



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

AND

Respondents

Mr C Griffin & 62 others (see schedule attached)

**Clockfair Limited t/a Broadway Casino
(in administration) (1)
Secretary of State for Business,
Energy and Industrial Strategy (2)**

HELD AT: Birmingham

ON: 8 April 2024

BEFORE: Employment Judge J Jones

Appearances: Decision made on the papers under Rule 21(2) of the Employment Tribunal Rules of Procedure 2013 ('ET Rules')

JUDGMENT

The judgment of the Tribunal is as follows:

1. In this judgment "the claimants" means all those individuals whose names appear on the schedule attached to this judgment.
2. The claimants' claims were presented in time. The Tribunal has jurisdiction to hear their claims.
3. The complaints that the first respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 are well founded.
4. I make a protective award in respect of all the claimants in respect of such failures by the first respondent, being one upon the claim of each claimant.
5. The description of employees to which the protective award made on the claim of claimant relates is that same claimant (and no one else).
6. In respect of each and all of the protective awards the protected period is 90 days and begins on 21 December 2022.

REASONS

Background

1. The 63 claims were made by a claim form presented on 24 February 2023. All are complaints for failure to consult pursuant to section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA').
2. The first respondent ceased trading on or about 20 December 2022 and joint administrators were appointed for the first respondent on 1 February 2023. The joint administrators gave their consent in writing to the institution of the proceedings on 16 February 2023.
3. No ET3 response was presented to the claims on behalf of the first respondent by the administrators. Given the claim identifies a potential liability on the part of the Secretary of State for Business, Energy and Industrial Strategy, she was made a second respondent to the claim which was served on her on 14 March 2023. The Secretary of State presented a response on 5 April 2023 which was accepted by the Tribunal. The Secretary of State confirmed that the claims were neither supported, nor resisted.
4. The claimants provided written information about the circumstances leading to the termination of their employment in the claim form and also in a letter dated 1 June 2023 from Elizabeth Welch, joint administrator.
5. As no response has been presented by the first respondent and the second respondent has confirmed that the claim is not contested, I have decided under the provisions of rule 21(2) ET Rules that a determination of the claim can be made on the available material.

Findings of fact

6. At the time the claimants were dismissed, there were more than 20 employees working for the first respondent at its site known as the Broadway Casino, Unit 1-4, Broadway Plaza, 20 Ladywood Middleway, Birmingham, B16 8LP.
7. On 22 December 2022 the claimants were informed verbally that they were being made compulsorily redundant which they were told was unavoidable as a result of the insolvency of the first respondent, which ceased trading on 21 December 2022. On 1 February 2023, the first respondent went into administration.
8. Accordingly, I find the claimants were dismissed along with all other employees of the first respondent on 22 December 2022.
9. The claimants conciliated via ACAS on 22 February 2023. Having checked the dates of early conciliation and presentation of claim form, I find that all claims were presented (or early conciliation was started) within three months of the date of dismissal (or within a month of conciliation terminating). The claims were all therefore presented within the time limits set out in section 189 (5) of TULRCA.
10. The effect of section 195 (2) TULRCA is that where an employee is or is proposed to be dismissed, it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant. I find in the absence of evidence to the contrary the claimants were indeed dismissed by reason of redundancy.
11. I also find that 20 or more employees were employed by the first respondent at one establishment on 22 December 2022 when they were dismissed, and

employees named in this claim were among those employees employed by the first respondent prior to dismissal. All employees were assigned to the establishment.

12. The first respondent did not have a recognised trade union at the relevant time.
13. No attempt was made to elect representatives with whom it could consult or an attempt to consult. No consultation took place prior to the dismissals.

Legal analysis and Conclusions

14. As to who may bring a complaint pursuant to s. 188 or 188A to an Employment Tribunal, s.189(1) TULRCA states:-
 - “(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.”*
15. I have considered *Independent Insurance Co Limited v Aspinall* [2011] IRLR 716 and the earlier decision of the Court of Appeal in *Northgate v Mercy* [2008] IRLR 222. Neither a recognised union nor employee representatives were in place and that this complaint falls within s.189(1)(a) (or (d)).
16. I therefore find that the employees have standing to make claims and as *Aspinall* makes clear, individually they must do so within the statutory time limit in order to bring a claim. The claimants each individually pursued a valid claim.
17. The main relevant provisions of the Trade Union and Labour Relations (Consolidation) Act (as amended) (“TULRCA”), are as follows:-
 - “s. 188 (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 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.*
 - s. 188 (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.*
 - s. 188 (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, representatives of that 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 purpose of this section, in an election satisfying the requirements of section 188A (1).

s. 188 (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.

and

“s. 188 (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.

s. 188A 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 to (h) make detailed provision for the elections, including secret voting and accurate counting of votes].”

