



EMPLOYMENT TRIBUNALS

Claimants: Mr C Dickinson & Others (see attached schedule)

Respondent: Bonds Precision Castings Ltd (in administration)

HELD AT: Manchester **ON:** 4 December 2020

BEFORE: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimants: Mr C Rutter (one of the claimants)

Respondent: Not represented, no response having been submitted

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

The Tribunal having heard the evidence of each of the claimants in a hearing conducted remotely by CVP technology, the Judgment of the Tribunal is that:

1. The claims for a protective award were not made within the initial time period required by section 189(5)(b) of the Trade Union & Labour Relations (Consolidation) Act 1992, but the Tribunal is satisfied that it was not reasonably practicable for the complaints to be presented within that period and all the claims were presented within such further period as it considers reasonable.
2. The respondent failed to consult with the claimants as persons who may be affected by proposals to dismiss, or measures taken in connection with the dismissal of twenty or more employees, in breach of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.
3. Under Section 189(1)(d), (2), (3) and (4) of the Trade Union and Labour Relations (Consolidation) Act 1992, the Tribunal makes a protective award in respect of each of the claimants named in the schedule, and the respondent is ordered to pay remuneration to each claimant for a protected period of 90 days beginning on 27 December 2019.

4. The claim of Mr C Rutter for breach of contract in respect of notice was not presented within the period of three months beginning with the date of termination as required by Article 7 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 and it was reasonably practicable for him to have done so. Accordingly, the Tribunal does not have jurisdiction to consider the claim.
5. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to these awards.

REASONS

1. All of the claimants claimed a protective award in respect of breach of the collective consultation requirements. No response was presented to the claims by the respondent, which is in administration.
2. The consent of the administrator had been provided for the stay to be lifted and the claims to proceed.
3. The hearing was conducted by CVP remote video technology. It was attended by all of the claimants. They were all represented by Mr Rutter. They each gave evidence under oath. Mr Rutter also made submissions on behalf of all of the claimants.
4. The Tribunal makes the following findings:
 - a. The respondent carried on business in Alston, Cumbria. There was no trade union recognised for collective bargaining, consultation or negotiation with the workforce;
 - b. The employees were first notified that there was any issue on 20 December 2019 when a meeting was held, but this was not formally arranged and very limited information was provided. All of the claimants left work for the Christmas shut down under the impression that they would be returning to work in the new year;
 - c. A letter was sent to all of the claimants (except for Mr Thomson) dated 27 December 2019 telling them that they were dismissed with immediate effect. That letter: was received that day by Mr Rutter, Mrs Walton and Miss Thomson; and was received and read the following day (28 December) by Mr Dickinson, Mrs Green and Mr Corey;
 - d. Mr Thomson was retained in employment longer than the other claimants. He was dismissed on 31 January 2020 with immediate effect, after being called to a meeting. His evidence was that no consultation took place with him during that period;
 - e. There were 64 employees at the site, all of whom were made redundant except for approximately five or six who remained in employment. A very small number of people, including Mr Thomson, were made redundant at the end of January 2020 or shortly after, but the vast majority of employees (including six of the claimants) were dismissed by letter of 27 December 2019;
 - f. None of the claimants knew anything about the ability to claim a protective award as a result of a failure to inform and consult, until the possibility was first identified by Mr

Case No:2403932/2020 & others
(see attached schedule)
Code V

Dickinson in late April 2020 when he was told about it. None of them took advice (or researched the possibility), prior to that date;

- g. After the possibility was identified, the claimants spoke to each other and also approached ACAS and (in Mr Dickinson's case) the trade union (which Mr Dickinson had joined when he commenced his new employment since his dismissal by the respondent);
- h. Each claimant contacted ACAS and then entered a claim very shortly thereafter (Mr Dickinson on 29 April, Mr Wood on 30 April, Mrs Walton on 4 May, Mrs Green on 4 May, Miss Thomson on 4 May, and Mr Rutter on 5 May;
- i. Mr Thomson lived some distance from the other claimants, and only discovered the possibility of bringing such a claim on, or around, 6 June. After ACAS early conciliation between the 6-8 June, he entered a claim on 16 June (with assistance from his wife as he is not someone who regularly uses computers); and
- j. Mr Rutter's evidence was that he also did not know about bringing a claim for notice, having never previously been made redundant, and he only identified the possibility of such a claim in late April or early May 2020. Mr Rutter was the Production Manager.

5. All the protective award claims were entered outside the primary time limit required. All of the claimants argued that it was not reasonably practicable for them to enter their claims within the time required, as they did not know about the possibility of claiming a protective award for failure to consult and only became aware of the possibility at the end of April (or in early May or, for Mr Thomson, early June). When they became aware of the possibility each claimant argues they entered their claim rapidly – that is within a reasonable further period.

6. In applying the provisions of section 189(5) of the Trade Union & Labour Relations (Consolidation) Act 1992, the Tribunal has considered the Judgment of Underhill LJ in the Court of Appeal in *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490 and in particular the essential points he summarises at paragraph 12 of that Judgment. The first such point is that the test is to be given a liberal interpretation in favour of the employee, and the second is that the test is not just about physical impracticability, but also about what was reasonably feasible. The Tribunal finds that each of the claimants' ignorance of the existence of a claim for a protective award for failure to inform and consult, was reasonable, as it is a technical claim which is not commonly known (and in the circumstances of each claimant they did not access advice or any resource which would or should have made them aware of it). Once each claimant became aware, they entered a claim relatively quickly (and in some cases very quickly), without undue delay – that is in a further period which the Tribunal finds to be reasonable.

