Case Number 1401865/2020
Code: V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Ms X Wu Holmes	Audiogum Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 16th April 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: in person
For the Respondent: Mr J Allsop, Counsel

JUDGMENT

The judgment of the Tribunal is that

(1) The claimant's complaint under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act) of a failure by the respondent to comply with the requirements of section 188 of the 1992 Act are well-founded.

(2) The Tribunal orders the respondent by way of protective award under section 189(3) of the 1992 Act to pay to the claimant a payment equivalent to remuneration for the period of 85 days beginning on 7th February 2020.

(3) The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award.

REASONS

Issue

1. The claimant brings a complaint under S189 Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA) of a failure by the respondent to comply with the requirements of section 188 of the 1992 Act.

Proceedings and evidence

2. The proceedings were conducted by video, held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties consented, because a face-to-face hearing is not practicable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 and because it is in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

3. I heard evidence from the claimant and Mr M Boyes, former director of the respondent both of whom were cross examined. I was provided with an agreed hearing file containing the pleadings, documentary evidence and the witness statements.

Relevant findings of fact

4. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. My relevant findings of fact are as follows.

4.1 The respondent (Audiogum) was a software technology company specialising in audio software for speakers. It was a start-up company which commenced operating in a niche market and had a number of investors. It had 22 employees at the material time. The claimant was on maternity leave throughout the relevant period including at the date Audiogum went into administration.

4.2 Audiogum used on licence an internal messaging service called “Slack”. When Audiogum went into administration the fee for the messaging service was not paid and the message history was deleted and, according to Mr Boyes, was irretrievable. There is therefore no documentary evidence about the meetings, discussions, notices if any that passed between the Audiogum senior management team and employees between late 2019 and 7th February 2020. The only documentary evidence relating information and consultation provided was a series of WhatsApp messages from Ms Clayton to the claimant and Mr

Boyes diary entries which were useful to the extent they assisted in helping to pinpoint when meetings might have occurred.

4.3 The key managers in the business were Mr Jamie Robertson, the CEO, Mr S Robbins, Mr M Boyes and Ms S Clayton as the fourth member of the management team. Ms Clayton was the claimant's line manager. Whilst the claimant was on maternity leave in 2019/2020 Ms Clayton kept in touch with her by what App messages.

4.4 In September 2019 there was a change in Audiogum's main investor's status in that the exclusivity clause in the contract with Audiogum was lifted. Audiogum could search and needed to search for new third party customers beyond the main investor. Some new clients were found although that alone was insufficient because of the delay between signing a new contract and income starting to flow.

4.5 On 2nd September 2019 Ms Clayton had sent a message by WhatsApp to the claimant forwarding an update from the CEO Mr Robertson which had an upbeat tone to it, explaining that after changes to the status of the major investor, Audiogum would be a no-debt business and on paper $9.25m richer; there would be a more balanced board when new investment partners were found. The employment /management share hold remained at 30% and there was a positive balance sheet which was very strong for a three year start up.

4.6 The message referred to what comes next as bringing on board new clients and customer licensing and implementing new technology. The message ended with the comment that over the next 2 -3 three months there would be a step up in investment process. No obvious hint there of financial stress in the company.

4.7 The reality was different by December 2019. Mr Bowers states in his witness statement at paragraph 11 that at that time, the majority if not all members of the staff were aware the business was" desperately" looking for investment to allow it to continue trading. There was no evidence to support that statement.

4.8 On 1st January 2020 the senior management team flew to the United States to try and strike a deal with Bowers and Wilkins (B&W), a major manufacturer of speakers in both the UK and the USA. Mr Bowers referred to meetings with B&W relating to the acquisition of Audiogum; the impression

given was that talks were urgent, intense, with workshops with the B&W team about “deep integration” after acquisition.

4.9 On 13th January 2020 Ms Clayton sent a WhatsApp message to the claimant informing her that the senior management team had been in the USA since 1st January; she commented that there were lots of investment discussions and also attendance at a big technological event.

4.10 Whilst in the United States, the senior management team were contacted by Audiogum’s accountant on 13th January 2020 who made a suggestion that they might like an introduction to an administrator with whom he was acquainted.

4.11 On 14th January 2020 the senior management agreed to contacting administrators to “be on the safe side” in case the negotiations with B&W failed. By 16th January 2020, no deal had been reached with B&W and Mr Boyes and his fellow senior managers returned to the UK.

