Case Number: 3202571/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr G Sittampalam**

Respondent: **Credit Suisse Services, AG London Branch**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **26 and 27 August 2021**

Before: **Employment Judge Speker OBE, DL**
Members: **Ms J Houzer**
Mr M Wood

Representation

Claimant: In person

Respondent: Mr D Reade QC

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The unanimous judgment of the tribunal is as follows:-

1. **The Respondent has failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.**

2. **The Tribunal makes the following declaration under Section 189(2) of the TULR(C) Act 1992**

   (i) Under Section 188(2) the Respondent failed to comply in relation to (b) reducing the numbers of employees to be dismissed.

(ii) The Respondent failed to comply with Section 188(4) of the Act in failing to disclose in writing to the appropriate representatives:

(a) The reasons for the proposals to dismiss for redundancy;

(b) The numbers and descriptions of employees whom it was 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.

3. The claim for a protective award succeeds and the Tribunal makes a protective award in respect of those employees of the Respondent who were made redundant in the June 2020 redundancy round and who were dismissed as redundant and that the employer pay remuneration for the protected period of 45 days. The recoupment regulations apply to this award.

4. Penalty: Under Section 12A of the Employment Tribunals Act 1996 the Tribunal orders that the Respondent pay a penalty to the Secretary of State in the sum of £20,000 on the basis that the Respondent breached the employee rights to which the claim related and the Tribunal concludes that the breach had one or more aggravating features.

REASONS

1 These proceedings were brought by Mr Sittampalam in relation to alleged breach by the Respondent's collective consultation obligations set out in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Specifically, this was in relation to the obligations set out in Section 188(1), 188(1A), 188(2) and 188(4).

2 This claim was made by the Claimant in a representative capacity he having been an employee representative in relation to a collective consultation in June 2020 referred to as 'the June 2020 round'. There were 7 relevant employees made redundant as a result of that round and these had been employees in respect of whom the Claimant was a representative. They worked in the QAT Section of the bank in which section the Claimant also worked. None of those 7 employees had been joined as a party to this claim nor did they submit any evidence or play any part in the proceedings.

3 The Claimant gave evidence himself. On behalf of the Respondent there were two witnesses namely Jill Cuthbert an employee relations specialist within the Human Resources Department of Credit Suisse (who made two statements) and Rebecca Corry, Management Representative for the bank's Chief Risk Office, who gave evidence largely with regard to processes in relation to rounds of redundancy generally, and with regard to

the June 2020 round, and this covered the joint collective consultation meeting on 29 June 2020.

4 We were provided with a bundle of documents which ran to over 380 pages. The claim form was fully pleaded as was the notice of response. We were provided with an agreed revised list of issues as well as a document headed 'agreed facts/chronology'. The Claimant produced for the Tribunal a document headed 'written submissions of the Claimant' and Mr Reade produced for us a skeleton opening. Prior to giving their final oral submissions, the Claimant provided submissions to us in writing as did Mr Reade. At the commencement of the hearing, we spent the first morning reading through an agreed set of documents including the opening submissions which made reference to relevant law and authorities.

5 We found the following essential facts:-

(1) The Respondent is one of a number of entities within the Global Credit Suisse group. A number of UK Credit Suisse entities together make up the Credit Suisse Group UK Operation. The Quantitative Analysis and Technology unit (QAT) is a broad area within which the Claimant operated which consists of several hundred people worldwide. In the UK there were 132 people in the QAT which is one of several departments which are in the Chief Risk Officer (CRO) division. QAT consists of a number of departments within the UK each reporting to the global head of QAT. One of these is Quant Engineering within which the Claimant was employed. We were provided with details with regard to the departments which exist within QAT.

(2) It was acknowledged that Credit Suisse runs frequent rounds of redundancies. Reference was made to the 2017 round in relation to which one of the employee representative John Phillip Meloche had noted that there was a very substantial lack of disclosure of information required by Section 188(4) of TULRCA and he challenged this. During that round the Claimant became an employee representative along with Mr Meloche. Issues were raised with the Respondent regarding the alleged failure to comply with Section 188. In the event Mr Meloche issued an Employment Tribunal claim in a representative capacity. The Respondents filed a response denying breaches of Section 188 and the case was listed for a full hearing. Eventually on 12 October 2017 at a truncated hearing counsel on behalf of the Respondent stated that the Respondent was making changes to its processes as a result of the claim. A judgment was entered by consent which included a declaration that the Respondent had failed to comply with the requirements of Section 188 TULRCA and consented to protective awards which were made at the maximum legal amount of 90 days for each of the employees who was made redundant in the January 2017 redundancy round and who were dismissed as redundant on or after 26 April 2017.

