



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr. A Hague & others

(2) Mr. P Munckton

Respondents: (1) Streamline Press Ltd (in administration)

(2) The Secretary of State for Business, Energy and Industrial Strategy

Heard at: Nottingham, on the papers

On: 29 June 2023

Before: Employment Judge Heathcote (sitting alone)

Representation:

Claimants: Written representations

First Respondent: No representations

Second Respondent: Written representations

JUDGMENT

1. The First Respondent failed to comply with the requirements of Sections 188 and 188A(1) Trade Union and Labour Relations (Consolidation) Act 1992 and the Tribunal makes a declaration to that effect.
2. The Tribunal accordingly makes a protective award in respect of all the Claimants named on the attached schedule.
3. The protected period is a period of 90 days commencing on 5 October 2022.
4. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to these awards.

REASONS

Background

1. The employment of the Claimants was terminated by way of redundancy as a result of the First Claimant entering into administration. The Claimants have each advanced claims against the First Respondent for protective awards. Claims have also been advanced against the Second Respondent (the Secretary of State for Business, Energy and Industrial Strategy) on the basis that it is common ground that should a protective award be made, those sums will fall to be paid, subject to a cap, by the Second Respondent out of the National Insurance Fund.
2. In respect of the first 42 claimants listed in the schedule, of which Mr. Alan Hague is the lead Claimant, ACAS was notified under the early conciliation procedure on 6 November 2022 and the certificate was issued on 7 November 2022. The ET1 was presented on 8 November 2022.
3. In respect of the claim of Mr. Paul Munckton, the second Claimant (claim number 2602641/2022), ACAS was notified on 19 October 2022 and the certificate was issued on 21 October 2022. The ET1 was presented on 9 November 2022. I considered this latter claim alongside the others, pursuant to an Order dated 14 November 2022.
4. Consent has been given by the parties to the hearing proceeding before an Employment Judge sitting alone and it has been agreed that the matter would be dealt with on the papers.
5. The First Respondent has not entered an ET3 response form in relation to the claims. The Second Respondent has filed an ET3 form and takes a neutral position on the basis that they were not party to the process leading up to the Claimants' dismissals and are unable to comment on the consultation process, or lack of it.
6. I have taken into account all of the submissions and information provided by or on behalf of the Claimants and the Second Respondent before determining the claims.

The Law

7. Section 188 Trade Union and Labour Relations (Consolidation) Act 1992 provides for the duty of an employer to consult representatives where they are proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. That section requires the employer to consult about the dismissals of all persons who are appropriate representatives of any of the

employees who may be affected by the proposed dismissals or by measures taken in connection with them.

8. In cases where there is no independent trade union recognised by the employer nor are there employee representatives already appointed or elected by the employees for the purposes of receiving information and being consulted about the proposed dismissals, it is incumbent upon the employer to hold an election to appoint such employee representatives. That election must satisfy the requirements of Section 188A(1) Trade Union and Labour Relations (Consolidation) Act 1992 which 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.”

9. Where a Tribunal finds that there has been a breach of the consultation obligations under Section 188 then it must turn to Section 189 which deals with the requirement to make a declaration in respect of well-founded complaints and that a protective award may also be made. A protective award is made in relation to the protected period which begins with the date on which the first of the dismissals to which the complaint relates takes effect and shall not exceed 90 days.
10. As to the amount of any protective award in that regard, Section 189(4)(b) makes clear that such an award should be of the length that 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.
11. A sanction under Section 189 is intended to be penal rather than compensatory and the approach of the Tribunal will be to start with 90 days and reduce it only if there are mitigating circumstances justifying a reduction to the extent which the Tribunal considers appropriate (see **Susie Radin Ltd v GMB [2004] IRLR 400**).

