EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107788/2022 and others (see Schedule)

Final Hearing held in Dundee on 17 March 2023

Employment Judge A Kemp

Ms Lorna Hutchison and 19 others	**Claimants** **Represented by:** **Mr W Bolling,** **Director**
Tayprint Ltd (in liquidation)	**First respondent** **No appearance or representation**
Secretary of State for Business, Energy & Industrial Strategy	**Second respondent** **Written submissions only from** **Ms Sherron Dobson,** **RPS Tribunal Officer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds that the Claims are within the jurisdiction of the Tribunal. The Claims are sisted to allow the claimants to seek the consent of the court for the present proceedings under section 130(2) of the Insolvency Act 1986.

REASONS

Introduction

1. This was a Final Hearing held in person. The claims are made by a total of 20 claimants for a protective award under the Trade Union and Labour Relations (Consolidation) Act 1992. The first respondent was the employer of the claimants, and has gone into liquidation. It did not appear. Its Joint Liquidator has written to consent to the awards sought. The second respondent appears for its interest, and provided written submissions. The second respondent did not appear at the Final Hearing.

Evidence

2. The claimants had prepared a set of documents that included details of each of them, their start dates with the first respondent, date of birth, and pay details. Evidence was given orally by Mr William Bolling, who also appeared to represent the claimants, and Ms Lorna Hutchison the first claimant. In advance of the Final Hearing I requested the clerk to send a message to the claimants' representative raising a concern over the terms of section 130(2) of the Insolvency Act 1986. At the commencement of the Final Hearing itself I raised a separate matter, which concerned the date on which Early Conciliation had started, and the statutory provisions as to time-bar.

3. Less than four hours after the hearing concluded Mr Bolling sent an email with additional documents, explaining the context in which he did so. He sought to add those to the documents that had earlier been produced and spoken to in evidence. I considered that it was in accordance with the overriding objective to permit him to do so as the point on time-bar was not one of which he had had advance notice, and the documents he produced were relevant to that.

Issues

4. The issues were identified at the start of the hearing and are:
   (i) Does the Tribunal have jurisdiction?
   (ii) Is the consent of the court required for these proceedings under section 130(2) of the Insolvency Act 1986?
   (iii) Are the claimants entitled to a protective award?
   (iv) If so, to what remedy are the claimants entitled?

Facts

5. The following facts, material to the issues before the Tribunal, were found to have been established:

6. The claimants are as set out in the Schedule to this Judgment.

7. The first respondent is Tayprint Limited. It is a company incorporated under the Companies Acts.

8. The second respondent is the Secretary of State for Business, Energy and Industrial Strategy. The second respondent is responsible for payments from the National Insurance Fund under Part XII of the Employment Rights Act 1996 and in particular section 182. The second respondent does so through an Executive Agency, the Insolvency Service.

9. The claimants were all employed by the first respondent at its premises at 11 Brunel Road, Wester Gourdie Industrial Estate, Dundee, Angus DD2 4TG. They were not members of a trade union. The first respondent had not established a body of employee representatives.

10. On 26 August 2022 Kenneth Patullo and Kenneth Craig, Begbies Traynor (Central) LLP, Finlay House, 10-14 West Nile Street, Glasgow G1 2PP, were appointed as provisional liquidators of the first respondent ("the provisional liquidators").

11. On 26 August 2022 the claimants were asked to attend a meeting with the provisional liquidators. Those who attended, numbering about 16 employees and including the first claimant, were informed that the business of the first respondent had ceased to trade that day. On that date, all of the claimants were informed that they were being dismissed with immediate effect on grounds of redundancy. The claimants had not had any warning formal or informal of their being at risk of redundancy. Many of them were shocked and visibly upset at being informed of their summary dismissal for redundancy. They were told to cease working, gather their belongings, and leave the premises.

12. Those employees who were not present were contacted by telephone that day or on the following day. There were on that date 20 employees of the

first respondent, all of whom worked at that one establishment, and all of whom were dismissed for redundancy. The claimants were informed in writing of their dismissal for redundancy with effect from 26 August 2022 by letter sent to them a few days later [which letters were not before the Tribunal].

13. Prior to the said dismissals the first respondent had not invited the claimants to elect employee representatives for consultation under the terms of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. No information was provided to the claimants, nor was there any consultation held with them, in advance of the said dismissals, in relation to the prospective redundancy or any of the matters associated with that, by the first respondent.