(3) In May 2018 the Respondent sent two employee representatives a memorandum seeking to explain the 2017 claim and stating that certain amendments had been made to its collective consultation process.

(4) Later in May 2018 the Claimant and another employee representative made a report to the Respondent's internal Reportable Concerns Office (RCA)

regarding the Respondent's collective redundancy process. An officer from the RCA met with them to discuss their concerns. No changes to the consultation process were actually made as a result of the report.

(5) On 15 June 2020 at 18.33 the Respondent by email informing, employees of its proposals for redundancies including within the corporate functions and commenced a collective consultation round. The Claimant was one of two employee representatives for QAT employees in respect of the round.

(6) On 26 June 2020 employee representatives were provided with documents including (1) a memorandum to employee representatives and (2) an employee representative's guide to consultation meetings. The memorandum confirmed that of the 36 redundancies proposed in the corporate functions, 7 were proposed in QAT.

(7) On 29 June 2020 a collective consultation meeting was held which was attended by the Claimant in his role as employee representative for QAT. This was identified as day one of the collective consultation period. The Claimant was sent draft minutes of the meeting for comments and he sent these to all of those he was representing. At the consultation meeting Rebecca Corry, Management Representative for CRO explained that there was a continuous budget challenge within CRO and that proposed elimination of roles within QAT was required to support and manage the budget challenges. At this consultation meeting the Claimant objected to the scope of information provided to employee representatives. Further information was refused although the Claimant stated that this information was required under Section 188. Although there was mention that a further consultation meeting could be requested, no second consultation meeting was requested.

(8) On 3 July 2020 the Respondent provided to the employee representatives a copy of the note about the 2017 claim.

(9) On 6 July 2020 the Respondent sent agreed minutes of the meeting of 29 June including a written copy of the reasons, for the redundancies which Ms Corry had stated at the meeting. The Respondent did not expand on these reasons or include any of the reasons which were subsequently given to individual employees placed at risk. The Respondent also confirmed that the selection criteria used at the consultation meeting would be followed. On 6 July the Claimant sent an email to the Respondent with his reasons for objecting to the lack of disclosure, and what he considered to be consequent lack of effectiveness of the consultation.

(10) On 7 July the Respondent provided to the Claimant a copy for HR1.

(11) On 8 July 2020 the Respondent replied to the Claimant's email of 6 July repeating their refusal to disclose the information the Claimant believed he was entitled to receive. On the same day 8 July, the Claimant notified the Respondent that a protective award could be up to 90 days pay, including pensions contribution rather than just 90 days pay.

(12) On 10 – 13 July the Respondent replied to the Claimant stating that they expected any protective award would be less than 90 days pay and issued an updated version of the note about the 2017 claim in order to reflect this.

(13) The Respondent sent employee representatives a note stating that the roles of four employees within Q80 had been placed at risk of redundancy and provided corporate titles such as “VP” “DIR” for those roles.

(14) On 31 July 2021 the Respondent brought the collective consultation exercise to a formal close.

(15) On 20 August 2020 the Respondent corrected an error in the note of 27 July 2020 and confirmed that the number of roles at risk of redundancy within the Q80 at that time was 6 but had since increased to 7. Corporate titles were provided.

(16) This case did not involve the question of individual consultation with those employees who were ultimately made redundant. Settlements were reached between the Respondent and those 7 employees which were the subject of compromise agreements. A redacted copy of one such agreement was included within the bundle of documents. It was pointed out that each of the employees was agreeing within those claims which were being compromised that they would not enforce any order made for a protective award if such award were to be made.

(17) The Claimant commenced these proceedings alleging breach by the Respondent of its obligations under Section 188 and seeking a declaration to that effect, for making of a suitable protective award and for the imposition of a penalty upon the Respondent.

Submissions

6 As stated above, there were detailed submissions presented to the Tribunal on behalf of both parties and within these, were set out detailed comments upon the actions taken within the June 2020 redundancy round as well as references to numerous legal authorities to assist the Tribunal with regard to interpretation of the relevant legislation.

The Law

7 188 TULRCA

> 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.
>
> (1A) 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 [F445 days] , and

(b)otherwise, at least 30 days, before the first of the dismissals takes effect.

(2) 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.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the [F6appropriate] 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 of the employer's undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.

