EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104729/2020

Hearing Held by Cloud Video Platform (CVP) on 1 April 2021

Employment Judge - A Strain

Mr M Rashid	**Claimant:** **In person**
Redeem UK Limited (In Administration) **c/o KPMG LLP (UK)**	**Respondent** **No Appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) It is found and declared that the Respondent 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 7 July 2020. The Respondents are ordered to pay remuneration to the Claimant for the protected period of 90 days, that being the period from 7 July 2020 until 5 October 2020.

(3) The Claimant was not unfairly dismissed by the Respondent and his claim is dismissed.

(4) The Claimant is not entitled to any additional redundancy payment and his claim is dismissed.

(5) The Claimant is awarded the sum of THREE THOUSAND SIX HUNDRED AND SIXTY-SIX POUNDS THIRTY PENCE (£3,666.30)(Gross) in respect of the balance of notice pay due.

Background

1. This case called for hearing by CVP on 1 April 2021. 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 informed the Tribunal that he had obtained that consent. The administrator was therefore aware of the claims being made. No form ET3 had been lodged.

3. The Claimant asserted Claims for Redundancy Pay, Notice Pay, Protective Award and Unfair Dismissal.

4. The Claimant had lodged a Statement, Schedule of Loss and correspondence in advance of the hearing.

Findings in Fact

5. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:

5.1 The Respondents were in the buiness of mobile phone recycling.

5.2 The Claimant commenced his employment with the Respondent on 14 June 2012 until the termination of his employment on 7 July 2020.

5.3 The Claimant was employed as Group Finance Business Partner on a Gross Annual Salary of £41,500, £798 (Gross) weekly.

5.4 There was no union recognised in the workplace. No employee representatives were elected. The Claimant worked in Bathgate. There were more than 20 employees at the Bathgate premises operated by the Respondents. The Respondents were run from their head office with all decisions of a management nature being taken there.

5.5 On 3 July 2020 the Respondents informed the Claimant (and all other employees) that they had gone into administration. The Claimant was, with all other employees, informed on 3 July that the majority, if not all, employees were being made redundant. There was no discussion with the claimant as to redundancy.

5.6 On 7 July 20120, the Claimant found out that his employment with the Respondents had ended and he was made redundant. This came as a shock to him. He had not been spoken to by his employer by way of consultation.

5.7 The Respondents did not have a contractual or enhanced Redundancy Scheme.

5.8 The Claimant had obtained alternative employment on a short term contract for the period from 8 July 2020 – 29 July 2020 in respet of which his earnings were £2,955.01.

5.9 The Claimant had been in receipt of Job Seekers Allowance of £265.60 for the period from 30 July 2020 to 8 September 2020.

5.10 The Claimant had obtained alternate employment thereafter in respect of which his earnings exceeded those with the Respondent and had no ongoing loss..

5.11 The Claimant received the following payments folowing the insolvency of the Respondents:

5.11.1 £4,304 statutory redundancy payment;

5.11.2 Notice Pay of £5,910.60 from which had been deducted the sums of £2,955.01 (in respect of contracted employment from 8 July 2020 – 29 July 2020) and £265.60 (in respect of Job Seekers Allowance from 30 July 2020 to 8 September 2020)

The Relevant Law

Protective Award

6. The **Trade Union and Labour Relations (Consolidation) Act 1992 ("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.

7. 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***.

8. 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.

9. 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.

Unfair Dismissal

10. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reasons) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for

dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

11. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

12. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

13. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the

employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

Redundancy pay

14. Unless the Employer has an enhanced Redundancy payment Policy or contractual scheme then Redundancy Pay is calculated in accordance with section 162 of the **Employment Rights Act 1996 (ERA 1996)**.

Notice pay

15. Unless the contractual notice period is greater an employee is entitled to statutory minimum notice calculated in accordance with section 86 of ERA 1996.

REASONS

16. There was no "testing" 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. The Tribunal found him to be entirely credible and reliable. The Tribunal was in no doubt as to his honesty.

Protective Award

17. As there were more than 20 employees at the work base, it was not necessary to determine whether it was a separate establishment for the purposes of the 1992 Act.

18. 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.

19. On 7 July 2020 there was redundancy of more than 20 emloyees. 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.

20. There was no consultation whatsoever. On the basis of the evidence the Tribunal 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 7 July 2020 to 5 October 2020.

Unfair Dismissal

21. The Tribunal considered and found that the reason or principal reason for the dismissal was redundancy. This is a potentially fair reason under section 98 of ERA 1996. The Tribunal considered that, in the particular circumstances of the Respondent going into administration, the dismissal was fair in accordance with section 98(4) of ERA 1996.

22. The Tribunal acknowledged the Claimant's evidence that this was not a genuine redundancy as another company had purchased aspects of the business and recruited a number of his former colleagues. This did not mean that the Claimant's dismissal was for any reason other than a genuine redundancy.

23. The claim of unfair dismissal is accordingly unsuccessful. The Claimant had sought a compensatory award. As his claim of unfair dismissal is unsucessful no compensatory award is made.

Redundancy pay

24. The Claimant asserted that he was entitled to 8 weeks gross pay as his redundancy entitlement. He had received the statutory redundancy

payment which was capped at the statutory rate of a week's pay. He had received payment of £4,304 and sought an additional £2,081.

25. The Tribunal was provided with no evidence in support of an enhanced redundancy payment policy or contractual entitlement. The Tribunal accordingly refused to make any further award in respect of redundancy pay.

Notice pay

26. The Claimant asserted he was entitled to 3 months' notice pay calculated at 12 x £798 (Gross weekly pay) in the amount of £9,576.90. He had received payment of £5,910.60 from which had been deducted the sums of £2,955.01 (in respect of contracted employment from 8 July 2020 – 29 July 2020) and £265.60 (in respect of Job Seekers Allowance from 30 July 2020 to 8 September 2020).

27. The Tribunal was satisfied that the Claimant was contractually entitled to the balance of notice pay calculated as (£9,576.90 - £5,910.60) = £3,666.30 (Gross).

28. The benefits received by the Claimant had been recouped from the notice payment made to him.

Employment Judge: Alan Strain
Date of Judgment: 27 April 2021
Entered in register: 17 May 2021
and copied to parties