



EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case Number: 4103363/2020 and Others
(As per attached sheet)**

Held in Glasgow on 29 January 2021

Ms Janice Calder and others per the attached sheet

**Claimants
Represented by:
Mr Martyn
(Solicitor)**

**McKay Flooring Ltd
(in creditors' voluntary liquidation)**

**Respondent
Represented by:
Not present and
Not represented**

JUDGMENT

Rule 21 of the Employment Tribunal Rules of Procedure 2013

No response has been presented to this claim and an Employment Judge has decided to issue the following judgment on the available material under rule 21:

1. In respect of the claimants (who are affected employees), the Tribunal makes the following declaration:

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- a. The respondent was proposing to dismiss as redundant 23 employees at one establishment (its entire business unit) within 90 days and failed to elect employee representatives in breach of section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992;]
 - b. The respondent failed to consult about the dismissals in breach of section 188 (1A), section 188(2) and section 188(4).
2. The claimants are entitled to a protective award against the respondent, the protected period being 90 days from 22 April 2020, the date of the first dismissal.
 3. The Employment Protection (Recoupment of Benefit) Regulations 1996 apply to this award.

REASONS

1. The claimants raised a claim for a protective award. They alleged that on 22 April 2020 there were over 20 employees who were dismissed as redundant without any procedure having been carried out in respect of the business unit to which the staff were assigned (the main place of business). The dismissals were immediate. No steps were taken to elect appropriate representatives and no consultation took place.
2. The respondent submitted no response. The respondent was in creditors' voluntary liquidation. On 6 May 2020 a resolution was passed that the company be wound up voluntarily and a liquidator was appointed. These proceedings were served on the respondent, and the claimant's submissions provided to the liquidator for comment.

The Law

3. Section 188 (1) of Trade Union and Labour Relations (Consolidation) Act 1992 states: 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.
4. Section 188 (1A) states: 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, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect...
5. Section 188(2) provides: the consultation shall include consultation about ways of— avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives...
6. Section 188(4) states that for the purposes of the consultation the employer shall disclose in writing to the appropriate representatives (a) the reasons for his proposals, (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant, (c) the total number of employees of any such description employed by the employer at the establishment in question, (d) the proposed method of selecting the employees who may be dismissed, (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect. (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed, (g) the number of agency workers working temporarily for and under the supervision and direction of the employer, (h) the parts

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of the employer's undertaking in which those agency workers are working, and (i) the type of work those agency workers are carrying out.

7. Section 188A provides for the election of representatives as follows: The requirements for the election of employee representatives under section 188(1B)(b)(ii) are that—
- (a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;
 - (b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;
 - (c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
 - (d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;
 - (e) the candidates for election as employee representatives are affected employees on the date of the election;
 - (f) no affected employee is unreasonably excluded from standing for election;
 - (g) all affected employees on the date of the election are entitled to vote for employee representatives;
 - (h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

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- (i) the election is conducted so as to secure that— so far as is reasonably practicable, those voting do so in secret, and (ii) the votes given at the election are accurately counted.

8. Section 189(1) provides: 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— 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; in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related, in the case of failure relating to representatives of a trade union, by the trade union, and in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

9. Any protective period should commence on the first day of the dismissals in terms of section 189(4) which states that the protected period 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 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.

10. Peter Gibson LJ in the Court of Appeal in **Susie Radin Ltd v GMB and others** [2004] IRLR 400 CA (paragraph 45) said:

“I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:

- (1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s. 188: it is not to compensate the

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employees for loss which they have suffered in consequence of the breach.

- (2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.
- (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.
- (4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s. 188.
- (5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate.”

Decision and reasons

11. I am satisfied that the respondent was under a duty to comply with the requirements of section 188 and that it failed to do so.
12. There were 20 or more staff employed at the same establishment in respect of whom the respondent proposed to dismiss as redundant. While I was initially concerned that it was not clear from the information before me that the establishment had 20 or more employees, since there was no clear statement that each of the employees were based at the same business unit but I was satisfied upon considering the evidence that there was only 1 establishment and that the dismissal of more than 20 employees had therefore engaged the collective consultation provisions. The claimants were affected employees.

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13. The requirements of the legislation had not been followed as no consultation took place with any elected representative and no steps were taken to do so. No reasons were given for such a failure.
14. The claimants are entitled to a protective award.
15. I conclude that it is just and equitable to make an award for a protected period of 90 days from 22 April 2020 when the first dismissal took effect. There was no mitigation or reason for the failure. It is just and equitable to make this award.
16. The rules with regard to recoupment apply to this award and the parties should consider those rules carefully.

Employment Judge: David Hoey

Date of Judgment: 29th January 2021

Entered into Register: 26th February 2021

Copied to Parties

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Please add list of claimants and recoupment notice details in usual way