Case number: 2601737/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr T Bethell

Respondents: GBM Manufacturing Limited (In administration)
Secretary of State for Business, Energy and Industrial Strategy

Heard at: Nottingham

On: 12 August 2022

Before: Employment Judge Clark (sitting Alone)

Representation

Claimant: Mr Bethell in person
Respondent 1: No response presented
Respondent 2: Written submissions

JUDGMENT

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.
2. The claimant's claim for a protective award succeeds.
3. The protective period commences on 4 August 2021.
4. It is just to order the respondent to pay remuneration to the claimant for a period of 90 days (the protective period).
5. The recoupment provisions apply.
6. The first respondent shall pay to the claimant the gross sum of £1345.50 as compensation under regulation 14 of the Working Time Regulations 1998 for accrued by untaken annual leave outstanding at the date of termination.
7. Upon the claims for arrears of pay, notice pay and a statutory redundancy payment having been met by the second respondent, those claims are dismissed upon withdrawal.

REASONS

1. Introduction

1.1 This is now a claim for a protective award and accrued but untaken holiday outstanding at the date of termination. Claims for a redundancy payment, arrears of pay and notice pay are withdrawn upon them being met by the Secretary of State. A payment was also made to Mr Bethell for holiday pay believed to equate to one day. I understand that payment was so limited as Mr Bethell was unable to access the records of his holiday and pay which had previously been available to him electronically until the company entered administration. His case is that he had a greater entitlement outstanding. I have permitted that claim to proceed on that basis, subject to credit being given for any relevant holiday payments already paid towards that entitlement.

1.2 The claim for a protective award is 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 Mr Bethell's claim. I am, however, aware that other similar claims have been presented by others.

1.3 There has been no ET3 response filed by the respondent but consent for the claim to proceed was given by the Insolvency Practitioner on 28 September 2021.

1.4 The secretary of state has been joined as there may be a claim on the national insurance fund.

1.5 Today's final hearing proceeds before me sitting alone by written consent of all three parties.

2. Issues.

2.1 The live issues for me in the protective award claim are: -

a) Whether the claimant can bring the claims.

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

2.2 The live issues in the accrued holiday compensation claim are: -

a) To determine the proportion of leave entitlement outstanding at the date of termination.

b) The amount taken in that leave year and quantifying any outstanding balance.

3. Evidence

3.1 The evidence before me is found in the particulars of claim and further documents provided by Mr Bethell. The second respondent cannot speak to the facts but provides a helpful written submission on the issues in the protective award claim.

3.2 I have required Mr Bethell to give oral evidence on affirmation.

4. The Facts

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

4.2 I find the claimant was an employee of the Respondent. I understand from him that the respondent was a manufacturing company producing products mainly in the rail sector.

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 find there was no existing employee representatives at all, still less any 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 the Claimant was employed at that one establishment. He has shown a contract of employment which expressly states this. Mr Bethell's evidence was that there were at least 40 or so employees although he did not see them all. I find all employees were assigned to that one establishment.

4.5 The claimant's employment commenced on 25 June 2018 as a welder fabricator. From 2 September 2019 he was promoted to Team Leader. His contract of employment shows a holiday entitlement of 20 days plus bank holidays. After two years' service, that basic entitlement increased by 1 day each year up to a maximum of 25 days.

4.6 In 2020, the claimant and others had been unable to take all of their annual leave due to the effect covid had on the business and their working arrangements. He had carried over 5 days into the 2021 leave year which renewed each year on 1 January. The leave year commencing on 1 January 2021 was the first year that Mr Bethell accrued an additional one day basic annual leave. I find that is a contractual

entitlement in addition to his statutory entitlement under the working time regulations. There was no contractual entitlement to have outstanding contractual leave paid on termination of employment. That one day must therefore be deducted from any outstanding leave as I have no basis in law to order it to be paid. Similarly, I find there was no relevant agreement affecting the operation of regulation 14 of the Working Time Regulations 1998.

4.7 I find that Mr Bethell took paid holiday on 1 January, 2 April, 5 April and 5 days taken in March 2021. That is 8 days.

4.8 In late April 2021, Mr Bethell was again furloughed during which he received 70% of his normal remuneration. He received no contact from his employer. He was not paid normal pay in respect of the further bank holidays that fell between April and his dismissal and I do not count them as paid annual leave taken.

4.9 On 4 August 2021 a colleague who was also on furlough leave contacted him to pass on information he had been told that the company had gone into liquidation. Mr Bethell managed to contact the purchasing manager, Gary Taylor, who confirmed that the business had shut down.

4.10 In fact, I find all staff were dismissed on the ground of redundancy on 4 August 2021. A few days later Mr Bethell received his own letter from the Insolvency Practitioner informing him of his dismissal with immediate effect and directing him to the redundancy payments service.

4.11 At the time of the termination of his employment, he was employed as a Team Leader on a weekly wage of £585 gross and £445 net.

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

4.13 There is no doubt that the Claimant's employment was terminated 4 August 2021. He was 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.

4.14 On 11 August 2021, the claimant contacted ACAS to commence early conciliation. Day B was the next day, 12 August 2021. On the basis that C had knowledge of his dismissal, albeit indirectly, on 4 August 2021, the time for presenting a claim expired on 3 November 2021. The claim was presented on 13 August 2021 that is well in time.

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 being 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.

5.6 The statutory rights to paid annual leave are set out in regulations 13 and 13A of the Working Time Regulations 1998. Regulation 14 provides: -

> ***Compensation related to entitlement to leave***
> ***14.—(1) Paragraphs (1) to (4) of this regulation apply where—***
> ***(a)a worker's employment is terminated during the course of his leave year, and***
> ***(b)on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.***
> ***(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).***

(3) The payment due under paragraph (2) shall be—

(a)such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b)where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

(A x B) - C

where—

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(5) Where a worker's employment is terminated and on the termination date the worker remains entitled to leave in respect of any previous leave year which carried forward under regulation 13(10) and (11), the employer shall make the worker a payment in lieu of leave equal to the sum due under regulation 16 for the period of untaken leave.

6. Discussion and Conclusions

6.1 I start with Mr Bethell's standing to bring his claim for a protective award. I am satisfied that he is entitled to present the claim. He qualifies 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. Mr Bethell 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 he brings his claim in a representative capacity for the benefit of any other employees as would be the case were it brought by a trade union or employee representative. A successful claim succeeds 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 staff, that is at least 40 people, were dismissed 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 might cast doubt on Mr Bethell being an employee, an affected employee or that his employment was terminated such that he was 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 in any event 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.

6.7 As to his annual leave, his contractual entitlement for the leave year commencing 1 January 2021 was 21 days plus the 5 days carried over from 2020 plus bank holidays. Converting bank holidays to the 8 days that a 5-day week worker would enjoy gives a total entitlement of 34 days, or 6.8 weeks. That is one day in excess of the statutory

entitlement. I have no basis in law to make order the payment of that additional contractual entitlement meaning the statutory entitlement was 6.6 weeks for the full year. For the part year to 4 August 2021, the proportion of that entitlement is 3.9 weeks (19.5 days). From that I must deduct the amount of paid annual leave actually taken. That is 3 bank holidays and 5 days holiday. Deducting those 8 days leaves 11.5 days or 2.3 weeks outstanding which, at the applicable gross weekly rate of pay of £585 equates to £1345.50.

Employment Judge Clark

12 August 2022