EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103327/2022 and others (see schedule)

Held in Glasgow on 9 June 2023

Employment Judge S MacLean

Mr Alan Molloy and others	**Claimants** **Represented by:** **Mr P Kissen - Solicitor**
Braisby Roofing Limited (in Liquidation)	**First Respondent** **No appearance and** **No representation**
Secretary of State for Business, Energy & Industrial Strategy	**Second Respondent** **No appearance and** **No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that 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 preliminary hearing to consider whether the permission of the court dealing with the liquidation proceedings is required for the claims before the Tribunal to proceed with the liquidator of a respondent company in compulsory confirmation who has confirmed their intention not to resist the claims.

Background

2. On 17 June 2022, the claimants sent to the Tribunal claims for a protective award under section 189 of the Trade Union and Labour Relations Consolidation Act 1992.

3. On 6 July 2022, the Sheriff Court at Dunfermline (the Court) ordered that the first respondent be placed into compulsory liquidation.

4. On 20 July 2022, the claimants and the first respondent made a joint application under rule 64 of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules) for a judgment by consent to be issued. The parties informed the Tribunal that the liquidator of the first respondent did not intend to defend the proceedings and granted consent for the claims to proceed.

5. On 6 September 2022, the Tribunal requested confirmation that the Court's consent had been obtained for the claims to continue in terms of the Insolvency Act 1986.

6. On 2 December 2022, the Court having received an application from the claimants for consent to be granted wrote to the claimants' representative advising that its consent would not be required and referred the claimant's representative to the Court of Session case of *Hill v Black* [1914] SC 913.

7. On 17 January 2023, the claimant's representative wrote to the Court advising that the Insolvency Act 1996 requires consent of the court in compulsory liquidations even where the liquidator has stated their intention not to defend the proceedings.

8. On 20 January 2023, the Court convened a hearing to hear representations from the claimant's representative. The Court issued an interlocutor in terms of which the claimants required to make further submissions to the Tribunal.

9. On 26 January 2023, the claimant's representative wrote to the Tribunal citing the case of *Hill* and advising of the Court's view that in the present case its

consent is not required. The Tribunal was asked whether it agreed with the Court's view.

10. On 9 February 2023, the Tribunal wrote to the parties advising that *Hill* had been discussed at some length at a conference of Employment Judges in Scotland (then Chairmen) in 2005 following which it had been agreed that the Tribunal's practice when a company is in compulsory liquidation is for the claim to be accepted; the claimant to be advised of the provisions of section 130(2) of the Insolvency Act 1986; and to ask the claimant to decide whether to apply to the court dealing with the liquidation proceedings for permission.

11. The view of the Employment Judges was that not obtaining consent appeared contrary to the express terms of the Insolvency Act 1986. While the provisions are identical to the provisions of section 142 of the Companies (Consolidation) Act 1908, the Insolvency Act 1986 post-dates *Hill.* Also colleagues in England and Wales require such consent before proceeding and if Employment Judges in Scotland did not that could cause problems in cross-border insolvency situations. Additionally if the liquidator was left to take the point they may do so in some cases in the multiple and not in others. This had happened which was why the matter was being discussed and it was considered inequitable allowing some claimants to proceed and not others at the will of the liquidator.

12. Accordingly the Tribunal advised the claimants' representative that it "does not agree that where a liquidator has confirmed their intention not to defend the claim presented to the Employment Tribunal that no permission is required of the court dealing with the liquidation proceedings".

13. The claimant's representative responded that given the wider implications it would be in line with the Tribunal's overriding objective for a hearing to be convened to consider the matter in more detail and to invite representations from the Secretary of State for Business, Energy and Industrial Strategy at any such hearing.

14. The Tribunal considered that the Secretary of State for Business, Energy and Industrial Strategy had a legitimate interest in the issue arising in the case

which also had wider consequences beyond these claims. Under rule 35 of the ET Rules the Tribunal invited the Secretary of State to participate in the proceedings by either attending the preliminary hearing or providing written representations.

15. On 23 May 2023, the Secretary of State responded. In the response form, the Secretary of State advised that "yes" had been ticked to defending the claim so that it could facilitate the submission of a response. The Secretary of State advised that he was an interested party in his role as statutory guarantor and that he neither supported nor resisted the claim. The grounds of resistance did not address the issue of the consent of the Court.

