EMPLOYMENT TRIBUNALS

Claimant: Mr M Grzesik

Respondent: West Ldn Limited, Trading As Plate Restaurant And Bar (In voluntary liquidation)

Heard at: London Central (via CVP) **On:** 2 March 2022

Before: Employment Judge S Connolly

Representation
Claimant: Claimant in person
Respondent: Did not attend

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The Claimant's claims for redundancy pay, notice pay and holiday pay are dismissed upon withdrawal.

2. The Claimant's claim of unlawful deductions from wages in respect of September, October and November 2020 is not well founded and is dismissed.

3. The Claimant's claim for damages for breach of contract relating to loss of universal credit that could have been received by him in respect of December 2020 is not well founded and is dismissed.

4. The Claimant's claim for a Protective Award under section 189 of the Trade Union Labour Relations Consolidation Act 1992 is well founded. The Respondent is ordered to make a payment to the Claimant in the amount of £9,346.15 being 90 days' gross pay. **The commencement date of the protected period is 30 November 2020.**

5. The Claimant's claim of unlawful deduction from wages relating to reductions from universal credit payments in respect of May, June and August 2021 is not well founded and is dismissed.

6. The Claimant's claim for £150 in relation to the Respondent's failure to return his personal items (Chef's knives and uniform items) is not well founded and is dismissed.

7. The Tribunal does not have jurisdiction to hear the Claimant's claim for compensation in respect of stress and inconvenience caused by the Respondent's actions.

REASONS

Claims and Issues

Summary

1. The Respondent operated a restaurant within a hotel premises in London. The Claimant was employed by the Respondent as a Breakfast Chef between 17 February 2014 and 30 November 2020.

2. The Claimant originally submitted claims in his ET1 for redundancy pay, notice pay and holiday pay. He confirmed in the hearing that he had received sums in relation to these matters from the Insolvency Service. These claims were therefore treated as withdrawn and dismissed by the Tribunal. The Claimant confirmed that the remaining claims he was pursuing were those set out in his email to the Tribunal of 24 February 2022. These claims are set out below:

3. Unauthorised Deduction from Wages pursuant to Section 13 of the Employment Rights Act 1996:

    a. in respect of September, October and November 2020;
    b. relating to reductions from universal credit payments in respect of May, June and August 2021.

4. Damages for breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales order) 1994:
    a. relating to loss of universal credit that could have been received by him in respect of December 2020;
    b. relating to £150 in respect of the Respondent's failure to return his personal items (Chef's knives and uniform items).

5. A Protective Award pursuant to section 189 of the Trade Union Labour Relations Consolidation Act 1992 due to a failure to consult on a collective redundancy.

6. Compensation in respect of stress and inconvenience caused by the Respondent's actions.

Unauthorised Deductions

7. In determining the claims for Unauthorised Deduction From Wages The Tribunal has considered the following issues:

    a. Is the claim in respect of wages?
    b. Has the employer made a deduction?
    c. If the wages were deducted, was the deduction authorised or exempt?
    d. What payment, if any, is owed?
    e. Is there any financial loss attributable to the non-payment?

Breach of Contract

8. In determining the claim for Breach of contract the Tribunal has considered the following issues:
    a. What was the contractual term?
    b. Was there a breach by the Respondent?
    c. If so, what damages are payable?

Protective Award

9. In determining the claim for a Protective Award, the Tribunal has considered the following issues:

    a. The Claimant's application to amend the ET1 to include the claim for a Protective Award. If the application is successful, the following issues must be considered:
        i. Did the Respondent propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less?
        ii. Did the Respondent consult with "appropriate representatives" of all employees who may be affected by the dismissals or measures taken in conjunction with them?
        iii. Does the Claimant have standing to bring this claim?
        iv. If the complaint is well-founded, what compensation should be awarded?

Compensation for Stress and inconvenience

10. In determining the claim for compensation for stress and inconvenience the Tribunal has considered the following issues:

    b. Does the Tribunal have jurisdiction to consider this claim?
    c. If so, on what basis?
    d. If this claim is well founded, what is the appropriate award?