14. Mr William Bolling had been asked to attend the meeting on 26 August 2022 by those who were intended to be the provisional liquidators. He is the managing director of Circo Consulting Limited. His role was to offer advice and assistance to the employees of the first respondent at that meeting on making claims for entitlements from the Redundancy Payments Service ("RPS"), part of the Insolvency Service, in relation to sums due in respect of unpaid wages, accrued holiday pay, notice and a statutory redundancy payment for each of those employees. He offered that service to the employees on a commercial basis [the details of which were not before the Tribunal]. They accepted that offer.

15. Mr Bolling obtained personal details of each claimant from the provisional liquidators, and worked with them and the claimants themselves to ascertain who was an employee of the first respondent, and what sums each of them were entitled to. Initially there were considered to be 24 members of staff, and after that checking process, which concluded towards the end of September 2022, he considered that there were likely to be 20 employees. He submitted claims to the RPS for those sums at or around the end of September 2022.

16. On 20 September the provisional liquidators were appointed as joint liquidators of the first respondent ("the joint liquidators") by interlocutor of

that date in the Court of Session. The first respondent was wound up as a company on that date.

17. Mr Bolling has been involved in other insolvency cases. His understanding from them, including after informal discussion with a law firm, was that the period to commence early conciliation to present a claim to the Employment Tribunal for a protective award under the Trade Union and Labour Relations (Consolidation) Act 1992 was three months from the date of the winding up of the company, being three months from 20 September 2022.

18. Mr Bolling waited for a response of the RPS to the claims made, which did not include claims for a protective award. That response was received on or around 25 November 2022. The RPS accepted the claims for unpaid wages, holiday pay, notice and statutory redundancy payment subject to statutory limits for the same. The payments due were made on or about that date to each claimant.

19. Mr Bolling was informed of the same at or shortly after that date. At that stage the only matter outstanding was a claim for a protective award. He made arrangements to commence Early Conciliation to do so. He gathered the details required for the same, including those who were employees of the first respondent and are the claimants in this case.

20. Early Conciliation was commenced by Mr Bolling on behalf of the claimants on 12 December 2022, and the Certificate for the same issued on 14 December 2022.

21. By letter dated 15 December 2022 the joint liquidators wrote an open letter to confirm that they had no objections to a protective award being made in favour of the staff employed by the respondent.

22. The Claim Form in the claims was presented to the Tribunal on 16 December 2022.

Submissions

23. Mr Bolling made brief submissions, which were that I should find that the timeline that took place was a reasonable and practicable one given the

circumstances, including the need to check both who was an employee, and what sums each was entitled to. In relation to the issue of the consent of the court, he had not been aware of the provision in the 1986 Act, and noted that many other cases had been dealt with by Employment Tribunals in the absence of such consent.

24. The second respondent in its Response Form requested that the paper apart to it be treated as written submissions. They did not address issues of jurisdiction at all, or that of the consent of the court, and included some matters irrelevant to the present claims, such that they were of limited assistance. I did however take them into account.

The law

(i) Protective award

25. Section 188 and following of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act") makes provision for a duty to inform and consult in the case of a collective redundancy, which is where there are more than 20 dismissals for redundancy at one establishment within a 90 day period. These provisions implement in UK law the terms of the Collective Redundancies Directive 98/59/EC, which consolidated two predecessor Directives. A purposive construction of the UK statute is required in light of that, which remains as retained law under the European Union (Withdrawal) Act 2018.

26. Section 188 states as follows:

> "**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.

(5) That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

(5A) The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(6) . . .

(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.

(7A) Where—

(a) the employer has invited any of the affected employees to elect employee representatives, and

(b) the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).

(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."

27. Section 188A provides as follows:

"188A

(1) 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) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;

(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that–

(i) so far as is reasonably practicable, those voting do so in secret, and

(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).”

28. Section 189 states as follows:

“**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.

(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) An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the date on which the last of the dismissals to which the complaint relates takes effect, or

(b) during the period of three months beginning with that date, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such further period as it considers reasonable.

(5A) Where the complaint concerns a failure to comply with a requirement of section 188 or 188A, section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (5)(b).

