



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111589/2019**

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**Employment Judge R Gall**

**Mr J Hunter**

**Claimant**

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**Border Cars Group Ltd (in Administration)**

**Respondent**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that: –

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1. It is found and declared that the respondents failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and

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2. The Tribunal makes a Protective Award in terms of Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of the claimant. The claimant was made redundant on 11 July 2019. The respondents are ordered to pay remuneration to the claimant for the protected period of 90 days, that being the period from 11 July 2019 until 9 October 2019.

### **REASONS**

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1. This case was brought by the claimant seeking a protective award.
2. As the respondents are in administration, consent of the administrator to bring proceedings was required before the cases could be heard. The claimant has obtained that consent. The administrator was therefore aware of the claims being made. No form ET3 had been lodged.

3. There was no union recognised in the workplace. No employee representatives were elected. There were more than 20 employees at the premises where the claimant worked. As there were more than 20 employees in that work base, it was not necessary to determine whether the claimant's workplace was a separate establishment for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").
4. The claimant had been working for the respondents. There was no discussion with him as to redundancies or termination of employment. There was no discussion with him as to insolvency of the company being a possibility.
5. The claimant was informed on 11 July 2019 that his employment with the respondents was at an end. He had not been spoken to by his employers by way of consultation.
6. The 1992 Act contains obligations on employers where redundancies are contemplated. Those obligations, broadly put, are to consult regarding whether job losses are to take place, if so how many job losses are to be involved and whether anything can be done to mitigate the impact of redundancies. This is in terms of Section 188 of the 1992 Act. The obligation is to consult a recognised trade union or alternatively for there to be appointment of employee representatives if consultation is to take place. As stated above, there was no recognised trade union in the workplace. No election or appointment of employee representatives took place. There was no individual consultation. The terms of Section 188 were therefore not adhered to.
7. The claimant was made redundant on 11 July 2019. There was redundancy of more than 20 but less than 100 employees. In that circumstance, the obligation is for consultation to take place at least 30 days prior to the first dismissal taking place. That did not occur.
8. Although the obligation to consult involves consultation at least 30 days prior to the first dismissal, if that is not adhered to the protective award which is to

be made in terms of Section 189 of the 1992 Act proceeds on the basis that the starting point is that an award in respect of 90 days is to be made. That is confirmed in the case of *Newage Transmission Ltd v TGWU & others* EAT 0131/05.

- 5 9. Payment in respect of that 90 day period is appropriate. The case of *Susie Radin Ltd v GMB & others* 2004 IRLR 400 makes it plain that an Employment Tribunal should start on the basis of a 90 day award. That period can be reduced depending upon the extent of the default and also depending upon whether any special circumstances exist justifying  
10 departure from the 90 day period. That is in terms of Section 188 (7) of the 1992 Act.
10. The case of *Clarks of Hove Ltd v Bakers' Union* 1978 ICR 1076 confirms that a "standard" insolvency does not constitute special circumstances. There was in that case no disaster of a sudden nature or any emergency. It  
15 was not said here that there had been a sudden disaster or emergency.
11. There was no consultation whatsoever. It is not said by the respondents that there were special circumstances justifying departure from the provisions of the 1992 Act and the obligation of consultation imposed. The protective award is therefore made in respect of the 90 day period running from 11 July  
20 2019.

Employment Judge: Robert Gall  
Date of Judgment: 05 June 2020  
Entered in register: 09 June 2020  
25 and copied to parties