Procedure, documents and evidence heard

11. The hearing was conducted via video. The Claimant suffered from some technical issues and joined by telephone. There were no other technical issues during the hearing.

12. The Claimant appeared in person. The Respondent did not submit an ET3, produce documents or take any part in the proceedings. No one from the Respondent attended the hearing.

13. The Tribunal had the benefit of limited documentation provided by the Claimant. The Claimant gave evidence in person and no witness evidence was adduced on behalf of the Respondent.

Fact Findings

14. The Respondent operated a restaurant within a hotel premises in London. The Claimant was employed by the Respondent as a Breakfast Chef between 17 February 2014 and 30 November 2020 when he was dismissed by reason of redundancy. The Claimant's dismissal was confirmed by letter in February 2021.

15. The Claimant's employer had changed a few times during his employment but his terms and conditions had not really changed and he retained continuous service.

16. The Respondent was impacted by the COVID-19 pandemic and the Respondent had made arrangements with its employees in relation to the Coronavirus Job Retention Scheme or "furlough" scheme. The Claimant agreed to participate in this scheme.

17. The Claimant was informed by video call on 18 July 2020 about the potential insolvency of the Respondent and was told that he could be made redundant as a result. The Respondent mentioned that there would be further discussions and that there would be a process for claiming payments from the government. The Claimant was told that more detail would follow.

18. The Claimant did not hear anything further in writing until 2 October 2020. This correspondence enclosed his P45 and confirmed that his employment ended on 31 August 2020. However, on 12 November 2020, the Claimant received further correspondence from the Respondent which stated that the P45 was sent in error and that the Claimant would remain on furlough until March 2021. The correspondence stated that payments would be made in accordance with the agreed scheme: 70% of salary would be paid in September 2020, 60% in October 2020 and 80% in November 2020. The Claimant confirmed in evidence that he received a payment from the Insolvency Service of £2,993.52 in May 2021 and confirmed that this seemed to correspond with the amounts referenced in the email of 12 November 2020.

19. The Claimant subsequently received correspondence in February 2021 enclosing his P45 and confirming his termination date as 30 November 2020.

20. The Claimant's unchallenged evidence was that there were over 20 people impacted by the redundancy. He said that there were around 12 people working in the kitchen in addition to at least 10 waiters, 2 bartenders, 1 night chef and 1 or 2 room service staff. There is no reason not to believe the Claimant on this point. The Tribunal's finding is that there were more than 20 employees impacted by the liquidation and subsequent redundancy.

21. Apart from the video call in July 2020, there has been no redundancy consultation. There was no recognised trade union and no representatives were appointed. No consultation meetings took place.

22. The Claimant received Universal Credit payments for January 2021 but unable to make a claim for December 2020 because according to HMRC he remained employed by the Respondent. The Claimant's Universal Credit payments were reduced during May, June and August 2021 when he received the notice, redundancy and holiday payments from the Insolvency Service. The Claimant raised these issues with the team responsible for Universal Credit via their website but this did not resolve the issue.

23. The Claimant used his own knives, Chef whites and safety shoes during his employment with the Respondent. It is common for all Chefs to have their own equipment. In the past, his employer had provided some uniform items and shoes but as at 30 November 2021, the Claimant was using his own (apart from a branded apron). The knives were initially quite expensive but were a few years old. The knives, whites and shoes were left in the Respondent's premises when the restaurant closed as part of the Covid-19 lockdown and were never returned to the Claimant.

24. The Claimant contacted the Insolvency Practitioner to retrieve these items who advised him to go to the hotel where the restaurant was located. The hotel was closed at the time he raised the issue and only security staff were on site. The Claimant doubted whether he would be let in as he was no longer employed there. The Claimant suspects that either the property was removed by the Respondent when it had taken its own property (equipment, food, alcohol) from the kitchen to a new premises or it has been removed and potentially thrown out by housekeeping as part of regular emptying of lockers to make room for new staff.

25. The Claimant confirmed his monthly gross salary of £2,250. The Claimant's effective date of termination was 30 November 2020. **The commencement date of the protected period is 30 November 2020.**

26. The Claimant contacted ACAS as part of the Early Conciliation Procedure on 15 December 2020. ACAS issued an Early Conciliation Certificate on 14 January 2021. The Claimant submitted his ET1 on 9 February 2021.