4.12 It is Mr Boyes case that on return to the UK there was a meeting with staff on 16th January 2020. The claimant disputes that as she was not invited to a meeting on 16th January 2020. The claimant and Mr Boyes agreed that Ms Clayton was a diligent line manager. She and the claimant had a good relationship. Ms Clayton was the agreed contact for the claimant in terms of necessary communication with Audiogum during her maternity leave. The claimant is of the view that if there had been a meeting, Ms Clayton would have informed her of it; as there had been no information about any meeting on 16th January, the claimant was firm in her view that there hadn’t been a meeting. The claimant could not accept that Ms Clayton would have attended a meeting and had not invited the claimant to it the meeting.

4.13 Given the claimant’s belief in Ms Clayton, it is surprising that even if Ms Clayton had attended a, say, ‘impromptu meeting’, that she didn’t report to the claimant subsequently to bring her up to date.

4.14 Mr Boyes’ evidence was that there was a company-wide meeting on 16th January 2020 to which all staff were invited and those who could not attend personally could log in remotely. Mr Boyes could not recall whether Ms Clayton was at that meeting. Certainly the claimant was not. Mr Boyes did not know who attended that meeting. There was no follow memo sent to all staff to confirm what information had been given who to the staff attended on that day.

4.15 This situation is repeated on 20th January 2020. Mr Boyes' evidence is that there was also a company-wide meeting that day to which every member of staff was invited. At this meeting Mr Robertson had explained the company was in a poor financial state and how the B&W negotiations had progressed. Mr Boyes stated that it was made clear by Mr Robertson to staff that Audiogum would be forced to close if a deal with B&W was not forthcoming.

4.16 Again the claimant denies that she had received any communication about this meeting taking place. Ms Clayton had not mentioned it to her. Nor had she had a report from Ms Clayton about the meeting subsequently. The claimant therefore believed it could not have taken place.

4.17 On 27th January 2020 Ms Clayton emailed the claimant to inform her that she knew the claimant and been in Bristol the previous week but Ms Clayton had been off sick that day and so could not come along to catch up. She refers to the latest news that investment was till the key focus and discussions were progressing with B&W for acquisition rather than investment. She commented that there were other investment discussions going on but B&W seemed to be the most advanced. There is little to immediately set alarm bells ringing in that information. Ms Clayton then updated the claimant on the work of two named persons, Paul and Mark, being put on hold until the investment phase had gone through. She suggested the claimant contact her if the claimant had any questions or concerns. It is not clear whether that last suggestion related to the first item of information or the second, about Paul and Mark being put on hold. The claimant replied yes she had heard about B&W - it was interesting and hopefully good news. She raised no concerns.

4.18 The third occasion on which the claimant disputes that a meeting was held by the senior management team was on or around 30th January when Mr Robertson attended the office and informed staff at a meeting that everyone's job was at risk as the B&W contract was looking very shaky. Those staff attending had a lot of questions about job security.

4.19 Mr Boyes' evidence is that following this meeting on 30th January 2020 conducted by Mr Robertson, he had arranged another meeting company-wide on 31st January 2020 because he did not think Mr Robertson had provided sufficiently clear information to staff the day before.

4.20 On 30th January 2020 Ms Clayton messaged the claimant to say that Mr Robertson would be in the office on 31st January (not 30th January) and had

called a company meeting at 10am with respect to investment discussion and staff Q&As. Ms Clayton was planning to dial in and would forward the log in details to the claimant. The claimant said she would dial in.

4.21 On the 31st January 2020 the claimant logged in but missed the first four minutes of the meeting. Ms Clayton messaged her to say that Mr Robertson had started the meeting with the words *"there is a high risk that we may close – changing day by day".*

4.22 Mr Boyes then spelled out that the situation was serious if B&W did not sign the deal. It would be effectively *"all over"* .

4.23 I find that the date of the WhatsApp message, the only clear documentary evidence about the meeting, suggests that Mr Boyes got his dates confused and Mr Robertson addressed staff on 31st January 2020.

4.24 On 6th February 2020 Ms Clayton messaged the claimant to say at 10.30am that B&W had pulled out so the company was heading to shut down. She said she realised it was a short notice meeting but suggested she could catch up with the claimant later by phone. The claimant was provided with log in details for a meeting but instead she arranged to contact Ms Clayton by telephone later that afternoon.

