Case No: 1600638/2021

EMPLOYMENT TRIBUNALS

Claimants: Mrs J Collins

Respondents: (1) Llangollen Railway PLC (in administration)

(2) Secretary of State for Business, Energy and Industrial Strategy

Heard: by video **On:** 19 January 2022

Before: Employment Judge S Jenkins

Representation:

Claimant: In person

First Respondent: No response submitted
Second Respondent: No appearance or representation

JUDGMENT

1. The Claimant's claim in respect of payment for accrued but untaken holiday is dismissed on withdrawal.

2. The Claimant's complaint, under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("Act"), of a failure by the First Respondent to comply with the requirements of section 188 of the Act, is well-founded.

3. The First Respondent is ordered to pay to the Claimant, who was dismissed by reason of redundancy on 26 March 2021, a payment equivalent to remuneration for the protected period of 90 days beginning on 26 March 2021.

4. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply.

REASONS

Background

1. The hearing was to consider the Claimant's claims, in respect of accrued but untaken holiday, and for a protective award, pursuant to section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("Act"), that the First Respondent had failed to comply with its duty, under section 188 of the Act, to consult appropriate representatives of the Claimant and her colleagues, being employees dismissed by reason of redundancy.

2. In the event, the Claimant confirmed at the outset of the hearing that the holiday pay claim had been settled by agreement, and that claim was therefore dismissed on withdrawal. That left only the protective award claim to be dealt with.

3. The Claimant was employed by the First Respondent up to 26 March 2021. On that date, or possibly the day before, it went into administration, and all employees were immediately dismissed by reason of redundancy.

4. The Claimant brought a claim in the Employment Tribunal on 22 April 2021, having gone through the early conciliation process with ACAS on 12 April 2021.

5. The First Respondent, in administration, did not submit any response to the claim. The Second Respondent, the Secretary of State, having been joined into the claims, provided a response on 8 October 2021, noting that the Secretary of State neither supported nor resisted the claim, but requesting that the Tribunal ensure that the Claimant was eligible to bring her claim. The response noted that the Secretary of State did not propose to be represented in person at any future hearing, but requested that the response be acknowledged as the Secretary of State's written submissions.

6. The Insolvency Act 1986 provides that legal proceedings cannot be instituted or continued against a company in administration without the consent of the administrator or the permission of the court. On 23 July 2021, the administrators provided consent to the Claimant for her to proceed with her employment tribunal claim, but indicated that, in the interests of costs, they would not be attending any hearing or providing any documentation in relation to the claim.

Issues and Law

7. Section 188(1) of the Act, provides as follows:

"*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 dismissal 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."

8. A number of constituent elements therefore arise in relation to the duties under section 188 of the Act. There must be an employer or employers, who propose to dismiss employees as redundant, and it seemed clear that, in this case, there was an employer who proposed to dismiss, and indeed immediately thereafter did dismiss, employees as redundant.

9. In such circumstances, the employer is under a duty to consult about those dismissals with appropriate representatives. Section 188(1B) provides that, if there is a recognised trade union, then it will be the appropriate representative. If there is no recognised trade union, then the obligation is to consult with employee representatives appointed or elected for that purpose, or, if not elected or appointed for that purpose, having authority from the relevant employees to receive information and to be consulted about the proposed dismissals on their behalf. I therefore needed to consider whether there had been a recognised trade union or unions at any or all of the various sites and, if not, whether any employee representatives had been appointed or elected or had the required authority.

10. The requirement set out in section 188 only arises where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. I therefore also needed to be satisfied as to whether there were 20 or more employees who were made redundant at a relevant establishment.

11. The European Court of Justice, in Rockfon [1996] ICR 673, noted that an establishment means the unit to which the redundant workers are assigned to carry out their duties, and also that it is not essential for the unit in question to have a management structure or autonomy to decide on and effect the redundancies itself.

12. The European Court also decided, in Panagiotidis [2007] IRLR 284, that an establishment, "*may consist of a distinct identity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks*".

13. The Court went on to say that, "*The entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy in order to be regarded as an establishment*". It also confirmed that it is, "*not essential, in order for there to be an establishment, for the unit in question to be endowed with a management which can independently effect collective redundancies*".

14. Where the duty to consult arises, section 188(1A) provides that the consultation shall begin "*in good time*" and, in any event, where the employer is proposing to dismiss 100 or more employees, at least 45 days, and otherwise, 30 days, before the first of the dismissals takes effect.

15. Section 188(7) of the Act allow a "special circumstances" defence to a claim of failure to consult, as it provides that, "*if, in any case, there are special circumstances which render it not reasonably practicable for the employer to comply with [any of its obligations], then the employer is to take all such steps towards compliance as are reasonably practicable in those circumstances*".

16. In Clarks of Hove Ltd v Bakers' Union [1978] ICR 1076, the Court of Appeal held that a 'special circumstance' must be something 'exceptional', 'out of the ordinary' or 'uncommon'. It also pointed out that insolvency is not on its own a special circumstance. Far from being 'exceptional' or 'out of the ordinary', insolvency is in fact a fairly common occurrence.

17. Finally, if I was satisfied that the employer had proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days, I needed to be satisfied as to whether there had then been a failure to comply with the consultation obligation, and, if so, the extent of that failure.