27. The Claimant wrote to the Tribunal on 24 February 2022 setting out a Schedule of Loss. In his email the Claimant set out (among other things) that he was claiming a:

> *"Protective award for failure to consult my redundancy in details- up to 90 days of pay which is: £1760 net pay x 3= £5280 (up to judge to decide how much I'm entitled to)"*

28. Reference to a protective award was not included in the Claimant's ET1 but he did make reference to the Respondent failing to follow "correct procedures". In response to a question from the Tribunal at the hearing on why he did not include this reference to a Protective Award in his ET1, the Claimant said that at the time of submitting the ET1 he had tried to get his head around what he could claim for and also that he didn't know where the claim would end up given that the Respondent was still referring to the potential that he would be re-hired or moved to a different site. He said initially that all he wanted was compensation for delays and stress and that he was aware that he had to comply with the time limits so needed to submit his claim.

The Law

Unauthorised Deduction from Wages

29. Section 13(1) provides the right for a worker not to suffer an unauthorised deduction from wages:

> ***13 Right not to suffer unauthorised deductions.***
>
> *(1)An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.*

30. Section 23 of the Employment Rights Act 1996 provides a worker with the right to bring a complaint to the Employment Tribunal:

> ***23 Complaints to employment tribunal.***
> *(1)A worker may present a complaint to an employment tribunal—*
>
> *(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*
>
> *(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),*
>
> *(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or*

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

31. Section 27 of the Employment Rights Act 1996 includes a definition of wages for the purposes of the act.

Breach of Contract

32. Employment Tribunals have the power to deal with breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

33. The aim of damages for breach of contract is to put the Claimant in the position they would have been in had the contract been performed in accordance with its terms.

Protective Award

Application to Amend ET1

34. The Tribunal has the power pursuant to the Employment Tribunal Rules of Procedure 2013 (Rule 29 and 30) to make Case Management Orders. In addition to these rules, The Tribunal has also considered Rule 2, which sets out the overriding objective of the Tribunal to deal with cases fairly and justly.

35. There is a body of case law relating to applications to amend a claim form. The leading case of *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661* sets out general principles applicable to amendments. The Employment Appeal Tribunal in *Selkent* decided that, when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions."

36. The Tribunal has also considered the case law relating to the impact of time limits on applications to amend including *Ashworth Hospital Authority v Liebling EAT/1436/96, 10 March 1997, unreported* and *Home Office v Bose [1979] ICR 481, EAT*.

Protective Award

37. Section 188 and 189 of the Trade Union and Labour Relations Consolidation Act 1992 addresses the duty to consult on redundancies where 20 or more employees are affected.

Section 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 [F3affected 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 [F14the 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.

Section 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 industrial 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.

Assessing the amount of the Protective Award

38. The Court of Appeal in *GMB v Susie Radin Ltd [2004] IRLR 400* provided guidelines to Tribunals in assessing the amount of the protective award. This set out that the purpose of the protective award is to punish the employer for not complying with the obligations under section 188, not to compensate the employee for their individual financial loss. It also highlighted that it is appropriate in a case where there has been no consultation at all for the tribunal to start with the maximum permitted protective award and then examine whether there are any mitigating circumstances which would justify this maximum period being reduced.

Conclusions

Unauthorised Deduction From Wages for Sept – Nov 2020

39. The Claimant accepts that these payments were received from the insolvency service in May 2021. Therefore this claim is not well founded and is dismissed.

Breach of contract - Financial loss of £371.75 relating to universal benefit that could have been received for December 2020

40. The Tribunal considered that whilst there may have been a breach of contract given that notice was not validly served until February 2021, notice pay was received from the insolvency service. The Tribunal does not find that the inability to claim universal credit amounts to a loss caused by the Respondent's breach. It is not for the Tribunal to interfere with the universal credit rules. This is a matter to be raised with the relevant government department.

Protective Award under section 189 of the Trade Union Labour Relations Consolidation Act 1992

Application for amendment

41. The Tribunal considered that the Claimant's email of 24 February 2022 was an application to amend his claim to include a claim for a Protective Award for a failure to consult as required by the Trade Union Labour Relations Consolidation Act 1992.

