Case Nos. 1401107/2020 (V)
1401108/2020 (V)
1401109/2020 (V)
1401317/2020 (V)
1401411/2020 (V)
1402537/2020 (V)

EMPLOYMENT TRIBUNALS

Claimants			**Respondent**
(1)	Ms M Chapman	-and-	JE Beale plc – In Administration
(2)	Mrs C Bristow		
(3)	Mrs M Ayre		
(4)	Mrs L Stratford		
(5)	Miss S Doll		
(6)	Miss H Peyman		

Held at: **Bristol (by video-CVP)** **On:** **22 April 2021**

Before: **Employment Judge Livesey**
Mr J Shah
Mr D Stewart

Representation

For the Claimants: Ms Bristow, Ms Chapman, Ms Doll and Mrs Stratford, all in person

For the Respondent: Did not attend and was not represented

JUDGMENT

1. The Claimants' complaints that the Respondent failed to comply with a requirement of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 are dismissed since none of them had jurisdiction to bring the complaint under s. 189 (1)(b).

2. Ms Doll's application to join Aviva Insurance Limited to the proceedings is dismissed.

REASONS

1. This is a claim for a protective award brought by 6 Claimants under s. 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').

Background

2. The claims were issued as follows;
   a. Ms Chapman, Mrs Bristow and Mrs Ayre; 5 March 2020;
   b. Mrs Stratford; 16 March 2020;
   c. Miss S Doll; 19 March 2020;
   d. Miss H Peyman; 21 May 2020.

3. The Claimants have each brought a number of different complaints, including breach of contract relating to notice, unfair dismissal, unpaid holiday pay and discrimination on the grounds of maternity and pregnancy (Miss Peyman only). They have all brought a complaint under s. 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

4. Messrs Wright and Absolom of KPMG LLP Restructuring were appointed as Joint Administrators of the Respondent on 20 January 2020. On 22 March 2021, the Administrators consented to allow these claims to proceed in respect of the claim for a protective award under s. 188 only. They indicated that they would not otherwise be participating in the proceedings.

Evidence

5. The Tribunal heard evidence from Mrs Stratford, which was confirmed and, to a limited extent, supplemented, by the other Claimants.

6. A bundle of documents, C1, was helpfully produced by Ms Doll.

Application to join Aviva

7. By an email dated 26 February 2021, the Joint Administrators indicated that Employers Liability Insurance had been put in place to cover the period between 20 January and 10 September 2020, when the final redundancies were made. The insurers were identified as Aviva.

8. On 21 March 2021, Ms Doll, purportedly on behalf of all of the Claimants, applied to join Aviva to the proceedings. She sought to invoke the provisions of the Third Parties (Rights Against Insurers) Act 2010. The case of *Irwell-v-Watson and others* [2021] EWCA Civ 67 was referred to in support of the application.

9. Section 189 of TULRCA provides for claims against the 'employer'. Clearly, Aviva did not employ any of the Claimants.

10. The Third Parties (Rights against Insurers) Act 1930, however, introduced a system whereby there was a statutory assignment of the rights of the insured to any injured third party. The third party had to establish and quantify the liability and show that the insured was insolvent before, then, bringing an action against the insurer under the policy pursuant to the Act.

11. The 2010 Act changed the mechanism for such claims, although the basic principle of the 1930 Act remains. The third party can now bring a single action against the insured and his liability insurer, rather than bringing an action against the insured and then seeking to force it in separate proceedings against the insurer.

12. In *Irwell-v-Watson,* The Court of Appeal concluded that the Employment Tribunal, as a 'court' within the meaning of s. 2 (6), had jurisdiction to make a declaration as to an insurer's liability under s. 2 (2)(a).

13. There are some significant problems for the Claimants here which led to the Tribunal dismissing the application. They are as follows;

    13.1 It is unclear who the insured is under Aviva policy, whether the Respondent or KMPG, which may have insured itself during its period of acting as Administrators. If the latter, since the Claimants did not have a right of action against the Administrators themselves under TULRCA, it is difficult to see how Aviva could be joined;

    13.2 It is unclear whether and, if so, to what extent the policy would cover the matter complained of. Whilst it was clear to the court in *Irwell* that the policy insured against losses arising from successful claims (paragraph 3), that cannot be said here;

    13.3 There is a limitation problem. Section 12 of the Act provides the same limitation period for claims under the Act as that which exists in respect of the Claimants' claims against the insured. The limitation period of three months within s. 192 of TULRCA means that the application to amend in March 2021 was about 11 months late;

    13.4 Aviva have not been notified of the application. The email of 21 March 2021 was not copied to the Respondent, the Administrators or the insurers. Aviva ought to be heard on some or all of the issues above.

