drake as a claimant. In the multiple all the claims were by individuals

and, following Aspinall none of their awards could be amended to allow them also to bring a claim on behalf of Mr Drake. Harford and ors. V Secretary of State for Trade and Industry EAT 0313/07 is not applicable, because that was a representative claim where the description of the category of employees might properly be amended to include others who were also covered by the authority of the union to represent them.

20. I would, however, have accepted if necessary the factual argument that it was not reasonably practicable for the Claimant to have known of this potential claim until a chance encounter with a former colleague just before Christmas. It is in the nature of mass redundancies effected without prior warning that there is a sudden dispersal of the workforce. Also it is the usual practice that the and administrators do not inform ex-employees of the right to claim a protective award in the same way that they do in respect to other claims that might proceed against the Redundancy Payments Fund. I would have found therefore that there was nothing to put the Claimant on notice of this further potential claim. Once he was made aware he and his solicitor acted reasonably promptly in approaching ACAS, and the claim was presented within what I consider to have been a reasonable time thereafter, even though he waited the full month after the issue of the ACAS corticate.
21. This claim remains joined with Abdalla and others for the purposes of any further .

EMPLOYMENT JU DGE LANCASTER

DATE 2nd June 2020