Case No.s 2406033/2020, 2405593/2020, 2406034/2020, 2406073/2020, 2406180/2020, 2406298/2020 & 2409484/2020: Code V

EMPLOYMENT TRIBUNALS

Claimants: Mr E Burke
Mr J Litten
Mr C Haworth
Mr W Arrowsmith
Mr M Smith
Mr J Wrigley
Mr D McCord

Respondents:
1. Construction Partnership UK Ltd (in administration)
2. Secretary of State for Business, Energy and Industrial Strategy

Heard at: Manchester **On:** 21 January 2021

Before: Employment Judge Slater (sitting alone)

Representation
Claimants: In person
Respondents: Not present

JUDGMENT

1. The Tribunal does not have jurisdiction to consider the complaint brought under section 189 Trade Union and Labour Relations (Consolidation) Act 1992 by Mr McCord because this was presented out of time.

2. The complaint brought by the other claimants under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 of a failure by the respondent to comply with the requirements of section 188 of the 1992 Act is well-founded.

3. The Tribunal orders the first respondent by way of protective award under section 189(3) of the 1992 Act to pay to Mr Burke, Mr Litten, Mr Haworth, Mr Arrowsmith, Mr Smith, and Mr Wrigley a payment equivalent to remuneration for the period of 90 days beginning on 30 April 2020.

4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award and the first respondent is advised of its obligations under regulation 5 of those Regulations, which are set out in the Annex to this judgment.

REASONS

Introduction

1. The "Code V" in the heading indicates that this was a remote hearing by video conference (Cloud Video Platform) in which the claimants participated.

2. The first respondent had not presented a response. The second respondent had provided written representations, taking a neutral stance, neither supporting nor resisting the claims but providing a reminder to the Tribunal about the matters about which the Tribunal needed to be satisfied to make a protective award.

Claims and issues

3. The claimants brought complaints under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act) for failing to comply with consultation requirements set out in section 188 of that Act in relation to large-scale redundancies (a claim for protective awards).

4. I had to consider whether the claimants had standing to bring the complaint having regard to section189(1) of the 1992 Act.

5. I had to consider whether the duty to consult in section 188 of the 1992 Act was triggered by considering whether the employer had proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

6. If the duty to consult was triggered, I needed to consider whether the first respondent had complied with its obligations under section 188. If it had not, I need to consider how long the protected period should be.

7. In relation to Mr McCord only, there was a time limit issue. If his complaint was presented out of time, as it appeared to me to be the case, I had to consider whether it was not reasonably practicable for his complaint to be presented within the time period and, if it was not, whether it was presented within such further period as I considered reasonable.

Facts

8. The claimants were all employed by the first respondent.

9. The first respondent went into administration on 24 April 2020.

10. The claimants were all dismissed with immediate effect on 30 April 2020. Around 90 employees were made redundant at the same time. All of them were employed at Chadwick House in Skelmersdale.

11. There was no recognised trade union in respect of any of the affected employees. There were no existing employee representatives.

12. The first respondent took no steps to arrange for the election of employee representatives with whom to consult about the redundancies. There was no consultation with any employee representatives.

13. By letter dated 18 May 2020, the administrators gave consent for protective award claims to be pursued with the employment tribunal.

14. All the claimants except Mr McCord presented the claims in time. Mr McCord's ACAS certificate shows the date of notification under the early conciliation process as being 30 July 2020. The date of issue of the certificate was 31 July 2020. Mr McCord presented his claim to the Tribunal on 31 July 2020.

15. Mr McCord told me he was not fully aware of the protective award scheme. He was unfamiliar with the process. After being made redundant, he was worrying about the bills and his immediate concern was to put food and water on the table. Issues about losing his job and the pandemic took their toll on him. He got assistance from another claimant, Mr Burke, some time before the end of the time limit, about what to do to contact ACAS and present his claim. Mr McCord said that he could not explain why he did not present his claim 2 months earlier.

Law

16. The parts of section 188 of the 1992 Act which are relevant for this decision are as follows:

188 **Duty of employer to consult . . . representatives**

(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 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).

17. Section 189 of the 1992 Act deals with making a complaint about failure to comply with a requirement of section 188 or section 188A. The relevant parts of that section for this decision are as follows:

189 Complaint . . . and protective award

(1) 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.

