Case number: 2601825/2021

EMPLOYMENT TRIBUNALS

Claimants: Mr P Woollands
Mr A Bellamy
Mr S Dean
Mr L Tidmarsh
Mr G Dolan
Mr M Dolan
Mr G Bull
Mr C Hand
Mr G Green
Mr D Atkins
Mr P Jones
Mr A Huxtable
Mr G Taylor
Mr N Peregreen

Respondent: GBM MANUFACTURING LIMITED (In administration)

Heard: In chambers

On: 1 March 2022

Before: Employment Judge Clark (sitting Alone)

Representation

Claimants: Written representations
Respondent: No response presented

JUDGMENT

The judgment of the tribunal is that: -

1. It is declared that the respondent failed to comply with its duties under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1989 in respect of all the individual claimants named above.

2. The claimants' claims for a protective award succeed.

3. The protective period commences on 4 August 2021.

4. It is just to order the respondent to pay remuneration to each of the above claimants for a period of 90 days (the protective period).

5. The recoupment provisions apply.

REASONS

1. Introduction

1.1 This is a multiple claim for protective awards, each brought on an individual basis under s.189(1)(a) and (d) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). It arises from wholesale redundancy dismissals upon the respondent entering administration. All of the first respondent's employees were affected as the business closed but I am only directly concerned with the 14 claimants before me as this is not brought as a representative claim.

1.2 There has been no ET3 response filed by the respondent. Today's final hearing therefore proceeds as a rule 21 determination before me sitting alone. In view of the background and the nature of the application, the parties have invited me to determine the matter on written submissions.

1.3 Five of the claimants are represented by solicitors (Mssrs Atkins, Jones, Huxtable, Peregreen and Taylor). The others presented claims individually in person. The insolvency practitioner is Butcher-Woods Corporate Recovery. By various correspondence it has given its consent for the claims to proceed in respect of protective awards only. Some individual claimants had also presented other types of claims. Those other claims remain subject to the statutory stay in administration although they appear to be claims which the State may underwrite to some degree.

2. Issues.

2.1 The live issues for me are: -

a) Whether the claimants can bring these claims.

b) Whether the duties under s.188 of the 1992 Act was engaged.

c) If the duty was engaged, whether the employer has failed to comply with that duty and if so to what extent.

d) If there was a failure, whether to make a protective award in addition to making a declaration to that effect.

3. Evidence

3.1 The evidence before me is found in the various particulars of claims provided by the claimants. It is complicated slightly by the different representation. The represented claimants have prepared a structured bundle and brief written submissions. The unrepresented claimants have sent an email to the tribunal (copied to the respondent) confirming that they rely on their claim and inviting me to determine the claim on that basis. I have also seen the letter of dismissal sent, or given, to the claimants dated 4 August 2021.

3.2 Most of the information before me has been sent to the tribunal within the necessary advance period for the purpose of rule 42 of the 2013 rules of procedure. So far as the bundle and written submissions were received on Friday 25 February 2022 they do not comply with the rules. However, the bundle is essentially a pagination of the existing documentation in this claim and known to the respondent. The accompanying written submissions are essentially that which has been pleaded in the represented claimants' ET1. There is no practical effect in substance of allowing or refusing those late documents as the information and argument remains before me either way. For the sake of formality, I am satisfied it would not be in the interest of justice for these to be excluded and, to the extent it is necessary, I apply rule 6 to waive that formality.

4. The Facts

4.1 I reach the following findings of fact on the balance of probabilities.

4.2 I find each of the claimants was an employee of the Respondent. I am told the Respondent was a building and construction company.

4.3 I find there was no trade union recognised in this employer for any purposes, for any category of staff or representing any area of work activity. I have no basis to find that there were any existing employee representatives already elected with a sufficient remit from the employees to receive information and to be consulted in respect of these dismissals. As and when engaged, the process of statutory consultation would therefore have been required to start with the process of electing employee representatives.

4.4 I find the respondent operated out of one establishment only, namely its premises at the Northedge Business Park in Alfreton Rd, Derby. I therefore find all Claimants were employed at that one establishment. Some of the claimants can show

that their contracts of employment expressly stated this. I infer all claimants had that provision in their contract and, in any event, I find as a fact that that was the place to which they were all assigned for present purposes. The claimants before me number just 14 out of a total of approximately 70 employees at the time of the dismissals. I find all 70 were assigned to that one establishment. I find all 70 were dismissed on the ground of redundancy on 4 August 2021.