18. The second respondent indicated in a letter dated 1 June 2023 that, pursuant to s.189(6), there were special circumstances and as a consequence there was “no opportunity to undertake a consultation process”. This assertion was based on the fact that there were said to have been confidential discussions with a third party for the sale of the business as a going concern. In its response, the second response declined to comment on the extent to which the first respondent failed to consult with the affected employees. Neither respondent provided evidence that the first respondent took any or e such steps as were reasonably practicable to

carry out consultation. I do not find that the first respondent has done so in this case.

19. I am satisfied that the first respondent failed to comply with its obligation to consult in section 188 and in order to allow such consultation to take place failed to elect representatives in accordance with section 188A. Accordingly, I find the complaint well founded.
20. By virtue of s. 189(2) in such circumstances I may make a protective award. If I do the statute provides as follows:-

“(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 the requirement of section 188;

but shall not exceed 90 days.”

21. Accordingly, I find the protected period in this claim commences on 18 August 2022.
22. As to the length of the protected period, Peter Gibson LJ in the Court of Appeal in Susie Radin Limited v GMB and Others [2004] IRLR 400 [45] gave the following guidance:-

“I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:

(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 the breach.

(2) The ET 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 ET assesses the length of the protected period is a matter for the ET, 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 ET consider appropriate.”

23. In this case there was no consultation or attempt to comply with the statutory consultation provisions; no relevant mitigating factors are advanced. The starting point for the assessment of the protective award is the maximum, 90 days, and whilst I have a wide discretion to do what is just and equitable, in the absence of

any evidence that points to the first respondent attempting to comply with its obligations or any mitigating circumstances, I conclude there are no grounds for me to reduce the same and the protective award shall therefore be set at the maximum of 90 days.

Employment Judge J Jones

9 April 2024

NOTE:

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.

SCHEDULE

CASE NUMBER **CLAIMANT'S NAME**

1302919/2023 CHARLES GRIFFIN

1302920/2023 JANE THOMAS

1302922/2023 DANIEL MONKS

1302921/2023 AADIL PATEL

1302923/2023 MARK HILL

1302926/2023 ANNE MARIE MEGGISON

1302924/2023 LEANNE BALL

1302927/2023 ROSEY HIDAYAT

1302925/2023 SHELLEY BARNES

1302929/2023 LUKE FITZGERALD

1302930/2023 JAANA MERILEPP

1302935/2023 ROBERT COP

1302931/2023 DONNA MONKS

1302933/2023 GAVIN SHIELDS

1302928/2023 GAVIN JONES

1302932/2023 JANINE RUDKIN

1302936/2023 **SANDRA BERNHARDSSON**

1302934/2023 **TIBERIO RAPISARDA**

1302937/2023 **CRAIG JUDD**

1302938/2023 **MIHAELA JENKINS**

1302939/2023 **ADAM FENYVES**

1302941/2023 **FRANCESCO DIPERNA**

1302940/2023 **FEKETE MATE**

1302942/2023 **TESFA CHARLERY**

1302944/2023 **LISA PERRY**

1302947/2023 **MAGDALENA KOWALCZYK**

1302943/2023 **ROBERTO TORNATORE**

1302945/2023 **CARLY GILSENAN**

1302948/2023 **BINDERJIT KHALA**

1302949/2023 **STEFANIA IONESCU**

1302946/2023 **WOODROW MALLEN**

1302950/2023 **ANTHONY SWANN**

1302951/2023 **VALENTINA BORDEA**

1302952/2023	ADRIANA TASEVSKA BUDDING
1302953/2023	ANNAMARIA DI RENZO
1302954/2023	ANTON FORGIA
1302955/2023	ASHLEY GARDNER
1302956/2023	STANISLAO NOVITA
1302958/2023	LUKE BAKER
1302959/2023	COSTEL BORDEA
1302960/2023	INDALO LOCASCIO
1302957/2023	FULVIO CASSARA
1302961/2023	ALAN YAU
1302962/2023	BRITTANY PRATHER
1302964/2023	RACHAEL CULLEN
1302963/2023	SHANIQUELL DEMMING - DACOSTA
1302965/2023	RACHEL JUDD
1302966/2023	SHALIKA GRAY
1302968/2023	NADIIA KOBLYANSKA
1302969/2023	VIKTORIJA KASTANOVA

1302970/2023	ARAN NGUYEN
1302967/2023	ROBERTS KRAMINS
1302972/2023	MONICA BUCALAU
1302971/2023	LAYLA SAMUDA
1302974/2023	JAN JAKUBIEC
1302973/2023	CRAIG BROOKES
1302975/2023	ANDREA DLUGOSOVA
1302977/2023	HUI TING WANG
1302976/2023	MARIA MIRABELA POPA
1302979/2023	DARRYN PYKE
1302978/2023	JULIO CASTILLEJO
1302980/2023	GURPAUL SINGH SAHOTA
1302981/2023	NATALIYA LUKOVA

Claim Number **Claimant's Name**

1302919/2023	Charles Griffin
1302920/2023	jane thomas
1302922/2023	daniel monks
1302921/2023	aadil patel
1302923/2023	mark hill
1302926/2023	anne marie meggison
1302924/2023	leanne ball
1302927/2023	rosey hidayat
1302925/2023	shelley barnes