EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4100925/19 & 4100926/19 (P)

Held on 27 July 2020

Mr R Downie	**1st Claimant** **In Person**
Mr M Davidson	**2nd Claimant** **In Person**
Urquhart & Co (PHE) Ltd (In Liquidation)	**Respondent** **No Appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

(1) the respondent, Urquhart & Co (PHE) Ltd, acted in breach of its obligations in terms of s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and

(2) the respondent shall pay a protective award of 90 days' remuneration to each claimant, in terms of s.192 of the 1992 Act.

REASONS

1. Ruairidh Downie and Martin Davidson each claimed that they were entitled to a protective award in terms of s.189 of the Trade Union & Labour Relations

(Consolidation) Act 1992 ("the 1992 Act"). No response was received from the respondent. The Company is in liquidation.

2. I am satisfied that both claimant were dismissed summarily without any consultation or warning on 25 September 2018. The respondent Company went into liquidation shortly thereafter.

3. I am satisfied over 20 employees, 27 in fact, were dismissed at the same time. Dismissals were by reason of redundancy in terms of s.139 of the Employment Rights Act 1996.

4. I understand that the claimants applied to the Insolvency Service and that they have received their redundancy payments and other financial payments due to them.

5. The claimants now seek "protective awards". Accordingly, I first considered whether, in terms of s.188(7) of the 1992 Act, there were "special circumstances" which rendered it not reasonably practicable for the respondent to comply. As was said in ***Clarks of Hove Ltd v. Bakers Union*** [1978] ICR 1076, a "special circumstance" requires there to be something "exceptional", "out of the ordinary", or "uncommon". Most redundancies are the consequence of adverse financial circumstances leading to insolvency. That was the case here. Insolvency itself is not "exceptional" or "out of the ordinary". There were no "special circumstances", in my view.

6. I am satisfied, therefore, that the respondent Company failed to comply with the requirements of s.188 of the 1992 Act in that it failed to consult and I shall make a declaration to that effect in terms of s.189(2).

7. S.189(2) also provides that in addition to making such a declaration, a Tribunal "make also make a protective award". As I understand it, that issue and the basis upon which any such award is calculated, is entirely a question for the Tribunal. In reaching my decision, I was assisted by the guidance of the Court of Appeal in ***Susie Radin Ltd v. GMB & Others*** [2004] IRLR 400:

a Tribunal in exercising its discretion to make a protective award and for what period, should have regard: (1) that the purpose of the award is a sanction for breach by the employers of their obligations to consult; (2) to exercise of the Tribunal's discretion, to do what is just and equitable while focusing on the seriousness of the employer's default, which may vary from the technical to a complete failure, as here, to provide any of the required information and to consult; and (3) to adopt what Lord Justice Gibson described as the "proper approach" in a case where there has been no consultation, by starting with the maximum period and reducing it only if there are mitigating circumstances justifying a reduction.

8. In the present cases, Messrs. Downie and Davidson were not afforded any opportunity of proposing alternative measures which might have avoided or reduced the need for their redundancies, or which might have enabled alternative work to be found. In my view, there are no mitigating circumstances which justify a reduction in the maximum period. I decided, therefore, in all the circumstances, that it would be just and equitable to make a protective award to each claimant, for a period of 90 days, starting on 25 September 2018.

Employment Judge **Nick Hosie**

Date of Judgement **30 July 2020**

Date sent to parties **3 August 2020**