42. In deciding whether to allow the Claimant's amendment, the Tribunal has considered the guidance of the Employment Appeal Tribunal in *Selkent* and carried out a balancing exercise of the relevant factors. The Tribunal has also considered the overriding objective on Tribunals to deal with cases fairly and justly.

43. The Claimant's amendment dated 24 February 2022 does add a new cause of action, namely a claim for a Protective Award, but this is claim is linked to and arises out of the same facts as the original claim submitted on 9 February 2021. In particular, the ET1 made reference to the Respondent not following the "correct procedures".

44. The Tribunal has considered the applicability of time limits for submitting the Protective Award claim. Considering the cases of *Ashworth Hospital Authority v Liebling* and *Home Office v Bose*, given that the new claim arises out of facts already pleaded, it is not essential that the Tribunal analyses the issues of time limits in detail. It is sufficient for the Tribunal to consider the application under the other general principles in *Selkent* and the overriding objective.

45. The Respondent did not submit an ET3, produce documents or take any part in the proceedings. No one from the Respondent attended the hearing. The Tribunal does not consider there to be any prejudice to the Respondent in allowing the amendment. The Claimant's delay in making the Protective Award claim has had no impact on the Respondent.

46. After carefully balancing these relevant factors, it is the Tribunal's decision to allow the Claimant to amend his claim to include a Protective Award claim.

Protective Award Claim

47. The Respondent proposed to dismiss 20 or more employees as redundant within a 90 day period. It failed to comply with section 188 of the legislation in that it did not appoint appropriate representatives, provide information or consult for a minimum of 30 days.

48. As the Respondent did not recognise a trade union and no representatives were appointed, the Claimant had standing to bring this claim. No evidence from the Respondent has been submitted on this matter.

49. The Tribunal therefore makes a declaration that there has been a breach of section 188 by the Respondent and makes a protective award of an amount that is just and equitable in all the circumstances having regard to the seriousness of the default, but with a 90-day maximum.

50. The Tribunal has a discretion to award what is just and equitable in all the circumstances and the Court of Appeal in *Susie Radin* held that where there has been no consultation at all, it is appropriate for the tribunal to start with the maximum permitted protective award and then examine whether there are any mitigating circumstances which would justify this maximum period being reduced.

51. In this case, as there has been no consultation whatsoever, the Tribunal makes an award of 90 days gross pay. **The commencement date of the protected period is 30 November 2020.** The Claimant's monthly gross salary was £2,250 and therefore his annual salary was £27,000. 90 days' pay amounts to £9,346.15 (£27,000 / 260 working days x 90).

<u>Unlawful Deduction from Wages relating to reductions from universal credit payments in respect of May, June and August 2021.</u>

52. Whilst there were delays in relation to payment of notice, holiday and redundancy pay, the reduction in the payment of universal credit does not amount to wages for the purposes of the Employment Rights Act 1996. Further, the Tribunal does not consider that this reduction amounts to financial loss that has been directly caused by the Respondent's breach. Even if the payment for notice, holiday and redundancy pay had been made at an earlier point, credit would have needed to be given for it in relation to claims for universal credit. It is not for the Tribunal to interfere with the universal credit rules. This is a matter to be raised with the relevant government department.

<u>Claim for £150 in relation to the Respondent's failure to return his personal items (Chef's knives and uniform items)</u>

53. There is no contractual provision in relation to return of employee property. The Tribunal therefore does not have jurisdiction to make an order in this regard. The Tribunal considers that the loss of the Claimant's items was as a result of the Covid-19 lockdown and subsequent insolvency of the Respondent. The proper forum for this is for it to be raised with the Insolvency Practitioner.

Compensation in respect of stress and inconvenience caused by the Respondent's actions.

54. The Tribunal does not have jurisdiction to make awards for stress and inconvenience in relation to the claims made. Therefore, this claim is not well founded and is dismissed.

S Connolly

Employment Judge S Connolly

10 July 2023

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.11/07/2023

FOR THE TRIBUNAL OFFICE