……..

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) A protective award is an award in respect of one or more descriptions of employees—

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

(4) 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 . . ..

(5) 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 the 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.

(5A) Where the complaint concerns a failure to comply with a requirement of section 188 or 188A, section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(b).

18. Section 292A has the effect that, if the claimant notifies ACAS of a potential claim within the time limit set out in section 189(5), the time spent in early conciliation does not count for the purposes of working out when the time limit expired and gives a minimum of one month after issue of the ACAS certificate to present the claim. If, however, the claimant does not notify ACAS within the time limit in section 189(5), section 292A does not extend the time limit.

19. Case law confirms that, when a claim is to be presented within a period

'beginning' with a particular date, as in section 189(5), that date must be included in the calculation of the time allowed — **Hammond v Haigh Castle and Co Ltd 1973 ICR 148, NIRC**. So, for example, a period of three months beginning with 10 March ends on 9 June and not on 10 June.

20. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. The claimant must explain precisely why they did not present the claim in time. The Tribunal must consider whether, taking into account all relevant facts, it was reasonably practicable for the claimant to present the claim in time. Ignorance of rights will not prevent it being reasonably practicable for a claimant to present their claim in time if they ought to have known of them, for example if they had the facilities and opportunity to find out the relevant information with a quick internet search.

Conclusions

Time limit issue – Mr McCord

21. The date on which the last of the dismissals took effect was 30 April 2020, all employees being dismissed with effect from that date. In accordance with s.189(5) the primary time limit expired on 29 July 2020, being the last day of the period of 3 months beginning with the date on which the last of the dismissals took effect.

22. Mr McCord notified ACAS of a potential claim on 30 July 2020. This was outside the primary time limit so no extension of time due to the effects of early conciliation applies. The claim was presented on 31 July 2020, which was 2 days out of time.

23. In accordance with s.189(5) of the 1992 Act, time can only be extended for presenting the claim where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the primary time limit, in which case it must be presented within such further period as the Tribunal considers reasonable.

24. Mr McCord is required to explain precisely why he did not present his claim in time and I must consider whether, in the circumstances, it was reasonably practicable for him to present the claim in time. Whilst I sympathise with the difficult situation Mr McCord was in, the circumstances he described of losing his job, financial worries and worries about the pandemic were not unusual for the times we are in. Although he was not familiar with the process for making a claim for a protective award, I consider he could, relatively easily, have found out what to do; information is readily available online. Mr Burke also provided help which would have enabled Mr McCord to present his claim in time. Mr McCord said, in his evidence, that he could not offer an explanation as to why he did not present his claim 2 months earlier. I conclude that it was reasonably practicable for Mr McCord to present his claim in time in the circumstances Mr McCord explained to me. Although Mr McCord was only two days outside the time limit in presenting his claim, this does not affect whether it was reasonably practicable for him to present

the claim in time, which is the test I have to apply. Since I have concluded that it was reasonably practicable to present the claim in time, the Tribunal does not have jurisdiction to consider Mr McCord's complaint.

25. In relation to the other claimants, I conclude that they have standing to bring these complaints. There were no trade union representatives or employee representatives. The employer failed to make arrangements for the election of employee representatives. As affected employees, the claimants are, therefore, entitled to bring their complaints in accordance with s.189(1)(a) of the 1992 Act.

26. The first respondent proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. They dismissed around 90 employees based at Chadwick house on 30 April 2020. The duty to consult in accordance with section 188 was, therefore, triggered.

27. There was a complete failure on the part of the first respondent to comply with the requirements in section 188 of the 1992 Act. Given this complete failure, I consider it just and equitable in all the circumstances, having regard to the seriousness of the default, for the protected period to be 90 days. The protected period begins on 30 April 2020 being the date on which the first of the dismissals (in fact, all the dismissals) took effect. I, therefore, order the first respondent to pay remuneration for this protected period to the claimants other than Mr McCord.

Employment Judge Slater

Date: 22 January 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 February 2021

FOR THE TRIBUNAL OFFICE

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Claimants: **Mr E Burke & Others**

Respondents: **Construction Partnership UK Ltd (in administration) & Other**

**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 the refrom 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.