Findings of fact

12. The First Respondent entered administration on 5 October 2022. On the same day, the First Respondent dismissed the Claimants by way of redundancy.
13. The Claimants worked at a single establishment at which there was no recognised trade union.
14. The First Respondent failed to organise the election of employee representatives and to consult with them in accordance with sections 188 and 188A of Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”).
15. There was no consultation whatsoever in relation to the proposed redundancies with the Claimants.
16. The first Respondent failed to submit a Response to the claims and the administrator has given consent for those claims to proceed.

Conclusions

17. The Claimants have standing to bring their complaints. There was no recognised independent trade union and no existing employee representatives with whom the First Respondent was required to consult.
18. The First Respondent was in breach of the provisions of Section 188 and 188A on the basis that no attempt was made to comply with the duty to appoint employee representatives and accordingly no consultation took place with the affected employees.
19. This came as a complete surprise to the Claimants, despite the legal requirement to consult, given the number of redundancies. Whilst there may be instances where consultation is not possible, insolvency is rarely such a circumstance. I do not find any mitigating circumstances to justify a reduction in the award.
20. Accordingly, the complaints of all the Claimants' complaints in the attached schedule, pursuant to TULRCA section 189, are well founded and succeed.

Employment Judge Heathcote

Date: 29 June 2023

Notes

1. A protective award is a two-stage process. The tribunal at this stage makes no financial award, but give a judgment that the claimants are entitled to a protective award in the terms set out above. The claimants must then seek payment of their individual awards from the respondent, quantifying the amount.
2. Failure to pay (should that occur), or any dispute as to the amount payable, then becomes a matter for a further separate claim under s192 of the Trade Union and Labour Relations (Consolidation) Act 1992 for payment of the award.

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.

Case No: 2602641/2022 & Others / Case No.2602684/2022 (see attached schedule)

Case No: 2602641/2022 & Others

Case No: 2602684/2022

Schedule of claimants entitled to a protective award for a 90-day period and who are within the scope of this judgment.

	Name	Case number
1.	Alan Hague	2602641/2022
2.	Carole Arrowsmith	2602642/2022
3.	Chris D'Amario	2602643/2022
4.	Christian Shaw	2602644/2022
5.	Craig Biddle	2602645/2022
6.	Violeta Tufan	2602646/2022
7.	Denise Darby	2602647/2022
8.	Donna Preston	2602648/2022
9.	Edgar James	2602649/2022
10.	Ian Banks	2602650/2022
11.	Jacob Morris	2602651/2022
12.	James Sharp	2602652/2022
13.	Jamie Ashton	2602653/2022
14.	Joe Hawker	2602654/2022
15.	Karen Blount	2602655/2022
16.	Karl Hawker	2602656/2022
17.	Kevin Sims	2602657/2022
18.	Mark Brown	2602658/2022
19.	Matthew Sinclair	2602659/2022
20.	Mike Sweeney	2602660/2022
21.	Oliver Bollingbroke	2602661/2022
22.	Paul Simkins	2602662/2022
23.	Paul Coleman	2602663/2022
24.	Paul Corser	2602664/2022
25.	Philip Newton	2602665/2022
26.	Sean Nooney	2602666/2022
27.	Simon Wood	2602667/2022
28.	Stephen Oakes	2602668/2022
29.	Trevor Hurrell	2602669/2022
30.	Leroy Johnson	2602670/2022
31.	Gareth Follows	2602671/2022
32.	John Rich	2602672/2022
33.	Damian Robertson Kirby	2602673/2022

Case No: 2602641/2022 & Others / Case No.2602684/2022 (see attached schedule)

34.	Geoff Cartwright	2602674/2022
35.	Joe Coton	2602675/2022
36.	Joshua Peel	2602676/2022
37.	Kerry Derham	2602677/2022
38.	Sharon Harkisan	2602678/2022
39.	Andrew Sewell	2602679/2022
40.	Richard Gamble	2602680/2022
41.	David Ross	2602681/2022
42.	Andrew Bates	2602682/2022
43.	Paul Munckton	2602684/2022