EMPLOYMENT TRIBUNALS

Claimants: Mr David Sturmer & Others

Respondents: 1) Hurstway Construction Co Limited (in voluntary liquidation)
2) Secretary of State for Business, Innovation & Skills

Heard at: London South (in public; by CVP) **On:** 17 January 2024

Before: Employment Judge Tsamados (sitting alone)

Appearances

For the claimants: Ms Kay Tillotson
For the respondents: did not attend, were not represented

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

All of the Claimants are entitled to protective awards for the maximum of 90 days' pay, as set out below:

1) Mr David Sturmer £11,262.60;

2) Mr Christopher Bourne £8,580.60;

3) Mr Daniel French £8,962.20.

4) Mr Richard Longstaff £7,772.40;

5) Miss Clare Moore £13,067.10;

6) Mrs Lisa Hogan £7,646.40;

7) Mr Robert Fry £10,044;

8) Mr John Beeslee £14,976.32;

9) Mr Chris Brown £10,044;

REASONS

Background and claims

1. This is a multiple claim and Mr Sturmer is the lead Claimant. There are eight other Claimants. Their details are set out in a schedule which is attached to this Judgment.

2. The claim is brought against the Claimants' former employers, Hurstway Construction Co Ltd which is in Creditors' Voluntary Liquidation.

3. Each Claimant brings a claim for a protective award under sections 188-198 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA") for failure to comply with the provisions relating to collective consultation.

4. The claims were ordered to be heard together by Employment Judge Dyal on 4 July 2023. For the avoidance of doubt, at the case management discussion held on 24 October 2023, which I conducted, I added Mr Chris Brown to the list of joined cases (insofar as he might not already have been included).

5. The essential factual matrix put forward is a follows. The Claimants worked in a number of different capacities for the first Respondent, a construction company. On Sunday 8 January 2023 most received a text from the first Respondent asking them to attend the head office ("the yard", as it is referred to) the next morning. 23 members of staff attended. At 7.10 am, the first Respondent told them that they were redundant with immediate effect, that there was no more money and that the company was ceasing trading. This came totally out of the blue.

6. The first Respondent was placed into Creditors' Voluntary Liquidation on 9 February 2023.

7. Given that this claim if ultimately successful would result in applications for payment of protective awards made from the National Insurance Fund as guaranteed debts, the Secretary of State for Business, Innovation & Skills ("BIS") was added as a second Respondent. The claim was also re-served on the liquidators for the first Respondent.

8. Both Respondents have presented responses. The first Respondent has only presented responses to some of the claims. In those, it denies the claim, in essence stating that there was no opportunity to consult in advance of the closure of the business. There is no reason to suppose that this is not the general defence to all of the claims. The second Respondent presented responses to 8 of the claims. It also denies the claim but its response provides useful guidance as to TULRCA and protective awards, and as to those payments it has already made from the National Insurance Fund to some of the Claimants.

9. The first Respondent was very unlikely to take part or attend the proceedings and indeed it did not. The second Respondent stated that it will not be attending the hearing.

10. At today's hearing, Ms Tillotson advised me that Miss Moore's claim form has not been served on the second Respondent. After the hearing, I instructed the administration to serve notice of claim with a copy of the claim form on the second Respondent.

Essential law

11. As indicated, the Claimants are purely bringing a claim for a protective award. They have all received payments in respect of statutory redundancy pay and notice pay from the second Respondent. In as far as other claims were brought in some of the Claimants' claim forms, these are not pursued.

12. Sections 188 to 198 TULRCA contains the legal requirements with regard to collective consultation with Trade Union or employee representatives where redundancies of 20 or more employees are proposed by an employer.

13. The duty to consult arises when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Essentially an establishment is the unit to which the employees to be made redundant were assigned to carry out their duties.

14. Consultation must begin in good time and in any event, where the employer is proposing to dismiss at least 20 but fewer than 100 employees, at least 30 days before.

15. The employer must also give the Department of Business, Industry & Skills written notification of its proposal to make 20 or more employees redundant at least 30 days before.

16. Consultation must at least cover ways of avoiding or reducing the numbers of dismissals and mitigating the consequences of the dismissals. To be meaningful, it should take place when the proposals are still at a formative stage; the representatives must have sufficient information and adequate time in which to respond; and the employer must give conscientious consideration to the response.

17. For the purposes of consultation, the employer must disclose in writing to the representatives:

- the reason for the redundancy proposals;
- the numbers and descriptions of the workers whom it is proposed to dismiss as redundant;
- the total number of workers employed at the establishment in question;
- the proposed method of selection; the manner in which the dismissals are to be carried out; and
- the proposed method of calculating the redundancy payments.

18. Where there is no Trade Union and the employees have failed to elect representatives after being invited to do so, the employer must give each affected employee this information.

19. Employers are excused from the duty to consult or provide information only in special circumstances, eg a very sudden disaster. However, it is unlikely to be considered special circumstances where there have been financial difficulties over a long period, or where redundancies would seem to be inevitable. Even if special circumstances exist, the employer must still do as much as is reasonably practicable.