(6) If on a complaint under this section a question arises—

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,

it is for the employer to show that there were and that he did."

29. Section 190 commences

*"***190 Entitlement under protective award**

(1) Where an employment tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 191, to be paid remuneration by his employer for the protected period……"

30. Section 192 provides

192 Complaint by employee to employment tribunal

(1) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.

(2) An employment tribunal shall not entertain a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the day (or, if the complaint relates to more than one day, the last of the days) in respect of which the complaint is made of failure to pay remuneration, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the period of three months, within such further period as it may consider reasonable.

(2A) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

(3) Where the tribunal finds a complaint under this section well founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.

(4) The remedy of an employee for infringement of his right to remuneration under a protective award is by way of complaint under this section, and not otherwise."

31. Section 182 of the Employment Rights Act 1996 provides as follows:

"**182 Employee's rights on insolvency of employer**

If, on an application made to him in writing by an employee, the Secretary of State is satisfied that—

(a) the employee's employer has become insolvent,

(b) the employee's employment has been terminated, and

(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,

the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which,

in the opinion of the Secretary of State, the employee is entitled in respect of the debt."

32. Section 186 provides for a limit on a week's pay for these purposes.

(ii) Jurisdiction – Early Conciliation and Time-bar

33. Before proceedings such as those in this case can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provide for the detail of what is required. Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which created section 292A of the 1992 Act.

34. Section 292A provides as follows:

"292A Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

(2) In this section—

(a) Day A is the day on which the complainant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

> (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
>
> (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

35. The question of what is reasonably practicable is explained in a number of authorities in the context of unfair dismissal claims where the statutory test is the same. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.*** Guidance was given in ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand, 'reasonably practicable' means more than merely what is reasonably capable physically of being done. … Perhaps to read the word 'practicable' as the equivalent of 'feasible', as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt

> investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

36. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

37. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether he was legally represented. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee, citing ***Williams-Ryan***. In ***Brophy*** the claimant did not have professional advice, which was held to be a factor in his favour.

38. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case was re-iterated as -

> "It is simply to ask this question: 'Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'."

39. The degree to which there was negligence was held not to be material in ***Croydon Health Authority v Jaufurally [1986] ICR 4.*** Even if there is negligent advice by a skilled adviser, however, the failure may still be reasonable in all the circumstances. In ***Northamptonshire County Council v Entwhistle [2010] IRLR 741*** the EAT stated that:

> ''It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable. Waller LJ made this very point in Riley: see at page 336 B. The paradigm case, though not the only example, of such circumstances would be where both the Claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward). I note indeed that May LJ referred to 'misrepresentation about any relevant matter' as a potentially relevant factor in paragraph 35 of his judgment in Palmer. He was not referring specifically to a case where the adviser as well as the employee was misled but I can see no difference in principle.''

40. That principle was applied in ***Ebay (UK) Ltd v Buzzeo UKEAT/0159/13*** in which the EAT emphasised that it may be necessary to consider whether the skilled adviser's wrong advice was not unreasonable.

41. The skilled adviser need not be a solicitor. The Court of Appeal in ***Riley v Tesco Stores Ltd [1980] IRLR 103*** considered the position of an adviser at the Citizens Advice Bureau. In ***Paczkowski v Sieradzka [2017] ICR 62*** the EAT overturned a Tribunal which had held that the Citizens Advice Bureau, ACAS, and the claimant's union had all reasonably failed to advise her of a right to bring a claim of automatic unfair dismissal under the

Employment Rights Act 1996 section 104 where she did not have adequate continuous service to bring a claim of ordinary unfair dismissal, and where her immediate issue was to seek to recover arrears of wages. It had been reasonably practicable to have presented the claim timeously.

42. What was reasonably practicable was considered more recently by the EAT in ***Cygnet Behavioural Health Ltd v Britton [2022] EAT 18.***

43. If it was not reasonably practicable to have presented the claim (including by commencing early conciliation) timeously, a secondary issue is whether the claim was presented within a reasonable period of time thereafter. That issue, and the question of reasonable practicability more widely, was addressed by the EAT in a protective award case in ***Howlett Marine Services Ltd v Bowlam [2001] IRLR 201.***

(iii) Court consent

44. There is a separate issue, that derives from the terms of section 130(2) of the Insolvency Act 1986. It states

> "**130 Consequences of winding-up order**
>
> (1) On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company (or otherwise as may be prescribed) to the registrar of companies, who shall enter it in his records relating to the company
>
> (2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose….."

