



EMPLOYMENT TRIBUNALS

Claimant: Unite the union on behalf of others, Mr D Osman, Ms M E Felices Romo, Ms Pamela Saunders, Ms Angela Marke, Miss Etta Ngobeh and Miss Kajol Kochar

Respondent: Advising Communities (in creditors' voluntary liquidation)

Heard at: London South via CVP **On: 10 August 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Tomison, Counsel for Unite and others

For the respondent: no appearance

JUDGMENT WITH REASONS

- (1) The complaint of Unite the Union for a declaration that the respondent failed to comply with S.188 TULRA 1992 is well founded.
- (2) The respondent is also ordered to pay, pursuant to S. 189 (4) TULRA 1992 remuneration for the period of 90 days from 1 May 2019 to all employees who were made redundant on that date. For the avoidance of doubt, the Tribunal finds all employees were made redundant on this date.
- (3) As a result of the primary (collective) claim brought by Unite the Union succeeding, all individual claims seeking a protective award are dismissed (which also includes those named claimants 2 to 11 in claim number 2303578-19).

Reasons

Appearances claims and documents

1. This is a claim brought by Unite the union & others under s. 189 Trade Union & Labour Relations Act 1992.
2. There had been 2 previous case management hearings in February and April this year.

3. Mr. Tomison, Counsel, appeared for the Union and the named claimants in that claim.
4. The Tribunal noted that there were 6 other claimants who had been added to the Unite claim Mr. Osman, Ms. Romo, Ms. Saunders, Ms. Marke, Ms Ngobeh and Ms. Kochar.
5. The Tribunal heard from Mr Vaughan (named in the Unite claim) and from Ms. Marke and had their witness statements.
6. The Tribunal had an electronic bundle consisting of 301 pages and submissions from Mr. Tomison.

Relevant findings of fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by the witnesses during the hearing, including the documents referred to and taking into account the Tribunal's assessment of the witness evidence.
8. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.
9. The named claimants and indeed others were employed by the respondent. There were varying dates of employment.
10. The respondent is an advice centre providing legal advice on debt, immigration and employment matters.
11. From 1 October 2018, it became apparent that there were issues in relation to the continuation of funding and that this may cease with effect from 31 March 2019. This was confirmed by Ms Marke and Mr Vaughan.
12. There was no subsequent formal or informal consultation about what effect this might have on the organisation.
13. By a text message sent on 30 April 2019, the respondent called staff to an emergency meeting on the following day (1 May).
14. A meeting took place on 1 May 2019 when the Tribunal finds all employees were made redundant. A subsequent, ambiguous letter from the liquidators indicated that the redundancy date was 17 May 2019 but absent any evidence or explanation about that date, the Tribunal finds the redundancy took effect from 1 May 2019. This impacted all 25 employees.
15. The respondent had a recognition agreement covering all employees. This was at page 30-35 of the bundle. Appendix 1 confirmed coverage of all employees.

That was the bargaining unit. Paragraphs 3 and 3.1 expressly refer to collective consultation and redundancy.

16. There were two sites from which employees worked one at West Moreland Road which was the client facing site, the other referred to as the Foundry at 17 Oval Way where back office functions were undertaken. Staff worked interchangeably between the 2 locations. Managers operated from both sites too.

Applicable Law

17. S 188 & 189 Trade Union & Labour Relations Act 1992 ('TULRA') provides the governance around collective consultation.

18. S. 188 (1) to (4) provides:

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 may be affected by measures taken in connection with those 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.

(1B) For the purposes of this section the appropriate representatives of any affected employees are:

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union,

or

(b) in any other case, whichever of the following employee representatives the employer chooses:—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)

(2) The consultation shall include consultation about ways of

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives:

(a) the reasons for his proposals

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed

(g) the number of agency workers working temporarily for and under the supervision and direction of the employer

(h) the parts of the employer's undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.

19. 189 (1) provides:

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:

- (a) *in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;*
- (b) *in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related*
- (c) *in the case of failure relating to representatives of a trade union, by the trade union, and*
- (d) *in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.*

20. S.189 (4) provides:

The protected period:

- (a) *begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and*
- (b) *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;*

but shall not exceed 90 days

21. The Tribunal was referred to ***Susie Radin v GMB and others 2004 EWCA Civ 180*** which provides guidance regarding the approach to assess the amount of any protective award to be made. A Tribunal should start with the maximum protected period of 90 days pay because an award is punitive for the breach of an employer's duty not compensatory. The Tribunal was also referred to the ***Rockfon A/S v Specialarbejderforbunde 1 Danmark Acting for Nielsen and others ECJ 1996 IRLR 168*** and ***Athinaiki v Chartopoiia AE v Panagiotidis 2007 IRLR 284 and USDAW v Ethel Austin 2015 ICR 675 ECJ*** cases on the meaning of establishment and the approach a Tribunal should take to its interpretation.

22. These cases provide the following guidance on the question of an establishment:

- a) An establishment may be part of a whole undertaking and where an undertaking comprises several entities meeting the criteria for an establishment, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the establishment.
- b) An establishment may consist of a distinct entity having a certain degree of permanence and stability which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organizational structure allowing for the accomplishments of those tasks.

Conclusions and analysis

23. Having regard to the Tribunal's finding on the Recognition Agreement and having regard to S. 189 (c) TULRA, the correct claimant in these proceedings is the union. Counsel for Unite and indeed other named claimants invited the ET to dismiss the claims of the named individual claimants as he says a protective award would benefit the group of employees the union represents – which is all of the employees. It appears that individuals were named in the claim forms on a protective basis.
24. The Tribunal concludes that the establishment was the advice Centre operating across 2 locations. There was no separate or sufficient distinct function between the two having regard to the purposive approach required to the question of establishment. The sites were inextricably linked both serving to fulfil the function of the organisation's advice providing purpose. There was no evidence of any separation of powers of a degree which would make one an autonomous entity.
25. There was no consultation at all. This was against the backdrop of known concerns about funding and in fact a predicted end date for the cessation of substantial funding in October 2018 from the end of March 2019.
26. The respondent has not entered a response, neither has it appeared today. There are no special circumstances advanced pursuant to S. 189 (6) TULRA. The Tribunal notes that insolvency is not in itself a reason not to make an award. (***Smith & another v Cherry Lewis Ltd (in receivership) 2005 IRLR 86 EAT.***)
27. Having regard to the principles set out in ***Susie Radin***, a protective award is punitive not compensatory in nature. The respondent's default is not minor, there was no consultation at all, no commencement of S.188 consultation, no HR1 form or anything else resembling a process. As such, it was a complete failure to engage with representatives of the workforce and a situation known for some time. The Tribunal does not know the reasons for non-compliance but absent any evidence to the contrary, the Tribunal concludes the failure was deliberate.
28. As a result of non-compliance with S.188 TULRA, the Tribunal awards 90 days' pay for the period from 1 May 2019 (S.189 (4) TULRA) This is in respect of all employees who were dismissed as redundant on that day pursuant to S.189 (3) TULRA.
29. As a result of the conclusion on the Protective award and the group of employees to whom that applies, the individual claims in relation to a protective award claim do stand dismissed.
30. In the case of Mr Osman only, a separate notice of hearing will follow for his Unfair Dismissal, Redundancy Pay, Wages and Holiday pay claims.

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Employment Judge Khalil

21 October 2020