



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107672/2021 and 4107673/2021

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Held remotely on 5 May 2022

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Employment Judge D Hoey
Member G Doherty
Member A McCaig

Mr Craig Russell

First Claimant
In Person

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Mr Andrew Johnston

Second Claimant
In Person

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25 R Realisations 1 Limited (in Liquidation)
(formerly Redeem UK Ltd)

Respondent
Not present and
Not represented

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The unanimous judgment of the Tribunal is that:

1. In terms of section 189(5) of the Trade Union and Labour Re - ms
(Consolidation) Act 1992 it was not reasonably practicable for the claimants
to have lodged their claim within 3 months following their dismissal and the
claim was lodged within such further period as was reasonable. The Tribunal
40 therefore has jurisdiction to consider the claims.

2. 2> respect of both claimants (who are affected employees), the Tribunal makes the following decoration:
 - a. The respondent was proposing to dismiss as redundant more than 20 employees at one time within 90 days and failed to elect employee representatives (there being no recognised trade union) in breach of section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992;
 - b. The respondent failed to consult about the dismissals in breach of section 188 (1A), section 188(2) and section 188(4).
3. The claimants are both entitled to a protective award against the respondent, the protected period being 90 days from 7 July 2020, the date of the first dismissal.
4. The Employment Protection (Recoupment of Benefit) Regulations 1996 apply to this award.
5. The remaining claims are dismissed.

REASONS

1. By ET1 accepted on 16 February 2021 the claimants sought a protective award. The respondent in this case is the company registered at Companies House with company number 09958966. It was formerly called Redeem UK Limited and changed its name to R Realisations 1 Limited. The respondent's designation is accordingly changed to reflect the correct company name. The respondent is in creditor's voluntary liquidation.
2. The claimants confirmed that while reference was made to a redundancy payment and notice pay, the only claim they were pursuing before this Tribunal was in respect of a protective award. The remaining claims are therefore dismissed.
3. The hearing was conducted remotely with the claimants attending and presenting their position to the Tribunal verbally and in writing. The respondent had not defended the claim but the liquidator was aware that the

claims were being considered, the claimant having informed them as to the position.

4. The preliminary issue in this case was whether or not the claims should be allowed to proceed given they were lodged outwith the 3 month time limit. The substantive issues arising in this case was whether or not the claimant was entitled to a protective award, there having been no prior warning or consultation before the respondent ceased to trade (and the claimant was dismissed) given the respondent had a business unit with over 20 staff and there being no recognised trade union and no elected representatives.
5. In this case the claimants had understood that a previous judgment which had been issued in a case raised by another employee had applied to them. That was because the judgment in that case stated that the Tribunal had decided to make a protective award "in respect of the claimant and all employees who were employed at the Bathgate site and were made redundant". The claimants understood that award would apply to them (and they had understood that would be sufficient from discussions with the then administrator). They then lodged their claim with the redundancy payments office and once they discovered that despite the terms of the judgment, unless he had a judgment that referred to him specifically, their protective award claims would not be allowed to proceed, the current claim was lodged.

Facts

6. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it orally and in writing.
7. The respondent was in the business of mobile phone recycling.
8. The first claimant commenced his employment with the respondent in July 2019 until the termination of his employment on 7 July 2020. The second claimant commenced his employment with the respondent in 25 July 2016 until the termination of his employment on 7 July 2020.

