



EMPLOYMENT TRIBUNALS

Claimant: Mr S Burgess

Respondents: 1. Clever Company Limited (in Administration)
2. The Secretary of State for Business, Energy and Industrial Strategy (Interested Party).

Heard at: Liverpool

On: 27 March 2023

Before: Employment Judge Ganner
(Sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: ET3 not served

JUDGMENT

The first respondent, not having presented a response to the claims, and the Secretary of State having made submissions as an interested party, and having heard evidence from the claimant, the judgment of the Tribunal is that:

1. The claimant's complaints under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") of a failure by the first respondent to comply with the requirements of section 188 of the 1992 Act are well-founded.
2. The Tribunal orders the first respondent, by way of a protective award under section 189(3) of the 1992 Act, to pay to the claimant a payment equivalent to remuneration for the period of 90 days beginning on 31 October 2022 in the sum of £7416.90.
3. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award.

REASONS

Introduction

1. Following a period of ACAS EC conciliation, by an ET1 claim form presented on 22 November 2022 the claimant contended that the respondent had failed to comply with its duty to consult and sought a protective award under section 189 TULRCA.
2. By a letter dated 13 December 2022 the joint administrators gave consent to the claimant bringing proceedings before the Employment Tribunal.
3. No ET3 response has been received in respect of this claim. It therefore follows the respondent company is debarred from defending the claim for the purpose of rule 21(3) of the Employment Tribunals Rules of Procedure 2013.

Evidence / Facts

4. The claimant gave evidence to me that he was employed by the respondent from 1 July 2019 to 31 October 2022 as a Finance Supervisor. He worked 38 hours per week and had an annual salary of £30,000.
5. There was no union recognised by the respondent for collective bargaining purposes. There was no attempt to arrange employee representative elections and no consultation took place at any time.
6. On 31 October 2022, without any prior warning, consultation or discussion, the claimant was told the company had ceased trading. He was therefore without a job and redundant. The claimant said that about 40 employees were made redundant on that day.
7. I accepted the unchallenged evidence given by the claimant which was corroborated by documentary evidence in his bundle.

Conclusions

8. There has been a failure to engage in discussions and consultations with either trade unions or the claimant himself. No employee representatives were appointed or elected. In these circumstances the first respondent is in clear breach of its duty under section 188 of the 1992 Act.
9. A protective award is punitive and not compensatory. Where there has been no consultation at all it is appropriate to start at the maximum period of 90 days; see **Susie Radin v GMB [2004] 1 IRLR 400**.
10. No mitigating features have been presented and I consider there is no basis for reducing the 90-day period in view of the circumstances I have found.
11. In these circumstances I consider the appropriate period for the protective award is 90 days. The respondent must pay 90 days' gross pay to the claimant.

Calculations

12. The claimant is owed £7416.90 for the protective award (£82.41 x 90 days gross daily wages).

13. The first respondent is advised of the provisions of regulation 6 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 such that within ten days of the decision in these proceedings being promulgated, or as soon as is reasonably practicable, the first respondent must comply with the provisions of regulation 6 of the 1996 Regulations and in particular must supply to the Secretary of State the following information in writing:

- (a) The name, address and national insurance number of the claimant to whom the award relates; and
- (b) The date of termination of the employment of the claimant.

14. The first respondent will not be required to make any payment under the Protective awards made until it has received a recoupment notice from the Secretary of State or notification that the Secretary of State does not intend to serve a recoupment notice having regard to the provisions of regulation 7(2). The Secretary of State must normally serve such recoupment notice or notification on the employer within 21 days of receipt of the required information from the first respondent.

Employment Judge Ganner

Date: 28 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 April 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**ANNEX TO THE JUDGMENT
(PROTECTIVE AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The respondent is under a duty to give the Secretary of State the following information in writing: (a) the name, address and National Insurance number of every employee to whom the protective award relates; and (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the Tribunal announced its judgment at the hearing. If the Tribunal did not announce its judgment at the hearing, the information shall be given within the period of 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the respondent to do so within those times, then the information shall be given as soon as reasonably practicable thereafter.

No part of the remuneration due to an employee under the protective award is payable until either (a) the Secretary of State has served a notice (called a Recoupment Notice) on the respondent to pay the whole or part thereof to the Secretary of State or (b) the Secretary of State has notified the respondent in writing that no such notice is to be served.

This is without prejudice to the right of an employee to present a complaint to an Employment Tribunal of the employer's failure to pay remuneration under a protective award.

If the Secretary of State has served a Recoupment Notice on the respondent, the sum claimed in the Recoupment Notice in relation to each employee will be whichever is the less of:

- (a) the amount (less any tax or social security contributions which fall to be deducted by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Secretary of State receives from the employer the information referred to above; OR
- (b) (i) the amount paid by way of or paid as on account of jobseeker's allowance, income-related employment and support allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date described in (a) above; or
- (ii) in the case of an employee entitled to an award of universal credit for any period ("the UC period") which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of universal credit for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the period to which the prescribed element is attributable.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award is then payable to the employee, subject to the deduction of any tax or social security contributions.

A Recoupment Notice must be served within the period of 21 days after the Secretary of State has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State or as soon as practicable thereafter.

After paying the balance of the remuneration (less tax and social security contributions) to the employee, the respondent will not be further liable to the employee. However, the sum claimed in a Recoupment Notice is due from the respondent as a debt to the Secretary of State, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State as to the amount specified in the Recoupment Notice.