(5)That information shall be given to each of the appropriate representatives by being delivered to them], or sent by post to an address notified by them to the

employer, or (in the case of representatives of a trade union)] sent by post to the union at the address of its head or main office.

(5A) The employer shall allow the appropriate representatives access to the affected employees] and shall afford to those representatives such accommodation and other facilities as may be appropriate.

8 Section 189

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–

(a) 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;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.
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 employer 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 takes 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. . . .

(5) An industrial tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the [F5date on which the last of the dismissals to which the complaint relates takes effect, or

(b) during the period of three months beginning with [F7that date], or

(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented [F8during the] period of three months, within such further period as it considers reasonable.

Entitlement under protective award.

(1) Where an employment tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 191, to be paid remuneration by his employer for the protected period.
(2) The rate of remuneration payable is a week's pay for each week of the period; and remuneration in respect of a period less than one week shall be calculated by reducing proportionately the amount of a week's pay.

(4) An employee is not entitled to remuneration under a protective award in respect of a period during which he is employed by the employer unless he would be entitled to be paid by the employer in respect of that period—

(a) by virtue of his contract of employment, or
(b) by virtue of sections 87 to 91 of the Employment Rights Act 1996] (rights of employee in period of notice),

9 Section 12A of the Employment Tribunals Act 1996:

(1) Where an employment tribunal determining a claim involving an employer and a worker—

(a)concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b)is of the opinion that the breach has one or more aggravating features,
the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay—(a)in deciding whether to order the employer to pay a penalty under this section;(b)(subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—(a)at least £100;(b)no more than £20,000.This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—(a)makes a financial award against an employer on a claim, and(b)also orders the employer to pay a penalty under this section in respect of the claim.

10 On behalf of the Claimant his arguments were set out in detail in his written submissions. His main submissions were as follows. The Respondent had conceded in a letter from its legal advisors to the Tribunal dated 28 June 2021 that there were failures of disclosure under Section 188(4) in relation to subheadings (a), (b) and (d) and that these were clear evidence of the Respondent's failures. There was also the additional concession made by the Respondent on the first day of this hearing as to the (c). He also argued that the consultation was not started in good time that it was not meaningful because of deficiencies in disclosure and the process adopted by the Respondent. He further argued that there was no adequate disclosure with regard to the general terms which were to be part of the process. He pointed to the Respondent ignoring their statutory obligations, notwithstanding the 2017 case, and the further representations made to the Respondent even before the 2020 round of redundancies had commenced.

11 On behalf of the Respondent Mr Reade, despite what he suggested were technical failures under Section 188A, had engaged in a meaningful consultation process in good time. He pointed to the process which had been operated and the information which was given to the Claimant as well as the opportunity given to ask for further information and to ask for a further consultation meeting. He also referred to the fact that the Respondent had not deliberately withheld information, but was having high regard to the interests of the employees in maintaining their confidentiality until such time as they had been selected for redundancy, at which time knowledge of the details of the individuals involved could become known. He sought to justify the actions of the Respondents and suggested that they had acted responsibly and in good faith.

Case Law

12 UK Coal Mining v National Union of Mine Workers (Northumberland area) [2008] IRLR 4.

13 R v British Coal Co EP Vardy [2002] ICR 365.

14 GMB v Susie Radin Ltd [2004] EWCA Civ 180.

15 Smith and another v Cherry Lewis Ltd (in receivership) [2005] IRLR 86 EAT.

Findings

16 With respect to the identified issues set out in the agreed revised list of issues:

(1) It is noted that the Respondent admitted acting in breach of Section 188 TULRCA with regard to the documents disclosed to employee representatives under Sections 188(4)(a)(b) and (d) as set out in the Respondent's legal advisers letter to the Employment Tribunal dated 28 June 2021. The Respondent also admitted breach of Section 188(4)(c) on the first day of the

hearing. We find that these amounted to significant breaches of the obligations of the Respondent under Section 188 expressly admitted by the Respondent.

(2) As to whether the Respondent acted in breach of its duties under Section 188 we find as follows:-

(a) The consultation did begin in good time taking into account the nature of the Respondent's business and its structure, and certainly began more than 30 days before the first of the dismissals took effect.

(b) With respect to the duty under Section 188(2) the Respondent did engage in meaningful consultation about the ways of (a) avoiding the dismissals and (c) mitigating the consequences of the dismissals. We find this based upon the evidence of the Respondent and the notes of the collective consultation meeting which was held on 29 June 2020 and attended by the Claimant. We do not find that there was meaningful consultation with respect to Section 188(2)(b) in reducing the number of employees to be dismissed and this was because of the failure by the Respondent to provide in writing the documents required to be provided under Section 188(4) as conceded by the Respondent and as set out.