9. The first claimant was employed as Applications Support on a gross annual salary of £30,000. The second claimant was employed as Senior Software Developer on a gross annual salary ■ ■ 1
10. There was no union recognised in the workplace. No employee representatives were elected. The claimants worked in Bathgate. There were more than 20 employees at the Bathgate premises operated by the respondent. The respondent's business was run from their head office with all decisions of a management nature being taken there.
- 10 11. On 3 July 2020 the respondent informed the claimants (and all other employees) that they had gone into administration. The claimants were, with all other employees, informed on 3 July 2020 that the majority, if not all, employees were being made redundant. There was no discussion with the claimants as to redundancy nor notice or consultation.
- 15 12. On 7 July 2020, the claimants found out that their employment with the respondent had ended and they were both dismissed as redundant. This came as a shock given there had been no prior notice, discussion or consultation.
- 20 13. The claimants had understood that a colleague had raised a claim for a protective award and that such a claim would cover them (and all staff). That understanding was assisted during discussions with the then administrator who suggested the claimants would be covered by the claim that had been lodged. Both claimants proceeded upon the basis that the claim that had been lodged by their colleague would cover their position and there was no need to lodge a separate claim.
- 25 14. A judgment was issued in that case (case number 4104254/2020) on 1 December 2020. That judgment stated that the Tribunal had decided to make a protective award "in respect of the claimant and all employees who were employed at the Bathgate site and were made redundant". That confirmed what the claimants understood, namely that the judgment would apply to both
- 30 of them and there was no need for a separate Tribunal claim.

15. Around February 2021 the claimants were told by the Redundancy Payments Office that despite the clear terms of the judgment, they required to lodge a separate claim with the Tribunal and without a separate judgment in their own names, their claims would not proceed.

16. The claims were lodged with the Tribunal on 16 February 2021.

The law

17. Section 188 (1) of Trade Union and Labour Relations (Consolidation) Act 1992 states: Where an employer is proposing to dismiss 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.

18. Section 188 (1A) states: The consultation shall begin in good time and in any event— (a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect...

19. Section 188(2) provides: the consultation shall include consultation about ways of— avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives...

20. Section 188(4) states that for the purposes of the consultation the employer shall disclose in writing to the appropriate representatives (a) the reasons for his proposals, (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant, (c) the total number of employees of any such description employed by the employer at the establishment in question. (d) the proposed method of selecting the employees who may be dismissed. (e) the proposed method of carrying out the dismissals, with due regard to

any agreed procedure, including the period over which the dismissals are to take effect, (fj 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 employers undertaking in which those agency workers are working, and (i) the type of work those agency workers are carrying out.

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21. Section 188A provides for the election of representatives as follows: The requirements for the election of employee representatives under section 10 188(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 15 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 20 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 25 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
employee representatives;
- h. the employees entitled to vote may vote for as many candidates as
 . ; e **are** representatives **to be** elected to re **>re** i **or**, if there
 are to **be** representatives for particular cl< se ye ;s n
 for as many candidates as there are representatives to be elected to
 represent their particular class of ployee;
- i. the election is conducted so as to secure that- so far as is reasonably
 practicable, those voting do so in secret, and (ii) the votes given at the
 election are accurately counted.

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22. Section 189(1) provides: Where an employer has failed to comply with a
 requirement of section 188 or section 188A, a complaint may be presented to
 an employment tribunal on that ground - in the case of a failure relating to the
 election of employee representatives, by any of the affected employees or by
 any of the employees who have been dismissed as redundant: in the case of
 any other failure relating to employee representatives, by any of the employee
 representatives to whom the failure related, in the case of failure relating to
 representatives of a trade union, by the trade union, and in any other case,
 by any of the affected employees or by any of the employees who have been
 dismissed as redundant.

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23. **Any** protective **period** should **commence** on **the first** day of **the dismissals** in
terms of section 189(4) - ch states that the protected period begins with the
 date on which the first of the dismissals to which the complaint relates takes
 effect, or the date of the award, whichever is the earlier, and is of such length
 as the tribunal determines to be just and equitable in all the circumstances
 having regard to the seriousness of dyer's default in complying
 any requirement of section 188 but shall not exceed 90 days.

