Case Numbers (see schedule)

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**AND**	**Respondent**
See schedule attached		**GBM Manufacturing Limited**
		(in creditors voluntary liquidation) (1)
		Secretary of State for Business, Energy and Industrial Strategy (2)

HELD AT: Birmingham **ON:** 13 & 24 October 2022

Appearances: **No attendance from any party**

JUDGMENT

The judgment of the Tribunal is as follows:

1. In this judgment "the claimants" means all those individuals whose names appear on the schedule attached to this judgment.
2. The claimants' claims were presented in time. The Tribunal has jurisdiction to hear their claims.
3. The complaints that the first respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 are well founded.
4. I make a protective award in respect of all the claimants in respect of such failures by the first respondent, being one upon the claim of each claimant.
5. The description of employees to which the protective award made on the claim of claimant relates is that same claimant (and no one else).
6. In respect of each and all of the protective awards the protected period is 90 days and begins on 4 August 2021.

REASONS

1. The claims were presented by a claim form on 11 November 2021 and are all complaints for failure to consult pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
2. The first respondent went into administration on 3 August 2021. The Tribunal wrote to the claimants on 16 November 2021 informing them that the consent of the administrators was required before proceedings could be continued against the first respondent. The claimants wrote to the administrators to seek that consent on 1 September 2021.

3. No response was presented to the claim on behalf of the first respondent by either the administrators or liquidators. The second respondent presented a response on 8 December 2021 which was accepted by the Tribunal and was taken into account when making this decision. The respondent moved into creditors voluntary liquidation on 1 April 2022.

4. The claimants provided information about the circumstances leading to the termination of their employment. This was contained in the claim form and also in a written witness statements dated 2 February 2022. The claimants have also provided on 15 July 2022 a copy of the decision of the Midlands East Employment Tribunal sent to the parties on 17 March 2022 (case number 2601825/2021) relating to the same circumstances applicable to this claim and copies of letters received by the claimants from the administrators. The Tribunal wrote to the claimants on 22 July 2022 asking them to confirm whether they were content for the matter to be dealt with by an Employment Judge on the papers (without the need for a hearing). The claimants' representatives replied on 10 August 2022 to the effect that they agreed with this proposal. The matter came before me on 13 October 2022. In the first instance I had to satisfy myself that the administrators had consented to the continuance of the proceedings under the Insolvency Act 1986. I noted that the claimants had written seeking such consent directly to the administrators on 11 September 2021 but it was not clear if a response has been provided. I also noted that the written judgment and reasons of the Midlands East Employment Tribunal (case number 2601825/2021) included at paragraph 1.3 the following finding of fact:

"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."

5. I therefore instructed the Tribunal to write to the parties informing them that in the absence of any further evidence, I was proposing to treat the consent already provided under case number 2601825/2021 (as noted in the judgment above) as also applying to this claim unless any objection was received from either party by 2pm on 20 October 2022. No such objection was received within that timescale so I am satisfied that the consent of the administrators was is in place when it was required.

6. The first respondent was in business in the building and construction industry. It operated solely from its premises at Unit 7, Northedge Business Park, Derby. At the time the claimants were dismissed, there were approximately 70 employees. On 4 August 2021, those claimants that were in work were called into a meeting and informed that their employment would be terminated with immediate effect as the first respondent would be going into administration. The employees present were given a letter confirming that this was the case and stating:

"*Due to the company's current financial position, the Company is no longer able to make payments to you for services rendered under its contract of employment with you. You should therefore regard your contract of employment terminated with effect from 4 August 2021."*

7. The letter went on to provide some basic advice as to how to make claims for redundancy payments and other sums due. A similar letter was sent to employees not in work on that day.

8. Accordingly, I find the claimants were dismissed along with all other employees of the respondent on 4 August 2021 (except two who were kept on temporarily to assist with the administration process, who were also subsequently dismissed).

9. The claimants conciliated via ACAS on 1 November 2021. Having checked the dates of early conciliation and presentation of claim form, I find the claim was presented (or early

conciliation was started) within three months of the date of dismissal (or within a month of conciliation terminating). The claims was therefore presented in time.

10. The effect of s. 195 (2) TULRCA is that where an employee is or is proposed to be dismissed, it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant. I find in the absence of evidence to the contrary the claimants were dismissed by reason of redundancy.

11. I find that 20 or more employees were employed by the respondent at one establishment on 4 August 2021 when the company went into administration an employees named in this claim were among some 70 employees employed by the respondent prior to dismissed. All employees were assigned to this location.

12. As to who may bring a complaint pursuant to s. 188 or 188A to an Employment Tribunal, s.189(1) TULRCA states:-

> *"(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."*

13. The respondent did not have a recognised trade union and no attempt was made to elect representatives with whom it could consult or an attempt to consult. No consultation took place prior to the dismissals.

14. I have considered *Independent Insurance Co Limited v Aspinall [2011] IRLR 716* and the earlier decision of the Court of Appeal in *Northgate v Mercy [2008] IRLR 222.* Neither a recognised union nor employee representatives were in place and that this complaint falls within s.189(1)(a) (or (d)).

15. I therefore find that the employees have standing to make claims and as *Aspinall* makes clear, individually they must do so within the statutory time limit in order to bring a claim. The claimants each individually pursued a valid claim.

16. The main relevant provisions of the Trade Union and Labour Relations (Consolidation) Act (as amended) ("TULRCA"), are as follows:-

> *"s. 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 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.*
>
> *s. 188 (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.*
>
> *s. 188 (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, representatives of that 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 purpose of this section, in an election satisfying the requirements of section 188A (1).

s. 188 (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.

and

"s. 188 (7): If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly) a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

s. 188A The requirements for the election of employee representatives under section 188 (1B) (b) (ii) are that –

(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;

[(b to (h) make detailed provision for the elections, including secret voting and accurate counting of votes]."

17. The respondent does not allege pursuant to s.189(6) that there were special circumstances and that it did take such steps as were reasonably practicable to carry out consultation. I do not find that the respondent has done so in this case

18. I am satisfied that the respondent failed to comply with its obligation to consult in section 188 and in order to allow such consultation to take place failed to elect representatives in accordance with section 188A. Accordingly, the complaint is well founded.

19. By virtue of s. 189(2) in such circumstances I may make a protective award. If I do the statute provides as follows:-

"(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 the requirement of section 188;

but shall not exceed 90 days."

20. Accordingly, I find the protected period in this claim commences on 4 August 2021.

21. As to the length of the protected period, Peter Gibson LJ in the Court of Appeal in *Susie Radin Limited v GMB and Others [2004] IRLR 400 [45]* gave the following guidance:-

"I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:

(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.

(2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.

(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.

(4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188.

(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate."

22. In this case there was no consultation or attempt to comply with the statutory consultation provisions; no relevant mitigating factors are advanced. The starting point for the assessment of the protective award is the maximum, 90 days, and whilst I have a wide discretion to do what is just and equitable, in the absence of any evidence that points to the respondent attempting to comply with its obligations or any mitigating circumstances, I conclude there are no grounds for me to reduce the same and the protective award shall therefore be set at the maximum of 90 days.

Employment Judge Flood
27 October 2022

THE SCHEDULE

Case Number	Claimant Name
1304744/2021	Mr J Dilkes
1304776/2021	Mr M Taylor
1304777/2021	Mr N Hardaker
1304778/2021	Mr S Wainwright
1304779/2021	Mr S Elliott
1304780/2021	Mr N Hunt
1304781/2021	Mr T Mellor
1304782/2021	Mr J Mallion
1304783/2021	Mr L Clark