EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113861/2019 Hearing held via Cloud Video Platform (CVP) on 14 September 2020

Employment Judge M A Macleod

Mr A Tasker	**Claimant** **Represented by:** **Mrs A Tasker - Mother**
Duncan Adams Limited	**Respondent** **Not present and** **Not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The Employment Tribunal has jurisdiction to hear the claimant's claim, notwithstanding that it was presented out of time; and
2. The claimant's claim for a protective award succeeds, and the respondent is therefore ordered to pay to the claimant a sum equivalent to 90 days' pay.

REASONS

1. A Preliminary Hearing was listed to take place in this case on 14 September 2020 by Cloud Video Platform (CVP), in light of the ongoing restrictions imposed due to the coronavirus pandemic.

2. The purpose of the Preliminary Hearing was to determine the following issues: firstly, whether the Tribunal has jurisdiction to hear the claim, in light of the fact that it was presented outwith the statutory time limit for such claims; and secondly, whether the claimant is entitled to the protective award which he seeks.

3. The claimant attended and was represented by Mrs A Tasker, his mother. The respondent did not attend, nor were they represented, having failed to submit an ET3 to the claim.

4. The claimant gave evidence to the Tribunal in the hearing.

5. The Tribunal was able to make the following findings in fact.

6. The claimant, whose date of birth is 25 February 1993, commenced employment with the respondent, a haulage contractor, as a traffic planner on 31 October 2016. His duties were to plan where the respondent's vehicles were to be dispatched, to liaise with drivers and to understand the contracts which the respondent had entered into with customers.

7. The claimant worked in the respondent's office, based at Grange Dock, Grangemouth, with approximately 15 to 20 other office staff.

8. On or around 3 March 2019, the claimant and his colleagues were invited by Eric Adams, director of the respondent, to come to the office boardroom. Having done so, they were advised by Mr Adams that the individuals who had been in the office for the previous two to three weeks, whom the staff had understood to be auditors, were in fact administrators. He explained that the company was facing financial difficulties, and that as at 2.30pm that day, the company would be going into administration. It was no longer to be in his hands. Mr Adams explained that the company was no longer able to pay the outstanding debts due to creditors, and that it was required to cease trading.

9. The claimant's reaction was one of shock and upset. He and his colleagues had no idea of the severity of the financial situation of the company. He understood that this meant that his employment was to come to an end immediately.

10. One of the administrators then spoke. He explained that staff were not to answer any phone calls or emails, and that all trucks were to be told to return to the depot in Grangemouth, no matter where they were or on what journey

they were engaged. All staff were asked to return to the yard at 9 the following morning.

11. On the following day, on or around 4 March 2019, the staff, including the claimant, the office staff and all the drivers, congregated in the yard. They were thanked by Mr Adams for their services. The administrators explained that with effect from 4pm the previous day, the company was now in administration, and could no longer continue to trade.

12. As the staff dispersed, the claimant was approached by one of the administrators who asked him if he would assist them over the following days in identifying assets and equipment of the company. They said he had been selected as a "valued member of staff". The claimant agreed to do so, and as a result he stayed on for another two days. The claimant's employment therefore came finally to an end on 8 March 2019.

13. At that date, the claimant was not a member of a Trade Union, and did not have any understanding of his rights to make a claim to an Employment Tribunal in respect of outstanding pay. He was advised by a colleague of a position in another company which might be suitable to him, and, anxious to minimise any period of unemployment, pursued this opportunity. He was successful in obtaining a position with another company and started immediately.

14. The claimant's mother has experience of working in a civil service office, and accordingly sought to assist the claimant in obtaining redress for his outstanding pay and unpaid holiday pay. That process dragged on for some time. She approached a local employment lawyer for assistance but was advised that the likely fees for such assistance would probably amount to £1,000, and given the amount sought from the respondent they considered that that was excessive and therefore did not proceed to seek further assistance.

15. The claimant was unaware of any right which he might have to claim for a protective award, until one of his former colleagues, who was now a member of the Unite Trade Union, told him that they were claiming for protective

awards. The claimant did not understand, and nor did his mother, but she phoned the Insolvency Helpline. The claimant's understanding was that she was advised that it is not possible to make a claim for a protective award until the consent of the administrators had been obtained, and the first claims had been resolved. The claimant therefore waited for the first claims, relating to unpaid wages and holiday pay, were resolved, before making an attempt to raise these proceedings.