(c) We find that the documents disclosed to the employee representatives during the consultation process did not satisfy the requirements of Section 188(4)(c) which related to the total number of employees of any such description employed by the Respondent at the relevant establishment.

17 Under Section 188(4) and in particular subsection (a)(b)(c) and (d) we find that these amounted to failures by the Respondent as previously indicated the Respondent having made concessions with regard to all of those sub-sections.

18 We considered the basis advanced by the Respondent for its failure namely that they were respecting the confidentiality of employees and refraining from identifying them or making them capable of being identified prior to them being selected for redundancy. This is not a basis justifying failure, by the Respondent to comply with its obligations under Section 188 and insofar as the Respondents considered that they could do so bearing in mind what had happened in 2017 and thereafter, the Tribunal finds that there was indeed no justification on confidentiality grounds with regard to these failures.

19 The Tribunal concluded that the failures were significant particularly taking into account the history and the size of the Respondent as an organisation and the fact that it has a substantial and well-resourced HR facility.

Protective award

20 Under Section 189 the Tribunal considered its power to make a protective award. We applied the section and the relevant caselaw including particularly the well-known Susie Radin case. We find that this is an entirely suitable case to make a protective award. It was

significant that we had the papers in relation to the Tribunal case of 2017 in which the Respondent acknowledged its failure to comply with the requirements of Section 188 and consented to the making of the declaration to that effect and to the making of a protective award for the maximum period. It was therefore entirely appropriate to impose a protective award because of the failures by the Respondent.

21 As to the amount or extent of the protective award, we have considered whether this again should be in the maximum amount for maximum period as it was in 2017. However, we have taken into account what was said in the Susie Radin case as to whether an employer was "going through the motions" of consultation. Lord Justice Peter Gibson stated that Section 188 imposes an "absolute obligation on the employer to consult and to consult meaningfully". The award should be that which we consider "just and equitable" and we would still be able to make a full 90 day award even if there has been some attempt at consultation although it is suggested that this would be rare. Mr Justice Elias then President of the EAT commented that "if there has been some consultation, however limited, then the Tribunal is compelled thereby to reduce the compensation below the maximum. No doubt that is true where such consultation pad does take place is more than minimal".

22 Applying this, we have given credit to the Respondent for attempts to comply with Section 188 even though we have found that these were inadequate and defective. Taking this into account we therefore made the protective award for a period of 45 days.

Penalty

23 Under Section 12(a) of the Employment Tribunals Act 1996 we have power to impose a penalty if we find breaches of the worker's rights to which the claim relates, and if we are of the opinion that the breach has one or more aggravating features. Our conclusion with regard to this is that clearly there was a breach of employment rights namely the right to have proper consultation in collective redundancy cases and those rights are set out in detail in Section 188 of TULCRA. What we found to be an aggravating feature is that as stated the same issues were considered in detailed in the proceedings which were settled in 2017 and during which this Respondent consented to a declaration as to its failure to comply with Section 188 requirements and consented to a protective award in the maximum statutory figure. They were aware of the need to reconsider the way in which they deal with such redundancy consultation and claimed that they had made suitable amendments to their own processes as set out in the document which was circulated. The matter was also raised with the reportable concerns office although there was no indication that any notice was taken of this. For the same type of failures to occur again within the June 2020 redundancy round shows either or all of a determination not to comply with the law, an inability to do so, or a failure to give the matter any serious consideration. It would be expected that an organisation as large and as well- resourced as this Respondent bank, would take these issues very seriously indeed. The collective consultation is separate from the consultation which individual employees are entitled to have leading up to their own redundancies and consideration of alternatives. The fact that all 7 employees may have come to terms with the Respondent even if they were on very attractive financial terms, does not obviate the need for this employer to engage in proper consultation on the general issues which might result in changing the number of redundancies or looking for alternatives. To enable such consultation to take place an employer must, as the law requires, disclose the necessary information at the relevant time. The failure of the Respondent in this case is so extensive

and so obvious and such a repetition, that we have concluded that it is appropriate to make an order for the imposition of a penalty and we do so in the sum of £20,000.

24 We have considered as we are obliged to do the ability of the Respondent to pay the penalty and we are in no doubt that the Respondent is able to do so.

Employment Judge Speker OBE, DL
Date: 1 September 2021