Facts

14. The Tribunal reached the following factual findings on the basis of the evidence which it heard and the documents which were presented. Page numbers in the bundle C1 have been referred to in square brackets.

15. Even though not present, the contents of the Respondent's Response Forms were also considered.

16. The Respondent traded as a department store. Its Head Office was 36 Old Christchurch Road, Bournemouth, Dorset BH1 1LJ which was also the location of its flagship store. It operated 22 other stores nationwide. As stated previously, it entered Administration on 20 January 2020.

17. The Claimants in these proceedings were all employed at the Respondent's Head Office. Some of them worked in HR, some were buyers and some had accounts functions.

18. Following the appointment of the Administrators, it was accepted that they secured the appointment of Employee Representatives. The Respondent's Head of HR, Ms Kempton, distributed an email to that effect on 21 January 2020 [12-3]. Twenty-four representatives were sought; one for each site plus an extra one for Head Office. No election was necessary at Head Office because it appeared that only one volunteer put themselves forward, Ms Herbert, who worked as a buyer.

19. An initial consultation meeting was held on 28 January with those representatives, questions having been submitted through those representatives. Then, on the 29th, Ms Kempton invited all of the Claimants to a meeting on the 30th at which they were informed of their immediate redundancy by representatives of the Administrators. Their effective dates of dismissal was the 31st. A total of 32 employees were dismissed at those premises on that day. Ms Herbert remained in employment until September 2020 until her own redundancy.

Relevant legal principles

20. Section 188 (1) of TULRCA provides as follows:

> "*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".*

21. Section 188 (1A) provides that

> "*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 90 days, and*
> *(b) otherwise, at least 30 days, before the first of the dismissals takes effect.*"

22. Section 188 (1B) specifies who the consultation shall be conducted with. '*Appropriate representatives*' of affected employees are defined as representatives of any recognised trade union or employee representatives, as defined within subsection (b).

23. Section 188 (2) provides that;

> "*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.*"

24. Section 188 (4) sets out the information in writing which has to be provided to appropriate representatives and section 188 (5) specifies how it should be provided.

25. Claims for breaches of s. 188 can be pursued under s. 189. Section 189 (1) defines who can bring what type of claim. For example, in a case relating to the failure to elect representatives, any affected employee can bring a claim (s. 189 (1)(a)) but, in the case of any other failure relating to such representatives any of those representatives to whom the failure related has locus (s. 189 (1)(b)). The point to note is that, if employees are represented, the representative ought to be the Claimant on their behalf (see *Mercy-v-Northgate HR Limited* [2008] ICR 410, CA).

26. Section 188A governs the manner in which elections should be held under the Act. There does not *have* to a vote; if the number of candidates/volunteers matches the number of spaces, valid appointments take place (see, by example, *Phillips-v-Xtera Ltd* [2012] ICR 171).

Consideration

27. It is clear that, in the limited amount of time available to the Administrators, some consultation took place. There was one meeting on 28 January but, according to Mrs Peyman, a significant number of important questions were left unanswered. Despite that, there was no evidence that any documents in

writing were shared with employee representatives which contain the information required within s. 188 (4) of the Act.

28. There would appear to have been a laid claim but for the fact that these Claimants did not have locus to bring it. Under s. 189 (1)(b), Ms Herbert ought to have as their employee representative.

29. Two issues required further consideration; was the appointment valid and did it matter that she was not dismissed at the same time?

30. As to the first question, see paragraph 26 above. There was no suggestion that the appointment was not compliant under s. 188A. If there had been, this would have been a different type of claim in any event, one under s. 189 (1)(d). None of the Claimants sought to advance such a case.

31. As to the second, Ms Herbert's survival in the business beyond 31 January did not mean that she was not the correct Claimant in respect of those dismissals then. In our experience, it was often in an employer's or Administrator's interest to retain employee representatives until the end to prevent the need for constant re-election/appointment after each tranche of redundancies.

32. Accordingly, the claims had to be dismissed since they were not validly brought under the Act.

Employment Judge Livesey
Date: 22 April 2021

Judgment & Reasons sent to Parties: 04 May 2021

FOR THE TRIBUNAL OFFICE