The law

16. Section 130 of the Insolvency Act 1986 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 register of companies, who shall enter it in its 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. …"

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

18. In *Carr v British International Helicopters Limited* [1994] IRLR 212, the statutory provision as to administration was considered. The claim was of unfair dismissal where the claimant and others had been made redundant. The respondent argued that the application to the Tribunal was incompetent as no consent had been obtained.

19. The EAT held that a claim to the Tribunal fell within "proceedings" for these purposes, and that either the consent of the court or leave of the administrator was required. Also 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 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 such claims. Nonetheless, 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, on what basis, leave to proceed should be granted rather than the question whether leave is required."

20. *Hill v Black* [1914] SC 913 was not cited to the EAT in *Carr. Hill* was a case at the Inner House of the Court of Session which concerned the terms of section 142 of the Companies (Consolidation) Act 1908 which provided:

"142 Action 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 the terms as the court may impose."

21. In *Hill,* the pursuer brought an action against a company, its liquidator and certain secured creditors for the declarator that he was the proprietor of debentures at a theatre in Dundee. Decree in absence was granted against the company and the liquidator. The secured creditors who defended the claim did not plead any objection to competency of the action or 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 the absence of the reference to that section in the pleading and that as the company and liquidator had chosen not to defend the action, they should not be taken to have done so as well. The secured creditors appealed. The Inner House held that the company liquidator had waived any objection to the competency and that it was no part of the duty of the sheriffs substitute to put the section into operation.

Discussion

22. Mr Kissen said that the provisions of section 130 of the Insolvency Act 1986 and section 142 of the Companies (Consolidation) Act 1908 were identical. While the Insolvency Act 1989 post-dates *Hill* that did not mean that the ratio in *Hill* does not apply.

23. The Tribunal considered that there were two authorities, one from the EAT, and the other from Inner House, which appeared contradictory in effect. The Tribunal considered that the authority in *Carr* was to be preferred for the following reasons.

24. In the Tribunal's view the present case, like *Carr* fell within the terms of the statutory provision as to the "proceedings". While the statutory provision was not identical (the company was in administration rather than liquidation) the principle was that the reference to consent in the Insolvency Act 1986 (in that case either from the court or the administrator) was necessary. It was also in the context of an employment claim and supported the principle that the statutory terms of seeking consent are mandatory.

25. It also accords with the ordinary and natural meaning of the words in section 130(2) of the Insolvency Act 1986 and the purpose of the provision which

appears to be to allow protection for the company in liquidation where the court considers that to be appropriate. The Tribunal did not have any details of the circumstances of the first respondent. While the Court had not given consent when the claimants made the application there was no suggestion that the Court would not do so.

26. While *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 facts and the statute on which the decision was made are, in the Tribunal's view, materially different to the present case.

27. In *Hill,* the action is of declarator in circumstances are entirely different from the present case. Further, it was decided at a time before the creation of the Employment Tribunal (previously the Industrial Tribunal). The present claim is for a protective award, where there are also statutory duties of the second respondent, but which are limited to an award of a total of eight weeks' pay. A protective award may be made for 90 days' pay being a little under than 13 weeks. Accordingly any award may have an effect on the first respondent, as well as a second respondent, because of that limit.

28. While the wording of the Companies (Consolidation) Act 1908 and the Insolvency Act 1996 are identical the latter has statutory provisions for administration in which the leave of the administrator would suffice and for liquidation which only refers to the consent of the court. The Tribunal considered that this was significant. Parliament could have provided for leave of the liquidator if it had so wished to do so in a liquidation or to exclude claims to employment tribunals from the requirements of leave or consent if it had wished when it did not do so. In addition the leave of 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. Accordingly, the Tribunal considered that the statutory provision indicated that the consent of the court was intended by Parliament to be necessary. The Insolvency Act 1986 is a statute having effect in Great Britain. *Hill* is the only authority that suggests that the court need not take note of its terms.

29. In the Tribunal's view the requirement by section 130(2) of the Insolvency Act 1986 for the consent of the court is not so high that it would amount to some form of undue impediment to pursuing the claims. The requirement does not prevent the claimants making an application for a protective award or make it unduly difficult to pursue as such an application to the Court was made in December 2022. Although the matter is for the Court, the Tribunal does not understand from the information available that the Court is refusing to give consent to the application before it.

30. The Tribunal's conclusion is that as a matter of law the consent of the Court is required following the appointment of the liquidator.

31. Accordingly, the claims are sisted to allow the claimants to make further submission to the court for consent under section 130(2) of the Insolvency Act 1986.

Employment Judge: S MacLean
Date of Judgment: 27 June 2023
Entered in register: 28 June 2023
and copied to parties