45. A separate provision applies in the case of administration, formerly found in section 11(3)(d) of the Insolvency Act 1986 at which provided that where an administration order had been made "no other proceedings may commence or be continued….against the company or its property except with consent of the administrator or the leave of the court." The provision was replaced with similar wording in Schedule B1 to the 1986 Act by amendment within the Enterprise Act 2002.

46. In ***Carr v British International Helicopters Ltd [1994] IRLR 212*** the statutory provision as to administration was considered. It appears from the report that the claim was one for unfair dismissal, as it states that the only remedy sought was re-instatement, in a situation where the claimant and 61 others had been made redundant. The respondent argued that the application to the Tribunal was incompetent as no consent had been obtained.

47. It was held that a claim to the Employment Tribunal (as it is now called, an Industrial Tribunal at that time) fell within "proceedings" for these purposes, and that either the consent of the court or leave of the administrator was required. It was further held that the absence of such consent or leave did not render the claim a nullity, and that it could be sisted for the consent to be sought. The EAT stated the following:

> "We have a great deal of sympathy with the argument that it seems very unlikely that Parliament really had it in mind to place limitations on the ability of employees to make claims and enforce rights under the employment protection legislation, particularly having regard to the extent to which that legislation has sought to provide swift and informal means of establishing claims, and to require speedy presentation and processing of such claims. Nevertheless, we have to deal with the terms of the legislation as they are. It seems to us that there is no way of construing section 11 of the Act of 1986 so as to exclude from its scope claims under the employment protection legislation, and, accordingly, that considerations of the kind which we have just mentioned must be relevant to the question whether, and on what basis, leave to proceed should be granted, rather than the question whether leave is required."

48. The EAT in that case did not have cited to it a case at the Inner House, ***Hill v Black [1914] SC 913.*** That case concerned the terms of section 142 of the Companies (Consolidation) Act 1908 which provided:

> **"142 Actions stayed on winding-up order.**
> When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company

except by leave of the court, and subject to such terms as the court may impose."

49. The pursuer brought an action against a company, its liquidator and certain secured creditors for declarator that he was the proprietor of debentures of a theatre in Dundee. Decree in absence was granted against the company and liquidator. The secured creditors who defended the claim did not plead any objection to competency of the action on the basis of absence of consent under that section. The Sheriff-substitute did not consider that he was bound to do so himself in light of that absence of reference to the section in the pleading, and that as the company and liquidator had chosen not to defend the action they should be taken not to have done so as well. The secured creditors appealed. The Inner House held that the company and liquidator had waived any objection to competency, and that it was no part of the duty of the Sheriff-substitute to put the section into operation.

50. It does not appear, from the researches that I have been able to undertake, that that decision has been referred to in a subsequently reported case.

51. The purpose of section 130(2) can I consider be gleaned from authority. Guidance was given on predecessor provisions in ***Re Calgary and Edmonton Land Co Ltd [1975] 1 All ER 1046*, *[1975] 1 WLR 355*.** The jurisdiction is discretionary and the onus lies on the applicant for the stay or sist. The discretion is wide, and was described by the Court of Appeal as a "freedom to do what is right and fair 'in all the circumstances' of the case" in ***Re Aro Co Ltd [1980] Ch 196*.** Its purpose appears to be the protection of the company in appropriate circumstances, for example a stay (the English equivalent of a sist under Scots Law) was granted because the petitioner's debt was in doubt in ***Re Lowston Ltd [1991] BCLC 570*.** The Court of Appeal also refused a stay in ***Edwards and another v Flightline Ltd [2003] EWCA Civ 63*.** If the claim is one which can be dealt with in the liquidation (for instance, by adjudication on proofs of debt), then the court will usually refuse permission: ***Re Lemma Europe Insurance Co Ltd [2016] EWCA Civ 484***. Other circumstances might

make it appropriate to grant permission such as where the company is a necessary party to proceedings, or the award will be met by an insurer, and the claimant undertakes not to enforce any order obtained against the company without leave of the court (***Bristol & West Building Society v Trustee of Back and Melinek [1998] 1 BCLC 485*).** I have not found a reported case of consent being given in respect of a claim to the employment tribunal, but I am aware of that being done in a number of individual circumstances.