4.5 On that day, some of the Claimants had attended work. They were called into a meeting and given a letter. The letter confirmed that the Respondent was entering into administration. It set out that their employment was terminated with immediate effect. For present purposes, I find all employees were made redundant with effect from 4 August 2021. I am told the letter also provided brief and basic advice on how the Claimants could claim for their statutory payments as part of the insolvency proceedings. I find anyone who was not in work that day was sent the same, or materially the same, letter by post.

4.6 I understand the insolvency practitioners were appointed as administrators around this time. The official public record shows the administration started the day before, on 3 August 2021.

4.7 Even from those basic facts, it is clear and apparent that the Claimants were dismissed without notice and without any prior warning or consultation. The Respondent did not attempt any consultation nor is there any evidence of any attempt to identify and elect employee representatives for that purpose.

5. The law

5.1 The principal domestic provision setting out the duty to consult in certain circumstances is section 188 of the 1992 Act. It provides, so 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).

(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 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.

(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.

…

(8) This section does not confer any rights on a trade union, a representative or an employee except as provided by sections 189 to 192 below.

5.2 Section 188(1B) is supplemented by s.188A which sets out the requirements for the election of employee representatives.

5.3 As to the right to present a claim for a protective award, s.189 of the 1992 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.

5.4 As to the protective award itself, the relevant part of s.189 of the 1992 act provides

(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. . . .***

5.5 The law on quantifying any protected period is relatively settled. I have had regard to the guidance found in GMB v Susie Radin Ltd [2004] EWCA Civ 180 and accept the proposition advanced by the first respondent that this is meant to be punitive, that any award should be proportionate to the degree of fault or failing; that the starting point in a case of total failure is the maximum, with a downward adjustment beign applied to reflect any features justifying a reduction and that it is a matter for me, assessing the facts and applying our just and equitable discretion.

6. Discussion and Conclusions

6.1 I start with the claimants' standing to bring these claims. I am satisfied that all the individual claimants are entitled to present their claim. They each qualify as being both an affected employee and having been dismissed as redundant. There was no relevant trade union. There were no relevant employee representatives. That informs the nature of the statutory duty or duties against which I then assess the extent of failure when arriving at the appropriate protected period. Each claimant can, therefore, present a claim in respect of the failure to facilitate the election of employee representatives under s.189(a) and as an affected and/or dismissed employee under s.189(d) of the 1992 Act. However, it is important to record that this does not mean they bring their claim in a representative capacity for the benefit of other employees as would be the case were it brought by a trade union or employee representative. Each claim that succeeds does so only for the benefit of the individual claimant.

6.2 I then move to consider the qualifying requirements engaging the duty as there can be no protective award made against a respondent that was not under any statutory duty to consult. First, there is no issue in this case concerning the meaning of 'establishment'; there was only one. There is no doubt that there were more than 20 redundancies proposed at that establishment within a 90 day period as all 70 were made redundant at the same time. There is no issue that I can see in this case that might require me to examine the wider definition of 'redundancy'. There is equally no issue that I can see that all the claimants were employees, affected employees and that they were dismissed as redundant.

6.3 I am therefore satisfied that the duty under s.188 to engage in collective consultation and, in this case, facilitate the election of employee representatives was engaged.

6.4 The next question is whether that duty was in anyway discharged, either in its substance or over a reduced period of time. There are, of course, two areas of duty engaged and the first thing to note is that, in respect of the obligation to facilitate the election of employee representatives, the burden rests with the respondent under s.189(1B) and 188A of the 1992 Act. It has not discharged that burden. Looking at the circumstances in totality, I cannot say that there was any attempt at discharging the duty in respect of information and consultation. However, before settling on that conclusion it is important to remember the statutory remedy of a protective award is a punitive provision and deliberately so. It is therefore incumbent on the tribunal to have regard to any partial compliance with the relevant duties. Such factors as may be identified may then go to reduce the extent to which the maximum protective award can be reduced.

6.5 In this case I am unable to identify anything. The most that can be said is that the employees were told in writing of their dismissal and provided with some guidance on obtaining some financial payments through the state. That does not provide any meaningful basis for saying the obligations under s.188 have been partly discharged and or it is de minimis. The respondent business appointed administrators on 3 August, the employees were told they were dismissed on 4 August. Whilst there is nothing before me to explain that urgency, I can infer from experience of other cases that there are often obvious practical reasons why that had to be the case. However, it also means there is nothing to mitigate the failures engaged in this case which might permit me to step back from the maximum award. I should add, there is scope in theory to argue special circumstances under s.188(7) of the 1992 Act although the opportunity to do so in insolvency circumstances is limited. In any event, there is nothing put to me in that regard.

6.6 For those reasons I am satisfied a protective award is due and that, applying the ratio of Susie Radin, I am obliged to impose a protective award at the maximum period of 90 days.

Employment Judge Clark

1 March 2022