16. Neither the claimant nor his mother received any advice, on the evidence before me, that there were strict time limits upon the raising of Tribunal proceedings. They did not understand when those time limits would commence, and understood from the advice provided by the Insolvency Service that they required to await the resolution of the earlier claims before raising this claim.

17. Mrs Tasker contacted ACAS to commence early conciliation on 4 December 2019, and received the Early Conciliation Certificate on that date. She then presented the claim to the Employment Tribunal on 4 December 2019.

Discussion and Decision

18. Section 189(5) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides that a complaint to the Employment Tribunal that the respondent has failed to consult about a redundancy in terms of section 188 shall not be considered by the Tribunal within three months of the date upon which the dismissal took effect, or within such further period as the Tribunal considers reasonable in circumstances where it was not reasonably practicable for the claimant to have presented the claim timeously.

19. The question for this Tribunal, therefore, is whether it was not reasonably practicable for the claimant to have presented his claim in time to the Tribunal. The reasons why he did not do so, on the evidence before me, were that he was ignorant of his rights before the Tribunal, and that when he consulted the Insolvency Service he was advised, through his mother, that he needed to wait until the earlier claims had been resolved. In addition, he understood

from colleagues that he had to wait until consent to proceed was granted by the administrators in October 2019.

20. Ignorance on the part of a claimant will only give grounds for an extension of time where that ignorance may be said to be reasonable. In this case, I consider that the claimant, who though plainly intelligent was very young and inexperienced in the workplace, was reasonably ignorant of his rights. He and his mother did seek to obtain legal advice but understandably found the potential cost of the fees too great, and therefore did not have access to specialist advice. Mrs Tasker has, as I understand it, a civil service background, but has no direct experience of the Tribunal nor of the legal provisions relative to this process.

21. In addition, while the advice from the Insolvency Helpline may have been misunderstood, it is clear that what the claimant drew from that was that he could not raise proceedings until he had settled the earlier claim for unpaid wages and holiday pay. If that were the advice which he received, that would be incorrect, but he could not be expected, reasonably, to have understood that at the time.

22. It is my conclusion that it was not reasonably practicable for the claimant to have presented his claim in time because he was ignorant, reasonably, of his rights, and was either misinformed or misunderstood the advice about when he could raise his claim.

23. Was the claim then raised within such further time as the Tribunal considers reasonable? In all the circumstances, it was. This was a case in which the claimant was deprived not only of his livelihood but also of his legal right to be consulted by the respondent, at a point when he had had no warning at all that his job was at risk. It would be grossly unjust to deprive him, further, of his right to make a claim before this Tribunal, in circumstances where he believed he was unable to do so until after October 2019. He could have been more prompt in presenting the claim once matters became clearer, but in all the circumstances, I consider that the prejudice to the claimant of preventing him from proceeding with this claim would be excessive. In all the

circumstances, therefore, I consider that the claim was presented within such further time as was reasonable.

24. Accordingly, it is my conclusion that the Tribunal does have jurisdiction to hear this claim.

25. The second issue for determination in this hearing is whether the claimant is entitled to the protective award which he seeks. The claimant was part of the workforce which was made redundant without consultation or indeed any warning.

26. If the Tribunal finds, as here, that the respondent has failed to consult with the claimant, as with others, in relation to the redundancy which led to his dismissal, the remedy available under section 189 is a protective award.

27. Is the claimant, then, entitled to a protective award? Section 189(1)(d) of TULR(C)A provides that a complaint made be presented to the Tribunal "by any of the affected employees or by any of the employees who have been dismissed as redundant."

28. Section 189(3) then states that a protective award is an award in respect of, among others, employees "who have been dismissed as redundant, or whom it is proposed to dismiss as redundant". While in some cases, there may be a difference between this category and those who are "affected" by the failure to consult, in this case, the claimant is both affected and dismissed, and accordingly, he is entitled to a protective award under this section.

29. The question then for the Tribunal is what the protective award should be.

30. In light of the fact that there was no consultation, nor any attempt at consultation, by the respondent, with the affected staff, including the claimant, it is my judgment that the appropriate period, under section 189(4), is the maximum period of 90 days.

31. The respondent shall therefore pay to the claimant 90 days' pay.

32. The claimant's claim therefore succeeds.

Employment Judge: Murdo Macleod
Date of Judgment: 17 September 2020
Entered in register: 22 September 2020
and copied to parties