52. In ***Employment Tribunal Practice in Scotland*** (in respect of which I should declare that I have more recently become one of the joint editors) the following is stated at paragraph 4-249 "Where the liquidator acquiesces in the continuation of the proceedings then, in practical terms, they normally proceed, despite the apparently strict terms of s. 103(2)".

53. In ***Bennion, Bailey and Norbury on Statutory Interpretation*** at section 22.1 it is suggested that the starting point in statutory construction is to consider the ordinary meaning of the word or phrase. In ***R (The Good Law Project) v Electoral Commission EWHC 2414,*** Leggatt LJ said the following about statutory construction:

> "The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation."

Discussion

54. I had no difficulty in finding that the two witnesses were credible and reliable in their evidence. Mr Bolling was candid about the reasons for the early conciliation being commenced as it was, which was more than three months after the dismissals, all of which had taken place on 26 August 2022. It appeared to me that it was his understanding that the relevant date was not that of the dismissals but of the winding up was part of the reason for the early conciliation being later than the statutory provisions required. It was not, however, the only reason. Mr Bolling was also aware that the minimum number of employees required for a protective award was 20, he had made claims on behalf of all 20 claimants to the RPS, and

the response to that was received on or around 25 November 2022. He sought to address matters responsibly.

55. In my opinion I require to consider the preliminary points as to jurisdiction and whether the consent of the court is required notwithstanding that neither respondent takes the point. The Tribunal is a creature of statute, and can only exercise the jurisdiction given to it in circumstances where it is lawful to do so. It may therefore require to take notice of a statutory provision if its terms are mandatory.

(i) Jurisdiction

56. There are two periods of time to consider, the first that from 26 August 2022 being the date of all dismissals up to 26 November 2022 being the date when early conciliation ought to have commenced unless it was not reasonably practicable to have done so, and the second from that date to 12 December 2022, being the date that it did commence. In the first period the issue is whether or not the claimants have established that it was reasonably practicable to have presented the claim, and in the second it is whether or not the claimants have established that early conciliation was commenced within a reasonable period of time thereafter. I consider that the Claim Form was presented within a reasonable period of time after the Certificate, being two days thereafter, such that no issue directly arises in that regard.

57. In respect of the first period there are arguments both ways. I have concluded, not without hesitation, that it was not reasonably practicable to have presented the claims timeously. That is so as Mr Bolling is not a solicitor, and his understanding from earlier informal discussions with a firm of solicitors was that the period for timebar started with the formal winding up, not the dismissals. This is wrong in law, as the time commences on the date of the dismissals, but that is not determinative. One factor to weigh in the balance in my view is that it appears that that was not formal advice such that it is not likely to be the basis on which a claim of negligence against such a firm could be founded. Another is that he had been waiting for the RPS response when the number of employees was at the very minimum threshold for a protective award, such that if one

of the claimants was considered by the RPS not to have been an employee no protective award could have been sought.

58. I also take into account that whilst the timebar provisions for claims of unfair dismissal and discrimination are now reasonably well known such that claimants can be expected either to know them or to make reasonable enquiries about them, the provisions as to a protective award are less well known, and they are less clear in an insolvency such as that in this case given the appointment of provisional and then joint liquidators, with the winding up of the company effective at the latter stage, such that someone not legally qualified is likely to find discerning the date from which timebar runs from the statutory provisions, which are quoted above, not straightforward. I consider that it is of relevance in this context that the second respondent, who has a potential statutory responsibility to make payment of some of any protective award, did not refer to any issue of timebar in the Response Form. No one appeared from the second respondent, but the document was submitted in the name of an RPS Tribunal Officer, and I infer from that, and the terms of the paper apart itself, that the person doing so had knowledge of the law applying to such claims. The absence of any reference to timebar therefore suggests that the second respondent had not noted this point, such that the mistaken view held by Mr Bolling may be seen as not unreasonable.

