



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103540/2023 and others (as per schedule)

Hearing held at Dundee on 14 December 2023

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**Employment Judge McFatridge
Tribunal Member Ms Shanahan
Tribunal Member Ms Rochford**

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Mr Bill Stewart and others

**Claimant
Represented by
Mr Thomson,
Solicitor**

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**Tayside Aviation Ltd (in administration)
Interpath Advisory**

**Respondent
Not present or
represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

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1. the respondent acted in breach of its obligations in terms of section 188 and section 188A of the Trade Union and Labour Relations (Consolidation) Act 1892; and
2. the respondent shall pay a protective award of 90 days' remuneration to the claimants listed in the schedule annexed.

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REASONS

1. The claimants submitted a multiple claim in which they claimed that they had all been dismissed by the respondent on 20 April 2023 and that the respondent had failed to comply with their obligations to consult with employees prior to the dismissals in terms of the Trade Union and Labour Relations (Consolidation) Act 1992. They sought a protective award. The claim form named Mr Stewart and 16 others. The identity of the claimants to whom this judgment relates are set out in the schedule attached. The claim was duly notified both to the respondent company and also to the administrators. The administrators submitted a response in which they accepted that they had been appointed administrators on 20 April 2023 and had immediately dismissed 22 employees on that date. They stated there had been no consultation. They stated that three employees had been kept on, one had been dismissed on 28 April and the two remaining employees had been dismissed on 13 June 2023. It was their position that there had been ongoing consultation in respect of the other three employees. The administrators consented to the proceedings. A hearing was fixed and at the hearing evidence was led from Geoffrey Sloan a former employee of the respondent and one of the claimants. Mr Stewart was not present but had previously submitted a witness statement. On the basis of the evidence and the documentary productions provided by the claimants the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

Findings in Fact

2. The respondent is Tayside Aviation Limited (in administration). The identity of the claimants to whom this judgment relates are set out in the schedule annexed. All 17 employees worked for Tayside Aviation Limited and were in their employment on 20 April 2023.
3. The respondent did not recognise any trade union for negotiation purposes.
4. Just before the usual finishing time on 20 April those employees who were in the respondent's premises were told to go to the conference room for a meeting. Once they were assembled there the respondent's previous

Finance Director came in accompanied by two individuals he introduced as administrators. Those present were advised that the company had gone into administration and would be closing its operations. They were advised that all of their employments were terminated herewith.

- 5 5. All 17 of the claimants had their employment terminated on 20 April 2023 by reason of redundancy. None of the claimants had received any prior notice that redundancies were in contemplation. No attempt was made to elect employee representatives in any way or to choose appropriate representatives. The claimants left the premises on 20 April and did not
10 return.

Observations on the evidence

6. We found Mr Sloan to be an eminently credible and reliable witness. Whilst he could only give detailed evidence about his own experience he confirmed that so far as he was aware all 17 claimants had been
15 dismissed on the same day as him, 20 April and most of them had been at the same meeting as him. He was aware that, as mentioned by the respondent in their response, a couple of employees had been kept on for a time to help the administrators wind up the company but he did not have any further details.

20 Discussion and decision

7. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that

25 “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 or any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.”

Section (1B) goes on to define appropriate representatives as being either

“(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:

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(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;

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(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).”

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In this case it was clear from the evidence that absolutely no consultation had taken place whatsoever. There had been no attempt to elect employee representatives in terms of section 188A of the Act.

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8. We required to consider whether in terms of section 188(7) of the 1992 Act there were special circumstances which rendered it not reasonably practicable for the respondent to comply with their obligations. As was said in ***Clarks of Hove Ltd v Bakers Union [1978] ICR 1076*** a special circumstance requires there to be something exceptional or out of the ordinary or uncommon. Many redundancies are a consequence of adverse financial circumstances leading to insolvency. It would appear that that is the case here. It is clear that insolvency itself is not exceptional or out of the ordinary and therefore in this case there were no such special circumstances in our view. We were therefore satisfied that the respondent company failed to comply with the requirements of section 188 of the 1992 Act in that it had failed to consult and we shall make a declaration to that effect in terms of section 189(2) of the said Act. We are also satisfied the respondent company failed to make arrangements to

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elect appropriate representatives in terms of section 188(1B)(b)(ii) of the said Act.

9. Section 189(2) also provides that in addition to making such a declaration a Tribunal may also make a protective award. In reaching their decision as to whether to make such an award and if so how much the Tribunal was guided by the judgment of the Court of Appeal in the case of ***Suzy Radin Ltd v GMB and others [2004] IRLR 400***. This case suggests that a Tribunal in exercising its discretion to make a protective award and for what period should have regard

10 (1) to the purpose of the award as a sanction for breach by the employer of their obligation to consult;

(2) to exercise the Tribunal's discretion to do what is just and equitable while focusing on the seriousness of the employer's default which may vary from the technical to a complete failure as here to provide any of the required information and to consult; and

(3) to adopt what Lord Justice Gibson describes as the proper approach in a case where there has been no consultation by starting with the maximum period and reducing it only if there were mitigating circumstances justifying a reduction.

10. In the present case there did not appear to be any such mitigating circumstances. The Tribunal therefore resolved that it would be appropriate to make a protective award of 90 days' pay.

Employment Judge: I McFatridge
Date of Judgment: 19 December 2023
Date sent to parties: 28 December 2023

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Schedule for 4103450/2023 and others

	4103540/2023	Mr Bill Stewart
	4103541/2023	Mr Darren Carver
5	4103542/2023	Mr Drew Dudgeon
	4103543/2023	Mr David Muir
	4103544/2023	Mr Declan Hume
	4103545/2023	Mr Geoffrey Sloan
	4103546/2023	Mr Ian Fraser
10	4103547/2023	Mr John Anton
	4103548/2023	Ms Bernadette Finney
	4103549/2023	Mr Pedro Ruisanchez
	4103550/2023	Ms Caroline Christie
	4103551/2023	Mr Lycurgus Moraetes
15	4103552/2023	Mr Peter Hodges
	4103553/2023	Ms Pippa Cowling
	4103554/2023	Mr Steve Wright
	4103555/2023	Mr William Shaw
	4103556/2023	Mr Ian Weinstein