18. Section 189 (2) of the Act provides that if the Tribunal finds a complaint of failure to consult well-founded, it shall make a declaration to that effect, and can make a protective award. Sections 189(3) and (4) then provide that a protective award is an award ordering the employer to pay remuneration for a protected period, which 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 the employer's default in complying with any requirement of section 188. It cannot however exceed 90 days.

19. The Court of Appeal, in Susie Radin Ltd v GMB and ors [2004] ICR 893, provided guidance as to how a tribunal should approach the assessment of a protected period. It noted five factors that Tribunals should have in mind when applying section 189, as follows:

    - The purpose of the award is to provide a sanction, not compensation.
    - The tribunal has a wide discretion to do what it considers just and equitable, but the focus must be on the seriousness of the employer's default.
    - The default may vary in seriousness from the technical to a complete failure, both to provide the required information and to consult.
    - The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under S.188.
    - How the tribunal assesses the length of the protected period is a matter for the tribunal, but a proper approach where there has been no consultation is to start with the maximum period of 90 days and reduce it only if there are mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate.

Findings

20. I drew my findings of fact from questions asked of the Claimant following her affirmation that her evidence would be the truth.

21. The First Respondent operated a heritage railway in the Llangollen area, and the Claimant was employed as a Marketing Administrator from the start of 2021. Following the onset of the Covid-19 pandemic, the Claimant, and her colleagues, spent much of the ensuing period on furlough.

22. The First Respondent operated from three sites in Llangollen situated within a mile of each other; a general office situated at the railway station, and two other nearby sites which dealt respectively with the maintenance of carriages and wagons, and the maintenance of engines. For obvious reasons, large spaces were needed for that maintenance work.

23. The First Respondent's organisation was run from its general office, supervised by a manager until her departure in November 2020 and then by a volunteer director. All management activities, such as HR, finance and payroll, were operated from the general office, with only maintenance work being undertaken at the other sites. Twenty-seven employees were employed at the three sites in the Llangollen area, with the Claimant being one of four employees in the general office.

24. Whilst the First Respondent's employees were generally aware that times were difficult, they were not aware that any financial problems were acute, noting that they were on furlough and understanding that assistance grants were being applied for. Indeed the Claimant, as presumably did the other employees, received her payslip for the month of March 2021 on 24 March, anticipating that pay would arrive in her bank account on 25 March. In the event, that pay did not arrive.

25. The Claimant was first aware of the appointment of administrators on 26 March 2021, as she was called and told that she was being made redundant. A communication from the Second Respondent however indicated that the appointment actually took place the day before, 25 March 2021. Dismissals of all staff by reason of redundancy were effected on 26 March 2021.

26. All the dismissals therefore took effect on that day, 26 March 2021, and it appeared to me that the earliest it could be said that the proposals to dismiss by reason of redundancy occurred was 25 March 2021.

27. No trade union was recognised within the First Respondent's business, and no employee representatives were appointed or elected or otherwise had authority to receive information and be consulted about any proposed dismissals.

28. In any event, no information about the proposed redundancies was provided to any representative or to the employees generally, and no consultation

about the proposed redundancies took place. The administrators' letter of 23 July 2021 noted that they had considered consulting with employees following their appointment but, as employees were furloughed at the time, they were unable to do so due to the short time frame between the appointment and the decision to terminate the employment of staff. They went on to say that the reason an urgent decision was made was because the Company did not have sufficient funds to pay the ongoing costs and the only offer for the business and assets had been withdrawn.

29. As I have noted, the First Respondent did not submit a response to the claim, and therefore no special circumstances defence was advanced.

Conclusions

30. In light of my findings, it was clear to me that there had been a proposal to dismiss 20 or more employees by reason of redundancy at one establishment. I considered, applying the guidance noted above, that the First Respondent, whilst operating at three individual sites, operated only one "establishment". All three sites were within a short geographical distance of each other, the operation was directed and run from the general office, and the maintenance sections were only apart from the general office due to the need for large premises in which to undertake the maintenance work. The obligation to consult under section 188 therefore arose.

31. It was also clear to me that there had been a complete failure by the First Respondent to comply with its obligations under section 188. No employee representatives were appointed or elected, nor did any representatives have authority from the relevant employees to receive information and to be consulted about the proposed dismissals on their behalf. Furthermore, no attempts were made to provide the employees with the required information or to consult with them, even though, as noted in the administrators' letter of 23 July 2021, there appeared to have been an attempt to sell the First Respondent's business and assets.

32. In the circumstances, I was satisfied that it was appropriate to make a declaration that the Claimant's claim was well founded.

33. Following the guidance provided by the Court of Appeal in Susie Radin Ltd, I then considered that it was appropriate to order that the protected period should run for 90 days. As I have noted, there was no attempt by the First Respondent to appoint or elect representatives, and no attempt to provide employees with information about the proposed redundancies or to consult with them on those redundancies. I therefore saw no reason to make any reduction from the 90 day period.

34. In conclusion, I directed that the First Respondent should be ordered to pay remuneration to the Claimant for the protected period, which began on the date of the dismissals of all staff, 26 March 2021, and ran thereafter for 90 days.

Employment Judge S Jenkins

Date: 19 January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 20 January 2022

FOR THE TRIBUNAL OFFICE Mr N Roche