



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Razzano (1)  
Mr C Resane (2)

**Respondent:** C1 Realisations (2020) Ltd (In Administration) (1)  
The Secretary of State for Business, energy and Industrial  
Strategy (2)

**Heard at:** Hull      **On:** 8 November 2021

**Before:** Employment Judge Miller

## Representation

Claimant: No attendance  
Respondent: No attendance (1)  
No Attendance (2)

# RESERVED JUDGMENT

1. The claimants' claims for notice pay, unpaid holiday pay and unauthorised deductions from wages are dismissed on withdrawal.
2. The claimants' claims of failure to inform and consult pursuant to regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are dismissed on withdrawal.
3. In breach of s.188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, the First Respondent failed to make any arrangements for the election of employee representatives in respect of redundancies it proposed to make in respect of its entire workforce. The redundancies took place on 24 April 2020.
4. Each of the claimants who was made redundant is entitled to a protective award in respect of the protected period against the First Respondent, the protected period being 90 days from 24 April 2020.
5. In the event that the First Respondent is insolvent, the Second Respondent must meet the First Respondent's liability for the protective awards, subject to its maximum liability under s.186 of the Employment Rights Act 1996.

# REASONS

## Introduction

1. The claimants were employed by the first respondents at their restaurant, Carluccio's, in St Helen's Square in York. The respondent entered into administration on 30 March 2020 and the claimants were dismissed on 24 April 2020.
2. The claimants commenced a period of early conciliation on 23 July 2020 and that ended on 4 August 2020. By way of a claim form dated 3 September 2020, they brought claims for notice pay, holiday pay, arrears of pay and made claims for protective awards under s 189 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and under regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
3. The first respondent did not submit a response. Following a case management hearing on 9 August 2021, the claim form was also served on the second respondent who submitted a response on 25 August 2021. The second respondent confirmed that the first respondent was in administration, that while part of the first respondent's business had transferred to a third party, the York St Helen's Square branch had not done so; and that the second respondent did not intend to attend this hearing. The second respondent asked that their response be taken as their representations.
4. On 14 September 2021, both claimants withdrew their claims for notice pay, holiday pay, arrears of pay and under the Transfer of Undertakings(Protection of Employment) Regulations 2006.
5. The claimants also indicated that they were content for the matter to be determined in their absence.

## Issues

6. The issues to be determined are therefore as follows:
7. Did the first Respondent fail to comply with its obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 - in that:
  - a. it failed to give affected employees the opportunity to elect representatives and neither did it provide the required information under section 188(4) of the Trade Union and Labour Relations (Consolidation) Act 1992;
  - b. consultation did not take place in good time and at least 30 days before the first of the proposed dismissals was due to take effect;
  - c. information about the proposed redundancies was not provided to the Claimants in writing.

- d. it failed to consult with the Claimants on ways of avoiding the dismissals and reducing the number of employees to be dismissed and mitigating the consequences of the dismissals and with a view to reaching agreement?
8. Are the Claimants entitled to:
- a. a declaration that the Respondent failed to comply with its obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and
  - b. a protective award under sections 189(2) to (4) of the Trade Union and Labour Relations (Consolidation) Act 1992?

### **Findings**

9. Each of the claimants provided a signed witness statement and there was a file of relevant documents. I have considered those documents and make the following findings from them.
10. Both claimants were employed by the first respondent from 18 December 2019 until 24 April 2020. They both worked in the York St Helen's Square Branch of Carluccio's, Mr Razzano as a Team Member, and Mr Resane as a sous chef. The first respondent entered administration on 30 March 2020.
11. On 31 March 2020, the claimants were informed that they would be furloughed with effect from 1 March 2002. They were required to consent to that by 3 April 2020. On 17 April 2020 the claimants' general manager, Anthony Gruitt, informed them that the first respondent's premises were being sold but that there was no interest in the York St Helen's Square branch.
12. On 20 April 2020, Mr Gruitt informed the claimants by text message that they would be made redundant on Friday 24 April 2020 and would remain on furlough in the interim. On 24 April 2020, the claimants attended a video call with the administrator who provided some information about claiming money form the redundancy payments office and claimant universal credit.
13. There was no consultation with the claimants about the redundancy and the claimants were not told to elect employee representatives. No Trade Unions were recognised by the second respondent. Consequently, there was also no consultation with any representatives on behalf of the claimants.
14. I find that there were at least 23 people employed to work at the York St Helen's Square branch of Carluccio's operated by the first respondent and where the claimants worked.