4.25 On the same day, the senior team informed the administrators that B&W were not going to reach a deal with Audiogum. The administrators issued their engagement letter and draft statutory notices for signature. They were formally engaged at a board meeting on 18th February 2020. Audiogum entered into administration on 19th February 2020.

4.26 On 6th February 2020 all employees including the claimant were told they were being dismissed with immediate effect from 7th February 2020. Formal redundancy 'letters' were sent to staff dated 14th February 2020. On 14th February 2020 the CEO sent the claimant an email stating:

> "I am sorry to have to advise you, as discussed Thursday 6th February, that Audiogum is insolvent and is no longer in a position to pay your wages as from Friday 7th February 2020. Your role is accordingly being made redundant and your employment terminated on economic grounds as of 7th February."

Relevant Law

5. The relevant law is found in S188 Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA). Under s188 a duty falls upon an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, to 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. The consultation must include consultation about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals and has to be undertaken by the employer with a view to reaching agreement with the appropriate union representatives/elected work force representatives. S188(1)A(b) stipulates that the consultation shall begin in good time and in any event at least 30 days before the first dismissal takes effect.
s 188(4) requires the employer to disclose in writing to the appropriate representatives on a number of matters which are set out in paras (a) to (i): they include, for example, the reasons for the proposals, the numbers and descriptions of employees whom it is proposed to dismiss as redundant.

6. I was referred to several authorities:
Bakers Union v Clarks of Hove Limited [1978] IRLR 336
Susie Radin Ltd v GMB and others [2004] IRLR 400
Amicus v GBS Tooling Ltd (in administration) [2005] IRLR 68
Shanahan Engineering Ltd v Unite the Union UKEAT/0411/09/DM
London Borough of Barnet v (1) Unison (2) NSL Limited UKEAT/0191/13/RN

7. Both parties made oral submissions of which I have taken a full note. I have read and re-read and taken into account the submissions in the course of my deliberations and I therefore do not repeat them here.

Conclusions

8. By reason of S189 I find the claimant was competent to bring a claim for a protective award. It was conceded by the respondent that there was no recognised trade union in the business of Audiogum and there was also no elected work force representatives for the purposes of the redundancy dismissals on 7th February 2020.

8.1 22 members of staff were made redundant, the first 18 dismissals taking place on 7th February 2020. The start date for consultation of 30 days under S188(1A)(b) was therefore 8th January 2020.

8.2 The nub of this case is whether or not there are special circumstances which engages 188 (7) of TULRCA and, if not, are there mitigating circumstances which would allow the Tribunal to reduce the 90 day award.

8.3 Audiogum says that there are special circumstances. It relies on the negotiations with B&W suddenly failing and B&W suddenly pulling out of the negotiations to acquire Audiogum on 6th February 2020.

8.4 I was referred to **Bakers Union v Clark s of Hove Limited** at paragraphs 14 – 16, specifically to paragraph 16 in which it is stated:

> "……insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance; and that is so whether the disaster is physical or financial. If the insolvency, however, was merely due to a gradual run-down of the company, as it was in this case, then those are facts on which the Industrial Tribunal can come to the conclusion that the circumstances were not special. In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word 'special' in the context of this Act."

8.5 Was the withdrawal of B&W from negotiation to acquire Audiogum a "sudden disaster" which struck the company making it necessary to close? Looking at the chronology in this case, it appears to me that the senior management team had known they needed investment since about September 2019. By December 2019 they were "desperately" looking to find further investors. That then appeared to change from investment in the sense of shareholding, to one of acquisition of Audiogum by B&W.

8.6 The grounds of resistance and Mr Boyes witness statement refer to the financial strain that the company had been under for a prolonged period of time. Mr Boyes refers in his evidence to the business "desperately" looking for investment to allow it to continue trading. There was no evidence to support Mr

Boyes' contention that staff knew from at least December 2019 onwards that Audiogum was in a precarious situation.

8.7 Whilst the WhatsApp message from Ms Clayton to the claimant in September 2019 suggested that hopes of finding investment in Audiogum were high, that had clearly changed by December 2019. The senior management team flew to the States on 1st January 2020 in order to negotiate the acquisition of Audiogum by B&W. Despite intense negotiations they returned on 16th January 2020 with an inconclusive result.

8.8 There must have been some real concerns in the minds of the senior management team that they may not ultimately successful in the acquisition negotiations because on 14th January 2020 they thought it would be sensible to contact an administrator; they made that contact at a meeting with the administrators on 20th January 2020.