59. That sense is also supported by two further matters. The first is that the clerk considering this claim did not appear to notice that point, as it was not referred to when the Claim Form was formally accepted. In other situations, where an issue of jurisdiction is thought by the clerk to arise, the claim is accepted subject to the issue of jurisdiction and that is confirmed in writing. The second is that when the papers were later considered by an Employment Judge again no point as to jurisdiction was noted. These two facts support the view that, whilst Mr Bolling was not correct in his understanding as to the date from which timebar ran, his mistake was a not unreasonable one for him to make in all the circumstances, applying the guidance in ***Buzzeo.***

60. I also take into account the authority of ***Bowlam.*** The facts in the present case are very different to those in that case, but the overall context is of

an insolvency, firstly a provisional liquidation and secondly the company being wound up, with employees dismissed for redundancy summarily without any prior notice or indication that that was to happen. They secured payment of other sums from the RPS on a date which happened to be the day before the last date to start early conciliation for a protective award. It appears to me that the need on the part of Mr Bolling to consider those circumstances, including particularly how many were accepted as being employees and were awarded sums, and the effect of those decisions on the claim for a protective award where the number of employees was on the threshold of 20, would naturally take a number of days to assess. Although it was possible to have done so that very day, and to have commenced early conciliation either that day or the following day which would have been in time to do so, that is not the test. The test is of reasonable practicability, as explained in that authority, and account is taken not just of a wrong view of statutory provisions but the other circumstances which apply where relevant.

61. I have concluded that in all the circumstances it was not reasonably practicable to have commenced early conciliation timeously, which in this case is by 26 November 2022.

62. In respect of the second period I have concluded that early conciliation was commenced within a reasonable period of time in all the circumstances. The delay was not undue, in my opinion.

63. In light of those decisions my finding in respect of the first issue is that the claims by the claimants are within the jurisdiction of the Tribunal.

(ii) Consent

64. The second issue is one that arises under section 130(2) of the Insolvency Act 1986, and is whether the case must be sisted to enable consent to be obtained from the court, or whether as neither respondent has pled that provision I can proceed to make a decision on the claim on the merits. In

one sense this matter may have been decided first, but I considered that that was not the appropriate way to proceed where, if the claims were not within the jurisdiction of the Tribunal, they would be dismissed and the point on consent would then become academic. This was a far from simple point, as at first glance there are two authorities, one from the EAT the other the Inner House, which appear contradictory in effect.

65. I considered that the authority of ***Carr*** was to be preferred. I did so partly from the fact that the present claim also fell within the terms of the statutory provision as to "proceedings". Whilst the statutory provision in that case was not identical, as it addressed an administration not a liquidation, the principle it applied was that the consent referred to by the 1986 Act (in that case either from the court or the administrator) was necessary. That was in the context of an employment claim, and supports the principle that the statutory terms of seeking consent are mandatory, as the quotation from the case set out above illustrates.

66. That also accords with the ordinary and natural meaning of the words in section 130(2) in my opinion, and is not contrary to the purpose of the provision which, as indicated above, appears to me to be to allow protection for the company in liquidation where the court considers that to be appropriate. Clearly, the court can grant consent for these claims where it considers, in its discretion, that that is appropriate. I was not provided with any details of the circumstances of the first respondent. The court may well grant consent if an application is made to it, not least given the position of the joint liquidators, but that is a decision for the court.

67. Whilst ***Hill*** is to the effect that the statutory provision requires to be pled by a party and not a point taken by the court itself, the context both factually and in relation to the terms of the statute on which the decision was made are so materially different that it should in my opinion be distinguished. There are two reasons for that. Firstly it was an action of declarator, in the circumstances referred to above. Those circumstances are entirely different to those in the present case. Secondly it was decided at a time substantially before the creation of what was initially the Industrial Tribunal. Thirdly the present claim is one for a protective award, where there are also statutory duties of the second respondent but which are to

an extent limited from the provisions quoted above, in summary under s. 184 to a total of 8 weeks. The protective award may be made for an amount greater than that, 90 days' pay being a little under 13 weeks. Any award may at least possibly have an effect on the first respondent, as well as the second respondent, because of that limit. In light of that, and subject to the circumstances of the first respondent, the issue may not be purely academic.