### **The law**

15. Section 188 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides (as far as is relevant)

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.

(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 45 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are—

(a) 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

(b) in any other case, whichever of the following employee representatives the employer chooses:—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

...

(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.

Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

16. The meaning of establishment is the unit to which the workers made redundant are assigned.

17. Redundancy is defined in s 195 TULRCA as follows:
- (1) In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.
  - (2) For the purposes of any proceedings under this Chapter, where an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant.
18. S 188A imposes obligations on the First Respondent in respect of the election of employee representatives. It says:
- (1) 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;
    - (i) the election is conducted so as to secure that—
      - (i) so far as is reasonably practicable, those voting do so in secret, and
      - (ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

19. Section 189 TULRCA 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—

(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.

(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.

(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied.

(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 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 employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

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

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

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

(5A) Where the complaint concerns a failure to comply with a requirement of section 188 or 188A, section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(b).

(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.

20. The length of the protected period under s 189(4) shall be 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. In *Susie Radin LTD v GMB and others* [2004] EWCA Civ 180, Gibson LJ 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 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”.*

21. It is clear, therefore, that the starting point for the protected period is 90 days and it will be for the First Respondent to show if there are any mitigating circumstances justifying a reduction.
22. In respect of the Second Respondent's potential liability, I refer to the following provisions in Part XII of the Employment Rights Act 1996.

182 Employee's rights on insolvency of employer

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

- (a) the employee's employer has become insolvent,
- (b) the employee's employment has been terminated, and
- (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.

23. By section 184 (1) and (2)(d), payments under a protective award are included in section 182(c). Section 185(b) provides that,  
  
“in relation to a basic award of compensation for unfair dismissal and to remuneration under a protective award so made, means whichever is the latest of—
  - (i) the date on which the employer became insolvent,
  - (ii) the date of the termination of the employee's employment, and
  - (iii) the date on which the award was made”.

24. In this case, therefore, the appropriate date is the date of this judgment.



25. The limits to which payments are subject are set out in section 186 which provides (as at the date of the claimants' dismissal):
- (1) The total amount payable to an employee in respect of any debt to which this Part applies, where the amount of the debt is referable to a period of time, shall not exceed—
- (a) £538 in respect of any one week, or
- (b) in respect of a shorter period, an amount bearing the same proportion to £538 as that shorter period bears to a week.
26. The effect of these provisions is that the Second Respondent may be liable for any protective award made in respect of any employees in circumstances where the employer is insolvent, but subject to a statutory cap on a week's wages.

### Conclusions

27. The claimants were employed at an establishment that employed at least 20 people. It seems likely that each branch was an establishment and that was where the claimants worked, but in any event if more than 20 people were employed at one branch, then more than 20 people would have been employed across the whole of the respondent. That branch closed and all of those employees were made redundant and they were all made redundant on the same day. It is clear that the employees were dismissed for reasons unrelated to the individuals concerned so that they all, including the claimants, fell within the definition in s 195 TULRCA.
28. Therefore, the first respondent proposed to dismiss as redundant at least 20 people from one establishment (York, St Helens Square) within a period of 90 days and the obligations under s 188 and s 188A above (to elect representatives and consult about the proposed redundancies) were triggered.
29. No steps were taken under section 188A to elect appropriate representatives or under s188 to consult with other appropriate representatives.
30. There was no trade union recognised by the First Respondent and no body of employee representatives in place who had authority from the employees to receive information and be consulted in accordance with section 188(1B) TULRCA. The First Respondent was therefore obliged to make arrangements under s 188A TULRCA for the election of employee representatives. It took no such steps.
31. As there was no recognised Trade Union and no other employee representatives, the claimants are entitled to bring their claims under s 189(1)(a) of TULRCA and the claimants' complaint under s 189 (1) TULRCA that the First Respondent failed to comply with either s188 or s188A.

32. It is for the First Respondent to show that there are mitigating circumstances so that the protected period should be reduced to less than 90 days. The First Respondent has taken no part in proceedings and, in any event, took no steps at all towards discharging its obligations to consult.
33. I therefore make an order that the First Respondent shall pay remuneration for the protected period to the claimants. The protected period is 90 days commencing on 24 April 2020.
34. In the event that the First Respondent is insolvent, the liability shall fall to the Second Respondent subject to the limits set out in part XII of the Employment Rights Act 1996

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Employment Judge Miller  
8 November 2021