EMPLOYMENT TRIBUNALS

Claimant: **Community Union & Others**

Respondent: **ACL 2020 Ltd (in administration) (1) The Secretary of State for Business, Energy and Industrial Strategy (2)**

Heard at: **In Chambers** **On: Monday 12 April 2021**

Before: **Employment Judge Matthews**

Representation:
Claimant: **Mr G Williams (Community Union Legal Officer)**

Respondent: **Did not attend and were not represented**

JUDGMENT

1. The claim made by Community Union for a protective award is well founded. The First Respondent failed to comply with a requirement of section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992.

2. The First Respondent is ordered to pay to the employees of the First Respondent based at its establishment at Gamberlake, who were dismissed as redundant on or around 19 February 2020, remuneration for a protected period of 90 days from 19 February 2020.

REASONS

INTRODUCTION

1. Community Union ("Community") brings claims for a protective award by reference to section 189 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA"). Some 34 other claimants bring a similar claim in their individual capacities. All the claims, apart from that brought by Community, were adjourned by direction of Acting Regional Employment Judge Cadney by letter of 8 April 2021. Given the terms of the Judgment now entered, the appropriate claimants will be invited to withdraw the adjourned claims.

2. The First Respondent (also referred to in this Judgment as the "Company") does not defend the claims. As the Compnay is in

administration, it was asked to consent to the proceedings and did so in a letter dated 20 March 2020 (134). As is customary in proceedings of this sort, the Second Respondent has filed a Response to the claims and made written representations, but *"neither supports nor resists the claims".* Notwithstanding, the Second Respondent asks the Tribunal, in terms, to evaluate the validity of the claims.

3. On 4 December 2020 there was a preliminary hearing before Regional Employment Judge Pirani. The record and resulting Orders (the "Orders") can be found at 98-111.

4. Mr Peter Coath (an employee of the Company and a Community Shop Steward) and Mr Michael Hancock (an employee of the Company) gave evidence supported by written statements.

5. There was an "electronic" bundle of documentation. References in this Judgment are to pages in the physical bundle (not to pages in the PDF version) unless otherwise specified. Mr Williams produced written argument.

6. The hearing was listed for two days in anticipation that all the claims would be heard. In the event, all the claims except that of the Community stand adjourned and a short hearing resulted. The Tribunal reserved judgment.

7. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

FACTS

8. The Company's business was that of the well-known "Axminster Carpets". It was based at Gamberlake, Axminster with a small (in terms of staff) retail outlet at a different location. The staff at the retail outlet are not the subject of these claims.

9. On 23 February 2013, Community secured recognition from the company then running the Axminster Carpets business in respect of *"direct production workers"* (113). This company was called Axminster Carpets Limited. As is common in such circumstances, there has been a succession of companies of that name. As the business has been taken over by successive companies, the old company has changed its name and allowed the new company to take on the Axminster carpets name.

10. At around the same time as Community secured recognition, that particular Axminster Carpets Ltd went into administration. The Axminster carpets business was taken over by the Company (in turn,

Axminster Carpets Limited before it changed its name to the current ACL 2020 Limited) and many employees were transferred to it under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The Company was, in effect, the successor to the slimmed down operations and workforce of the Axminster Carpets business.

11. Community says that the recognition it had with the former Axminster Carpets Limited was transferred to the Company under the provisions of regulation 6 of TUPE.

12. Whether or not the recognition was transferred, however, interactions between Community and the Company took a wider turn.

13. The Company seems to have more or less acted as though Community was the recognised trade union for not only *"direct production workers"* but for other groups as well. The Company's employee handbook included this (138):

> *"**Collective agreements/Union representation***
>
> *The Company recognises Community Union for collective bargaining purposes for a number of operational departments and you will be advised in your offer letter if your own employment is covered by this arrangement."*

14. The Tribunal does not have evidence of whether or not this subject was dealt with in the individual contracts of employment of employees. What it does have is evidence that, in at least a number of relevant ways, the Company dealt with Community as though it had a significant role to play in respect of all employees. Training employees of the Company as Community representatives, health and safety reviews by Community, Community/management meetings, joint communications and employee relations training by Community were all discussed in terms of employees generally, rather than being limited to *"direct production workers".* (See 117-121).

15. In December 2018 the Company provided a room, computer and lockable cabinet for Community's officials and shop stewards to use.

16. In a Community Axminster Carpets Newsletter in December 2018, Community reported that its November meeting with Company management had included *"Pay negotiations"* (121). In March 2019 the Company awarded an across the board pay rise of 3% (subject to some special cases). Mr Coath's evidence is that this was a result of the pay negotiations conducted by Community.

17. By this time, however, the Company was in financial difficulty. On 19 February 2020 the Company's Joint Administrator completed the Insolvency Service's Form HR1 "Advance notification of

redundancies" (130-131). Community was recorded as the recognised trade union in respect of *"Factory workforce"*. No groups of employees were recorded as not represented by a recognised trade union in the box available for that purpose. The form acknowledged that no consultation process with the *"appropriate representative"* had started. Total *"Number of possible redundancies" "at this establishment"* was recorded as 86 people out of 89 employees.

18. On the same day as the Form HR1 was signed (19 February 2020) around 86 of the employees at Gamberlake were summarily dismissed by reason of redundancy.

19. Community entered into early conciliation in respect of the matters in these proceedings on 8 April 2020 and ACAS issued its certificate on the same day (28). On 5 May 2020 Community lodged its claim form in respect of these proceedings.

