EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111571/2019 (A)

Held via telephone conference call on 3 June 2020

Employment Judge R Gall

Mr R Armour	**Claimant** **In Person**
Border Cars Group Ltd (In Administration) **C/O BDO LLP**	**Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: –

1. It is found and declared that the respondents failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and

2. The Tribunal makes a Protective Award in terms of Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the claimant. The claimant was made redundant on 16 July 2019. The respondents are ordered to pay remuneration to the claimant for the protected period of 90 days, that being the period from 16 July 2019 until 14 October 2019.

REASONS

1. This case called for hearing on 3 June 2020. The claimant been set down to proceed by way of an in-person hearing. That however was not practicable

due to the coronavirus pandemic. With consent of the claimant, and following upon a case management PH held earlier in the case, the hearing was set up to take place by CVP, video conferencing facility. The claimant participated in that CVP hearing and gave his evidence.

2. As the respondents are in administration, consent of the administrator to bring proceedings was required before the cases could be heard. The claimant had obtained that consent. The administrator was therefore aware of the claims being made. No form ET3 had been lodged.

3. There was no "testing" of the evidence of the claimant's evidence as there was no challenge to his evidence, given that there was no appearance and no representation for the respondents in circumstances where no form ET3 had been lodged. I found him to be entirely credible and reliable. I was in no doubt as to his honesty.

4. There was no union recognised in the workplace. No employee representatives were elected. There were more than 20 employees at the premises operated by the respondents. The claimant worked in Ayr. The respondents were however run from their head office with all decisions of a management nature being taken there. As there were more than 20 employees the work base, it was not necessary to determine whether it was a separate establishment for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

5. The claimant had been working for the respondents. He had worked with them for approximately 4 years in July of 2019.

6. In early July 2019 the respondents were rumoured to be in financial difficulty. The claimant was, with other employees in Ayr, informed on 2 July that some employees were being made redundant. He and a colleague were informed that they were being kept on. There was no discussion with the claimant as to redundancy as far as he was concerned.

7. On 16 July 2019, the claimant found out that his employment with the respondents had ended. He had worked that day and left the respondents'

premises thinking that he would be back at work the following day. Early that evening, however, he received a communication from the respondents. This communication was by email sent after the end of working hours. The email stated that the claimant was redundant as of 6pm that evening. This came as a shock to him. He had not been spoken to by his employer by way of consultation.

8. The 1992 Act contains obligations on employers where redundancies are contemplated. Those obligations, broadly put, are to consult regarding whether job losses are to take place, if so how many job losses are to be involved and whether anything can be done to mitigate the impact of redundancies. This is in terms of Section 188 of the 1992 Act. The obligation is to consult a recognised trade union or alternatively for there to be appointment of employee representatives if consultation is to take place. As stated above, there was no recognised trade union in the workplace. No election or appointment of employee representatives took place. There was no individual consultation. The terms of Section 188 were therefore not adhered to.

9. All employees were made redundant over the period from 10 July 2019 to 23 July 2019. There was redundancy of more than 20 but less than 100 employees. In that circumstance, the obligation is for consultation to take place at least 30 days prior to the first dismissal taking place. That did not occur.

10. Although the obligation to consult involves consultation at least 30 days prior to the first dismissal, if that is not adhered to the protective award which is to be made in terms of Section 189 of the 1992 Act proceeds on the basis that the starting point is that an award in respect of 90 days is to be made. That is confirmed in the case of *Newage Transmission Ltd v TGWU & others* EAT 0131/05.

11. Payment in respect of that 90 day period is appropriate. The case of *Susie Radin Ltd v GMB & others* 2004 IRLR 400 makes it plain that an Employment Tribunal should start on the basis of a 90 day award. That period can be

reduced depending upon the extent of the default and also depending upon whether any special circumstances exist justifying departure from the 90 day period. That is in terms of Section 188 (7) of the 1992 Act.

12. The case of *Clarks of Hove Ltd v Bakers' Union* 1978 ICR 1076 confirms that a "standard" insolvency does not constitute special circumstances. There was in that case no disaster of a sudden nature or any emergency. It was not said here that there had been a sudden disaster or emergency.

13. There was no consultation whatsoever. On the basis of the evidence I heard, no special circumstances existed justifying departure from the provisions of the 1992 Act and the obligation of consultation imposed. The protective award is therefore made in respect of the 90 day period running from 16 July 2019 to 14 October 2019.

Employment Judge: R Gall
Date of Judgment: 3 June 2020
Entered in register: 5 June 2020
And copied to parties