7. There was no proper warning or notice given to or consultation with the workforce. No employee representatives had been elected or appointed for any such consultation within Section 188A of the 1992 Act. The dismissals were put into effect without any consultation or advance notice.

8. In these circumstances, the respondent was in breach of the duty under Section 188 of the 1992 Act and the Tribunal makes an award under Section 189 in favour of the claimants for the maximum protected period of 90 days commencing on 27 December 2019.

9. The respondent is advised of the provisions of Regulation 5 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, such that, within 10 days of the decision in these proceedings being promulgated or as soon as is reasonably practicable,

Case No:2403932/2020 & others
(see attached schedule)
Code V

the respondent must comply with the provisions of Regulation 6 of the 1996 Regulations and, in particular, must supply to the Secretary of State the following information in writing:

- a. the name, address and national insurance number of every employee to whom the award relates; and
- b. the date of termination of the employment of each such employee.

10. The respondent will not be required to make any payment under the protective awards made until it has received a recoupment notice from the Secretary of State or notification that the Secretary of State does not intend to serve a recoupment notice having regard to the provisions of Regulation 7(2). The Secretary of State must normally serve such recoupment notice or notification on the employer within 21 days of receipt of the required information from the first respondent.

11. Six of the seven claimants confirmed that the only claim which they were pursuing was for a protective award. Mr Rutter also pursued a claim for breach of contract in respect of notice.

12. Article 7 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 requires that a claim for breach of contract at the Employment Tribunal must be presented within the period of three months beginning with the date of termination. The claim was not entered within this period. The last date for such a claim to be made would have been 26 March 2020 and the claim was entered on 5 May 2020. The claim was therefore entered outside the primary time limit.

13. As with the protective award claims, the Tribunal can nonetheless have jurisdiction to determine such a claim if it was not reasonably practicable for such a claim to be entered in time. However, in this case and for these claims, the Tribunal considers the reasonableness of not being aware about the potential ability to bring a claim to recover unpaid notice pay, was very different than it was for the less well-known, more technical and relatively obscure claim for a protective award as a result of a failure to inform and consult. Information about a claim for notice is relatively readily available and the possibility of such a claim would have been clearer. The Tribunal finds that it was reasonably practicable for Mr Rutter (a senior manager) to have entered such a claim in time. Accordingly, the Tribunal does not have jurisdiction to consider his claim for breach of contract.

NOTE

14. These claims all arise from the Administration of the respondent, and the necessary consents to the claims proceeding have been given. No response to the claims has been received, and the claims therefore succeed.

15. A protective award is a two-stage process. The Tribunal at this stage makes no financial awards, but gives a judgment that each of the listed claimants is entitled to a protective award in the terms set out above. The claimants must then seek payment of their individual awards from the respondent (or the Secretary of State), quantifying the same.

16. Failure to pay (should that occur), or any dispute as to the amount payable, then becomes a matter for a further separate claim under s.192 of the Trade Union and Labour Relations (Consolidation) Act 1992 for payment of the award.

Case No:2403932/2020 & others
(see attached schedule)
Code V

Employment Judge Phil Allen
4 December 2020

JUDGMENT SENT TO THE PARTIES ON
29 December 2020
AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

SCHEDULE TO THE JUDGMENT

The claimants to which this Judgment applies (and their case numbers):

1. Mr Carl Dickinson - 2403932/2020
2. Mr Craig Rutter - 2405386/2020
3. Mr Corey Wood – 2403973/2020
4. Mrs Christine Walton – 2405240/2020
5. Mrs Kelly Green – 2405230/2020
6. Miss Lauren Thomson – 2405238/2020
7. Mr Paul Thomson – 2408541/2020

Claimants: Mr C Dickinson & Others

Respondent: Bonds Precision Castings Ltd (In Administration)

**ANNEX TO THE JUDGMENT
(PROTECTIVE AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The respondent is under a duty to give the Secretary of State the following information in writing: (a) the name, address and National Insurance number of every employee to whom the protective award relates; and (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the Tribunal announced its judgment at the hearing. If the Tribunal did not announce its judgment at the hearing, the information shall be given within the period of 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the respondent to do so within those times, then the information shall be given as soon as reasonably practicable thereafter.

No part of the remuneration due to an employee under the protective award is payable until either (a) the Secretary of State has served a notice (called a Recoupment Notice) on the respondent to pay the whole or part thereof to the Secretary of State or (b) the Secretary of State has notified the respondent in writing that no such notice is to be served.

This is without prejudice to the right of an employee to present a complaint to an Employment Tribunal of the employer's failure to pay remuneration under a protective award.

If the Secretary of State has served a Recoupment Notice on the respondent, the sum claimed in the Recoupment Notice in relation to each employee will be whichever is the less of:

- (a) the amount (less any tax or social security contributions which fall to be deducted therefrom by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Secretary of State receives from the employer the information referred to above; OR
- (b) (i) the amount paid by way of or paid as on account of jobseeker's allowance, income-related employment and support allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date described in (a) above; or

- (ii) in the case of an employee entitled to an award of universal credit for any period (“the UC period”) which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of universal credit for the UC period that would not have been paid if the person’s earned income for that period was the same as immediately before the period to which the prescribed element is attributable.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award is then payable to the employee, subject to the deduction of any tax or social security contributions.

A Recoupment Notice must be served within the period of 21 days after the Secretary of State has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State or as soon as practicable thereafter.

After paying the balance of the remuneration (less tax and social security contributions) to the employee, the respondent will not be further liable to the employee. However, the sum claimed in a Recoupment Notice is due from the respondent as a debt to the Secretary of State, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State as to the amount specified in the Recoupment Notice.