8.9 Referring to the three stages in **Bakers Union v Clarks of Hove** to show that there were special circumstances:

> " (1) were there special circumstances? If so, (2) did they render compliance with s.99 not reasonably practicable? And, if so, (3) did the employer take all such steps towards compliance with s.99 as were reasonably practicable in the circumstances?"

whilst the withdrawal of B&W may have been confirmed on or just before 6th February 2020, the potential withdrawal of B&W from acquisition negotiations should have been (and, I believe, was) foreseen earlier as a possibility by the senior management team. It simply cannot be described as 'sudden' or 'completely unexpected'. Failure of negotiations with B&W had clearly been seen as a possibility by 14th January 2020 at the end of the two weeks spent in the United States negotiating with B&W. The failure of the negotiations was not a special circumstance. The insolvency of Audiogum was not sudden – it had been anticipated.

8.10 Audiogum claims that there were four meetings with staff prior to the dismissals, at which staff where informed of the dire straits Audiogum found itself in and that its future was dependent on successfully negotiating an acquisition by B&W. It is not possible on the facts to find that it was not reasonably practicable to have undertaken more formal consultation with staff. Instead the senior management team relied on ad hoc meetings without at short notice, and it

appears that whomsoever was in the building at the time, or was connected to the Slack system, attended such meetings.

8.11 There was sufficient time to have provided more form formal notice of meetings to all staff, not just those present in the office, with the date, time and purpose of the meeting. It would have also been appropriate to have emailed all staff after each meeting to confirm what information had been given and when the next update would be. Even if that had been sent by Slack, a file copy would have been kept. None of this appears to have occurred. The senior management team knew that the B&W negotiations may not be successful as they had taken the precautionary step of contacting administrators; they had the benefit to two professional advisers by 20th January 2020 - over two weeks before the first dismissals took place. In summary I find that none of the three stages in **Bakers Union v Clarks of Hove** were met.

8.12 I then turn to the mitigating factors which might reduce the award from 90 days as stipulated in **Susie Radin Ltd v GMB & Ors.** At paragraph 45 of the judgment it is stated:

> "(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."

8.13 This is not a case where the senior management team did absolutely nothing at all about information and consultation with their work force. Their staff could not have been completely taken by surprise by the dismissals on 6th February 2020. The claimant was perhaps more surprised than other staff as she had notice only of the meeting of 31st January 2020 and no meeting before that. I find it entirely possible and impromptu meetings did take place. The

claimant was throughout her maternity leave not connected to the internal email service. Clearly the arrangement that Ms Clayton keep the claimant up to date with important issues did not work adequately.

8.14 Audiogum relies on four meetings which were described as company-wide with everyone invited, even though the claimant had knowledge of only one meeting on 31st January 2020 and a second on 6th February 2020 which she did not attend but telephoned Ms Clayton later that day. I found that Mr Boyes and Ms Wu Holmes were honest and straight forward witnesses, so is it the case that one of them is not being truthful? I do not believe so. It is more likely that the meetings on 16th and 20th January were impromptu meetings, arranged very quickly without any formality and with no written notice or memo to confirm the content of the discussions being sent subsequently to all staff. The claimant was not invited to the meetings and was unaware of them. We did not have the benefit of Ms Clayton's evidence on the matter. Mr Boyes cannot remember whether Ms Clayton was at any of the meetings on 16th, 20th and 30th January 2020. We know that both she and the claimant attended a meeting on 31st January 2020. It is not possible for us to know whether Ms Clayton attended the previous three meetings but as a senior management team member, it seems unlikely that she didn't. It is suggested by one of her WhatsApp messages on 27th January that for one of the meetings, possible on 20th January, she was off sick. But that is speculation

8.15 Given the positive character references that both the claimant and Mr Boyes gave Ms Clayton, it is odd that Ms Clayton did not message the claimant after the meetings on 16th and 20th and 30th January to notify her of what had happened if she had known of the meetings and/or had attended as a member of the senior management team. The likelihood is that there were meetings but because the claimant was not in the office at the time, and possibly Ms Clayton was not, impromptu, informal meetings took place on short notice and the claimant being on maternity leave, was completely unaware of the meetings taking place at all. I find the likelihood is that the claimant was just forgotten as she was not present in the office.

8.16 In any event, I find that there was no formal meeting on 30th January 2020 with Mr Robertson. That meeting date is not supported by the stronger documentary evidence of Ms Clayton's WhatsApp message and I find that Mr Boyes was confused as to the dates.