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24. **Peter Gibson LJ** in **the Court of App f sie Radin Ltd v GMB and others**
[2004] IRLR 400 CA (paragraph **45**) said:

I suggest that to a?deeming m Uni evimmse to mmr discredon totoner to make a protective award and for what period, should have the following matters in mind:

- 5 (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.*
- 10 (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.*
- 15 (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.*
- 20 (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 is, 'onsider appropriate.'*
- 25 25. A claim should be brought in accordance with section 189(5) which states that a Tribunal shall not consider a complaint unless it is presented to the Tribunal (a) before the dismissals take effect, (b) during the 3 month period beginning with 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 3 months, within such further period as it considers reasonable.
26. The Employment Appeal Tribunal has confirmed that the case law in relation to time limits pertaining to unfair dismissal applies in this area (see *GMB v Hamm* 2000 Ail ER (D)1830).

27. It is a question of fact in each case whether it was reasonably practicable to present a claim in time, the onus being on the claimant to satisfy the Tribunal that the claim should proceed.

If it was not reasonably practicable, the Tribunal should consider whether the period was reasonable to have done so. The Tribunal should exercise its discretion judicially in determining this matter.

Decision and reasons

29 The Tribunal was able to reach a unanimous decision following deliberation in relation to the evidence that was presented and the applicable law.

10 Preliminary issue

The first issue is whether or not it was reasonably practicable for the claimant to have lodged his claim in time. The test here is one of reasonable practicability, which differs from the just and equitable test pertaining in discrimination cases. The claimants both reasonably believed that a claim had already been lodged that covered his position and the judgment that was issued in December 2020 specifically stated that it covered all employees (which would have included both claimants). The belief of the claimants was reasonable and was supported by the terms of the judgment. While it was practicable in the sense of feasible to have lodged a claim within the 3 month period following their dismissal, on the facts of this case the Tribunal concluded that it was not reasonably practicable for them to have done so, having reasonably believed their position was covered by the other claim, which] - it specifically supported their position.

31. It was only in February 2021 that the claimants were advised that the judgment on the face of it applied to him, would not be acceptable. The claimants lodged their claim shortly following that discussion. They lodged their claim within such further period as was reasonable.

32. The Tribunal is satisfied it was not reasonably practicable to have lodged their claims within the 3 month time frame given the claimants' knowledge of the position. They acted reasonably and expeditiously. It became clear that

a separate claim required to be made by Coy did so and lodged the claim within such further period' as was reasonable.

33. The Tribunal therefore had the power to consider the claim.

Merits

34. The Tribunal then considered the merits of the claim. The Tribunal was satisfied that the respondent was under a duty to comply with the requirements of section 188 and that it failed to do so.

10 35. There were 20 or more staff employed at the same establishment in respect of whom the respondent proposed to dismiss as redundant. The claimants were both affected employees.

36. The requirements of the legislation had not been followed as no consultation took place with any elected representative and no steps were taken to do so. No reasons were given for such a failure. The explanation of being unable to trade during administration does not explain why the rules were not followed.

15 37. The claimants are entitled to a protective award.

38. The Tribunal concludes that it is just and equitable to make an award for a protected period of 90 days in line with the authorities set out above. There was no mitigation or reason for the failure. It is just and equitable to make this award.

20 39. The Tribunal at this stage makes no financial award but gives a judgment that the claimants are entitled to a protective award in the terms set out above. The claimants must then seek payment of their individual award from the respondent (or the Secretary of State), quantifying the same. Failure to pay (should that occur), or any dispute as to the amount payable, then becomes
25 a matter for a further separate claim under section 192 of the Trade Union and Labour Relations (Consolidation) Act 1992 for payment of the award.

40. The rules with regard to recoupment apply to this award and the parties should consider those rules carefully.

41. The respondent is advised of the provisions of Regulation 5 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: the name, address and national insurance number of every employee to whom the award relates and the date of termination of the employment of each such employee.
42. 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 first respondent.

Employment Judge: D Hoey
Date of Judgment: 05 May 2022
Entered in register: 12 May 2022
and copied to parties