68. Secondly, the statutory context of the present claim is different to that of the 1908 Act, in that the 1986 Act has two different statutory provisions, one for administration in which the leave of the administrator would suffice, the other for liquidation which only refers to the consent of the court. It appears to me that, considering the statute as a whole, this distinction is of significance, as Parliament could have provided for leave of the liquidator if it had wished to do so in a liquidation, or to exclude claims to the Employment Tribunal from requirements for leave or consent if it had wished, and did not do so. It also appears to me that the leave of the administrator would have been unnecessary to provide for in an administration if the effect of the provision was restricted to circumstances where a party raised the point in pleading and only then would the court or tribunal require to take notice of the point, as there was little if anything in substance that distinguishes not raising a point in pleadings such that one is taken not to object, and giving leave. The full terms of the statutory provisions indicate, in my opinion, that the consent of the court was intended by Parliament to be necessary.

69. Thirdly I took account of the fact that the Insolvency Act 1986 is a statute having effect in Great Britain. The only authority that suggests that the court need not take note of its terms is that of ***Hill***.

70. It did not appear to me to be necessary to hold that the consent of the court was not a requirement in light of the need for a purposive construction of Act to accord with the terms of the Collective Redundancies Directive. That is firstly as it appeared to me that the issue of consent of the court is one process and may be regulated by national law, and secondly as the Insolvency Directive 2008/94/EC does not impose any additional limitations to the provision referred to on court

consent, or on issues of time-bar. The requirement for consent of the court does not appear to me to prevent the claim for a protective award to be made, or make that unduly difficult to pursue, and although the matter is for the court there is nothing before me that would indicate that such consent may not be given if sought. The “hurdle” created by s.130(2) is not I consider such a high one that would amount to some form of undue impediment to pursuing the claim in the context of a right emanating from the Directive.

71. Finally I also had regard to the commentary in the textbook, which was supported by the fact of a decision that was shown to me by Mr Bolling where one of my colleagues had made a protective award and where the terms of section 130(2) were not raised as an impediment to doing so. Obviously those are factors that favour proceeding without consent, but it seems to me that neither is sufficient. The textbook refers to the cases being heard “normally”, and is in any event not authoritative. The decision of another Employment Judge is naturally persuasive, but it is not binding on me. My opinion is as above, and I respectfully disagree on this point.

72. I concluded that as a matter of law the consent of the court is required following the appointment of the provisional and then joint liquidators, and that I am obliged to sist the proceedings pending it being obtained. Subject to that, it appears to me that it would be appropriate to award a protective award for the period of 90 days commencing with the dismissals of each claimant on 26 August 2022.

73. I make that finding as to a sist without any enthusiasm, as it is an unattractive conclusion in a case such as the present. I can understand why others have a contrary view on the issue of consent. It is an additional expense for claimants who have been dismissed in circumstances which are a clear breach of the terms of section 188 of the 1992 Act, and that will also cause delay. Unless the statutory provision is amended, however, my opinion is that it must be complied with.

Conclusion

74. These claims are within the jurisdiction of the Tribunal. They are sisted to allow the claimants to seek the consent of the court under section 130(2) of the Insolvency Act 1986.

Employment Judge: A Kemp
Date of Judgment: 22 March 2023
Date sent to parties: 30 March 2023

Schedule of claimants

Ms L Hutchison & others
v
Tayprint Ltd (in liquidation)
and
Secretary of State for Business, Energy & Industrial Strategy

Case Number	Claimant
4107788/2022	Ms Lorna Hutchison
4107789/2022	Mr Kevin Stephen Geoghegan
4107790/2022	Mr David Kenneth Peters
4107791/2022	Mr Scott James Reid
4107792/2022	Mr Clark Brown
4107793/2022	Mr Lucasz Nogowski
4107794/2022	Mr Paul Stewart Brown
4107795/2022	Mr Robert Jan Sacowicz
4107796/2022	Mr Gavin John Dye
4107797/2022	Mr Arran Green
4107798/2022	Mr Craig Fortheringham
4107799/2022	Mr Liam McMillan
4107800/2022	Mr Liam Harvey
4107801/2022	Mr Blair Lindsay

4107802/2022	Ms Lorna Hutchison 22 Emmock Woods Crescent, Emmock Woods DD4 9GA
4107803/2022	Mr Gavin Hood
4107804/2022	Mr Christopher Harris
4107805/2022	Mr Gary Morrison
4107806/2022	Ms Fiona Hoyland
4107807/2022	Mr Gregor Green
4107808/2022	Mr Michael Kane