8.17 The duty was on Audio to consult and inform. It was for the senior management team including Ms Clayton to ensure that invitations went to all staff for attendance at briefing meetings, no matter how informal the invitation may have been. It is not enough to rely on members of staff being in the office and picking up important information because they happen to be present. It was also the responsibility of the senior management team to confirm the information imparted in meetings, in writing to all staff. The management team were being advised by professionals from 20th January at the latest. Mr Boyes says at paragraph 15 in his witness statement about the meeting on 20th January 2020:

> "shortly after this meeting we spoke with [the administrator] as we were aware the company might fail and wanted to make sure we conducted ourselves properly should a redundancy process be necessary. From that point on we kept in contact with him and his colleagues regarding the steps we were taking to try and save Audiogum."

8.18 Even late information and consultation commencing after 20th January 2020 would have been better than none at all. However no real effort was made to keep *all* members of staff informed. Mr Boyes did not know which employees he had addressed at each of the meetings and he also could not have known whether all staff had attended in person or logged in, as he had no list of staff to whom invitations had been sent, and no list of staff who had received follow-up written statements of information after each meeting. There was no written follow up confirming the content of the meetings, spelling out the consequences of the failure of the B&W negotiations, nor inviting any suggestions to avoid redundancies.

8.19 I find that Ms Claytons email of 13th January did not impart accurate or reasonably discernible information to the claimant about the precariousness of the business or the strong likelihood of redundancy. I find there was a failure to inform and consult with the claimant until the meeting on 31st January 2020. At that stage the information and consultation were too late and also did not adequately properly satisfy the requirements of S188 on informing and consulting.

8.20 It was submitted that there had not been time to conduct meaningful consultation or impart information to Audiogum's workforce because the withdrawal of B&W was sudden, on 6th February 2020. There was only a lack of time if the start date for consultation had been 6th February, but it was not. The start date occurred at the latest on 14th or 20th January 2020. There was no real explanation for why information and consultation had not been formally

commenced from either of those dates. Clearly the possibility of failure of a deal with B&W had been considered.

8.21 Without any meaningful attempt to consult in good time with the claimant on how redundancy might be avoided, it is not appropriate to criticise the claimant impliedly or directly, for failing to ask for the senior management team information or failing to make suggestions on avoiding redundancy.

8.22 Mr Boyes stressed that the senior management team had been very concerned about their staff's respective livelihoods and had decided on 6th February 2020 to put the company into administration immediately on notice that B&W had withdrawn from acquisition discussions, so that there would be enough cash in the company account to pay salaries up to the date of dismissal.

8.23 No reasonably practicable steps to consult were taken. It would however, not be correct to say that no attempts whatsoever had been made by the senior management team to keep staff informed. The senior management team were not culpable of deliberately keeping staff in the dark. They made some attempts to informally inform some of their staff about the precarious nature of the acquisition discussions, but were not sufficiently diligent to ensure that *all* staff were informed. There appeared to be zero consultation with any staff.

8.24 Stepping back and looking at the evidence, considering whether there should be reduction from the maximum award of 90 days' pay, I find that it would be just and equitable to award the claimant 85 days of gross pay. Had the claimant been invited to the meetings on 16th and 20th January 2020 and been given the information that Mr Boyes claimed he had given to other members of staff present at those meetings, I would have fixed the reduction of her award at 75 days.

8.25 Mr Allsop brought to my attention **Independent Insurance Co Ltd v Aspinall 2011 IRLR page 716**, the authority for a protective award to be made to a named individual claimant.

8.26 The respondent is advised of the provisions of Regulation 6 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, such that, within 10 days of the decision in these proceedings being promulgated or as soon as is reasonably practicable, the respondent must comply with the provisions of Regulation 6 of the 1996 Regulations and, in particular, must supply to the Secretary of State the following

information in writing: 9.1. the name, address and national insurance number of every employee to whom the award relates; and 9.2. the date of termination of the employment of each such employee.

8.27 The respondent will not be required to make any payment under the protective award made until it has received a recoupment notice from the Secretary of State or notification that the Secretary of State does not intend to serve a recoupment notice having regard to the provisions of Regulation 7(2). The Secretary of State must normally serve such recoupment notice or notification on the employer within 21 days of receipt of the required information from the respondent.

Employment Judge Richardson
Date: **20th April 2021**

Judgment sent to Parties: 29 April 2021

FOR THE TRIBUNAL OFFICE