APPLICABLE LAW

20. Section 178 of the TULRCA, so far as it is applicable, provides:

> *"**178 Collective agreements and collective bargaining***
>
> *(1) In this Act "collective agreement" means any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations and relating to one or more of the matters specified below; and "collective bargaining" means negotiations relating to or connected with one or more of those matters.*
>
> *(2) The matters referred to above are-*
>
> *(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;" ….*
>
> *"(f) facilities for officials of trade unions; and*
>
> *(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.*
>
> *(3) In this Act "recognition", in relation to a trade union, means the recognition of the union by the employer, or two or more associated employers, to any extent, for the purpose of collective bargaining; and "recognised" and other related expressions shall be construed accordingly."*

21. Section 188 of the TULRCA, so far as it is applicable, provides:

> ***"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." ….*
>
> *"(1B) For the purposes of this section the appropriate representatives of any affected employees are-*
>
> *(i) 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" ….*
>
> *"(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."*

22. Section 189 of the TULRCA, so far as it is applicable, provides:

> *"**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-" ….*
>
> *"(c) in the case of a failure relating to representatives of a trade union, by the trade union, and" ….*
>
> *"(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 employee 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 take 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." ….

"(6) If on a complaint under this section a question arises-

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,

It is for the employer to show that there were and that he did."

23. The Tribunal was referred to *Clarkes of Hove Ltd v Bakers Union* [1978] ICR 1076, *Susie Radin Limited v GMB & Ors* [2004] IRLR 400 and *Smith v Cherry Lewis Limited* [2005] IRLR 86.

CONCLUSIONS

24. The headings used below, although modified, are taken from the list of issues recorded by Regional Employment Judge Pirani in the Orders. Where an issue does not fall to be decided by this Tribunal it is omitted.

25. **Was the claim made to the Tribunal within three months (plus early conciliation) of the effective date of termination?**

26. Ignoring conciliation, the affected employees were dismissed on or later than 19 February 2020. Community's claim form was received by the tribunals on 5 May 2020, some days before the time limit would have expired on 18 May 2020. The claim was made in time.

27. **Has Community standing to bring a claim under section 188(1B)(a) and section 189(1)(c) of the TULRCA?**

28. In the Tribunal's view, Community and the Company had an arrangement relating to the negotiation of pay, aspects of the physical conditions in which workers worked, membership of a trade union, facilities for officials of trade unions and machinery for consultation on these. Any one of these is sufficient to satisfy the test of *"collective bargaining".* On the facts it is clear that the Company recognised Community for those purposes in respect of all the employees concerned at Gamberlake.

29. Community, therefore, was the appropriate representative for the purposes of section 188(1B)(a) of the TULRCA because it was recognised by the Company for collective bargaining purposes on behalf of the employees concerned. For the same reason, Community had standing to bring the claim under section 189(1)(c) of the TULRCA.

30. **Was Community at the material times up to and including 19 February 2020 (a) an independent trade union, and (b) recognised by the First Respondent (c) in respect of which categories of employees? Issues relating to TUPE (see above) may be relevant here.**

31. The Tribunal's understanding is that Community has been a certified independent trade union since October 2004, when it was created out of the merger of the Iron and Steel Trades Confederation and the Knitwear, Footwear and Apparel Trades Union.

32. As explained above, the Tribunal's finding is that Community was recognised by the Company in respect of all categories of employee at Gamberlake. The recognition of Community in respect of *"direct production workers"* probably was the subject of a TUPE transfer between the Company's predecessor company and the Company, but that is a narrower outcome from Community's point of view.

33. **Whether the First Respondent proposed to dismiss as redundant 20 or more employees at an establishment within a period of 90 days or less for the purposes of section 188(1)?**

34. On the facts, the Company proposed to dismiss as redundant 86 employees at the Gamberlake establishment within a period of 90 days or less.

35. **Whether the First Respondent complied with its obligations under section 188 of the 1992 Act.** [The Orders then list obligations under sections 188(4), 189(5) and 188(2) of the TULRCA which list is not reproduced here.]

36. The Tribunal does not have to consider the detailed consultation requirements of section 188 of the TULRCA. This is because there is almost no evidence that the Company took any steps whatsoever to consult on or provide any information in respect of its proposals as far

as the employees affected were concerned. There is reference in one version of the Form HR1 to it having been copied to employees and/or Community. Mr Coath's evidence is that he never saw it and Community has found no trace of the HR1 being copied to it at the time. The Company did not comply in any respect with its obligations under section 188 TULRCA. In the Form HR1 itself, the Company acknowledged there had been no consultation with appropriate representatives.

37. **Does one or more of the Respondents (there is no response from the First Respondent) advance arguments in relation to special circumstances?**

38. Although the Second Respondent has been joined to the proceedings and entered a response, it has not suggested special circumstances.

39. **Is Community entitled to: (a) a declaration that the First Respondent failed to comply with its obligations under section 188 of the 1992 Act pursuant to section 189(2) and (b) should a protective award be made, pursuant to section 189(2)-(4)?**

40. In the Tribunal's judgment, Community is entitled to such a declaration and a protective award should be made to the affected employees.

41. **If so, is a 90 day protective award just and equitable in all the circumstances, having regard to the seriousness of the First Respondent's default in complying with any requirement of section 188?**

42. In the Tribunal's view it is just and equitable to make the full award of 90 days' pay. There are no mitigating circumstances.

Employment Judge Matthews
Date: 18 April 2021

Judgment and Reasons sent to the Parties: 30 April 2021

FOR THE TRIBUNAL OFFICE