



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

BETWEEN:

Ms C Fuller

Claimant

and

EBS Systems Ltd (t/a Exemplar Education)
(in administration)

Respondent

ON: 8 June 2022

JUDGMENT

1. The claims of unfair dismissal, unpaid holiday pay and unpaid notice pay are dismissed on withdrawal.
2. The respondent has failed to comply with its obligations under section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992.
3. The respondent is ordered to pay a protective award to the claimant in the sum of **£6,010.72**.
4. **The protected period is 27 February 2020 – 27 May 2020 (90 days).**

REASONS

Background

1. With the agreement of the claimant this matter was dealt with on the papers. I had before me and considered the two signed witness statements from the claimant (both dated 26 January 2022) and a bundle of documents which included the claim form, a schedule of loss and relevant correspondence.
2. This claim was first submitted in April 2020 and was for unfair dismissal, unpaid holiday pay and notice pay. It was served on the respondent with a due date

for filing any response of 30 July 2020. No response was received or has been since.

3. On 30 September 2020 the claimant applied for leave to add a claim for a declaration that the respondent had failed to comply with its obligations under section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 (the 1992 Act) and for a protective award for affected employees dismissed by the respondent under sections 189(2) to (4) of the same Act. It is not clear from the file whether that application has ever been judicially considered but in the event it has not, leave is given for that amendment to be made.
4. On 9 March 2021 the administrators of the respondent gave their consent for a claim by an individual for a protective award for lack of consultation to be commenced.
5. On 27 January 2022 the claimant confirmed that the only claim pursued is for a protective award and the other claims were withdrawn.

Relevant Law

6. The 1992 Act provides:

Section 188

(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).

(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.

...

(4) 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.
- (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.

...

Section 189

(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.

...

- (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. **Findings of Fact**

7. Having read the written evidence, I find on the balance of probabilities the following to be the relevant facts.
8. The claimant was employed by the respondent as a customer care officer from 4 March 2019. At the relevant time the claimant's salary was £22,440 with a gross weekly pay of £467.50 and net weekly pay of £391.57.
9. On 27 February 2020 the claimant and her colleagues were given notice of immediate dismissal by reason of redundancy. The respondent failed to engage in any consultation prior to notice being given, offer any alternative employment, allow the affected employees to appoint representatives or provide any information about their redundancies. This notice was given to more than 20 employees at the establishment at which she worked, Hermitage Court, Hermitage Lane, Maidstone. There was no recognised trade union at the respondent and no appropriate employee representatives appointed or elected for consultation purposes.

Conclusions

10. The respondent failed to comply with its obligations under section 188 of the 1992 Act 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 1992 Act.
 - (b) the consultation did not take place at all, and therefore was not done in good time and at least 30 days before the first of the proposed dismissals was due to take effect;
 - (c) the information about the proposed redundancies was not provided to the claimant in writing; and

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(d) it failed to consult with the claimant on ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals with a view to reaching agreement.

11. Accordingly it is appropriate to make a declaration that the respondent has failed to comply with its obligations under section 188 of the 1992 Act.
12. Further, it is just and equitable in all the circumstances having regard to the seriousness of the respondent's default in complying with the relevant requirements to make a protective award for the claimant in the sum of **£6,010.72** ($£467.50 \div .7 \times 90$).

Employment Judge K Andrews

Date: 8 June 2022

Corrected 18 June 2022