



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101792/2022 and others as per attached schedule

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Preliminary Hearing via telephone conference call on 1 August 2023

Employment Judge M Kearns

10 **Mr M McLauchlan & others as per attached Schedule**

**Claimants
Represented by:
Mr J Thompson -
Solicitor**

15 **W.G. Walker & Company (Ayr) Limited (in Liquidation)**

**Respondent
Represented by:
Mr S Robertson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that:

1. The lead claimant's name is amended to Mark McLauchlan;
2. The respondent has failed to comply with its obligations under Sections 188A and 188 of the Trade Union & Labour Relations (Consolidation) Act 1992. The
25 Employment Tribunal makes a protective award under Section 189 of that Act in favour of the respondent's employees (per attached schedule) who were all made redundant on 10 or 11 January 2022 and orders the respondent to pay remuneration to its employees for the protected period namely for 90 days
30 starting on 10 January 2022.

REASONS

1. Having complied with the early conciliation requirements, the claimants presented their application to the Employment Tribunal on 6 April 2022. By ET3 lodged on 5 May 2022, the claim was initially defended. By interlocutor
35 of Sheriff J Montgomery dated 16 February 2023, leave was granted enabling

these proceedings to be continued. Today's telephone preliminary hearing was fixed with a view to identifying the matters in dispute between the parties and fixing a final hearing on them. However, on behalf of the respondent, Mr Robertson indicated that having taken advice, the respondent is no longer
5 maintaining its defence. He invited Mr Thompson to contact Emily Bainbridge at the Clumber Consultancy and confirmed that he would pass Mr Thompson her email address.

2. Mr Thompson had yesterday provided a witness statement from the lead claimant setting out the claimants' position in relation to the relevant facts. I
10 went through this paragraph by paragraph with Mr Robertson and he was able to confirm its accuracy. Thus, the relevant facts in this case are agreed to be those in the witness statement, all as set out below.

Agreed Facts

3. The claimants were all employed by the respondent. On 10 January 2022 the
15 employees of the respondent were dismissed by reason of redundancy with immediate effect. The lead claimant was one of more than 20 employees dismissed by reason of redundancy on 10 or 11 January 2022. On or about 12 January 2022 the respondent went into Compulsory Liquidation and Scott Bastick and Mark Phillips, Insolvency Practitioners, of SKSi were appointed
20 Joint Provisional Liquidators to the respondent by interlocutor of the Court of Session. More than 20 employees were dismissed by the respondent on or about 10 January 2022. No information had been provided to the employees and there was no prior consultation.

4. No trade union is recognised in respect of the employees, nor were any
25 employee representatives appointed. The respondent has failed to comply with its duty to consult under sections 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Applicable Law

5. Section 188 of the Trade Union and Labour Relations (Consolidation) Act
30 1992 ("TULRCA") provides (so far as relevant):

'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 90 days, and*

(b) *otherwise, at least 30 days,*

before the first of the dismissals takes effect.'

6. Section 188A sets out the requirements for the election of employee representatives. It is a matter of agreement that these were not followed in this case, so there is no need to set them out here.

7. Section 189 states so far as material:

'Complaint ... and protective award

(1) *Where an employer has failed to comply with a requirement of s.188 or s.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.*

...

..... and

(d) *in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.*

(1B) *On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in s.188A have been satisfied.*

5 (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 –*

10 (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 s.188,*

ordering the employer to pay remuneration for the protected period.

(4) *The protected period –*

15 (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*

20 (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 s.188;*

but shall not exceed 90 days ...'

8. In Susie Radin Ltd v GMB and Others [2004] IRLR 400 the Court of Appeal gave the following guidance to tribunals in assessing a protective award.

25 *“Employment tribunals should have the following matters in mind when deciding in the exercise of their discretion whether to make a protective award and for what period: (1) The purpose of the award is to provide a sanction for*

breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of that breach. (2) Tribunals have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default. (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. (4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188. (5) How the length of the protected period is assessed is a matter for the tribunal, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the tribunal considers appropriate.”

Discussion and Decision

- 15 9. The respondent in this case quite properly does not maintain its defence. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”) provides (so far as relevant) that where an employer is proposing to dismiss as redundant 20 or more employees at one establishment, the employer must consult the appropriate representatives of those employees affected. There was no consultation of any description in this case prior to the dismissal of all the claimants for redundancy on 10 or 11 January 2022, nor were any steps taken to enable the election of employee representatives as required by section 188A of the Act.
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10. On the basis of the pleadings before me and the agreed facts set out above, I consider that it is appropriate to make a protective award in this case. Applying the guidance given by the Court of Appeal in Susie Radin, I consider that the protective period is the period of 90 days from 10 January 2022. There was a complete failure by the respondent in this case to provide any of the required information and to consult. That failure was serious. The proper approach is to start with the maximum period and to reduce it only if there are mitigating circumstances justifying a reduction. No such mitigating circumstances were before me. In view of the seriousness of the
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respondent's failure I consider that a protected period of 90 days is just and equitable. I have therefore ordered the respondent to pay to the employees affected their remuneration for the protected period.

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Employment Judge: M Kearns
Date of Judgment: 01 August 2023
Entered in register: 03 August 2023
and copied to parties

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Multiple Schedule**Multiple: 4100208 – W.G. Walker & Company (Ayr) Limited****List of Claimants**

Case Number	Claimant
4101792/2022	Mr Mark McLauchlan
4101793/2022	Mr Dale Evans
4101794/2022	Mr Lee Smith
4101795/2022	Mr Ian Smith
4101796/2022	Mr Alan Gray
4101797/2022	Mr Kevin Wright
4101798/2022	Mr John Paul Wright
4101799/2022	Mr Alan Hassard
4101800/2022	Mr Steven Nelson
4101801/2022	Mr Gordon Wilson
4101802/2022	Mr Greig Kinney
4101803/2022	Mr Stephen Heron
4101804/2022	Mr James Riddicks
4101805/2022	Mr William Irvine
4101806/2022	Mr Jamie Armstrong
4101807/2022	Mr Elliot Young
4101808/2022	Mr Andrew Irvine
4101809/2022	Mr Callum Macwilliam

4101810/2022	Mr Mark Payne
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