20. If the employer fails to inform or consult, the remedy is to complain to an Employment Tribunal. In the absence of a recognised Trade Union or elected employee representatives, this can be brought by the individual affected employees.

21. The first stage at the Tribunal is to seek a declaration that the employer has failed to consult and the Tribunal may award compensation to each affected employee.

22. The second stage applies if the employer fails to pay, in which case the individual employees must then apply to the Tribunal.

23. Where the Tribunal declares that there has been inadequate consultation on collective redundancies, it can make a protective award, ordering the employer to pay remuneration to individual employees for the protected period. This period starts when the first dismissal takes effect and lasts for as long as the Tribunal thinks just and equitable having regard to the seriousness of the employer's default. It cannot exceed 90 days' pay.

24. The purpose of the award is to ensure consultation takes place, and not to compensate individual workers. In deciding how much to award, the emphasis is therefore on the extent of the employer's failure to consult, whether it was deliberate and whether legal advice was available.

25. Where there has been no consultation at all, the starting point is to consider the 90-day maximum (regardless of the minimum statutory consultation period applicable) and to reduce it only if there are appropriate mitigating circumstances.

26. Mitigating circumstances could be that the employer had already discussed matters at an earlier stage, or that the employer would have been unable to consult for the 30 days anyway, because it very suddenly became insolvent. However, insolvency is not in itself a reason not to make a protective award.

Evidence

27. I was provided with an electronic bundle of documents containing 288 pages. I will refer to this as "B" followed by the relevant page number where necessary.

28. I was also provided with witness statements for each of the Claimants, namely David Sturmer, Clare Moore, Lisa Hogan, Robert Fry, Richard Longstaff, John Beeslee, Chris Brown, Christopher Bourne and Daniel French. I heard evidence from each of them by way of their statements and in oral testimony.

Findings

29. The number of affected employees is 23 (B25). There is no recognised Trade Union and the first Respondent did not provide for election of and there were no employee representatives. All of the affected employees worked at the same establishment, that is, the first Respondent's yard in Cranbrook, Kent, albeit some of the Claimant's worked off site at various jobs or projects.

30. I do not propose to set out the evidence of each Claimant in full but to set out an overview taking account of the various perspectives each came at it from. I have accepted their individual evidence to pay and this is set out below in my conclusions.

Mr David Sturmer and Mr Robert Fry

31. Mr Sturmer was the Site Foreman and was employed from 21 October 1988 - 9 January 2023. He received a text on Sunday 8 January 2023 at 12:33pm from Chris Ditton, one of the Directors, saying "Can you come to the yard in the morning please" (at B3). He was at a family meal. His son-in-law, Mr Fry, who also worked for the first Respondent, as Site Foreman, was also there and received the same text message. Mr Fry had been employed from April 2017 until 9 January 2023.

32. The text message made them both feel extremely uneasy and worried because it was not a normal thing to receive such a message on a Sunday. Mr Ditton would not normally contact them outside of work hours but if he did, he would say words to the effect that "it's nothing bad". He did not say that in this message. lt ruined the day and celebrations for them both.

33. On Monday 9 January 2023, Mr Sturmer attended the yard along with all the other employees. At 7.10 am, Mr Ditton told all the staff that there was no money left and that the firm was ceasing trading with immediate effect. He further said that a liquidator would be appointed and that they would hear from them shortly.

34. Mr Sturmer and Mr Fry were completely shocked and genuinely could not believe it. There had been no prior notice of this nor any consultation.

35. Mr Sturmer had been running a job in Mayfield which had almost finished, and Mr Ditton had told him a few days before that his next job would be starting on Wednesday 11 January 2023 and that he and the Contracts Manager were going to see the new site on Friday 6 January 2023, ready for him to start.

36. Mr Sturmer also gave evidence that he was told that the company was due to start a high value job on the Wednesday and he had been told by one of the quantity surveyors that they had three big jobs promised to them

Mr Christopher Bourne

37. Mr Bourne was employed as a Lorry Driver/General Labourer from 1 July 2018 until 9 January 2023.

38. He received the same text and had the same concerns as Mr Brown has related. He attended the yard on 9 January as the other Claimants have related.

Mr Daniel French

39. Mr French was employed as a Machine Operative/Grounds Worker from 16 July 2012 until 9 January 2023.

40. He received the same text from Mr Ditton on 8 January 2023. He was confused by the contents because he had been told on Friday 6 January 2023 where he would be working the following week, although he had got last minute changes to instructions in the past. He also attended the yard on 9 January 2023. He attended the yard on 9 January as related by Mr Sturmer and Mr Fry above.

Mr Richard Longstaff

41. Mr Longstaff was employed as a General Operative from 2 July 2019 until 9 January 2023.

42. He received the same text message on 8 January 2023 and expressed the same concerns as Mr Brown and the other Claimants as to receipt of a text outside office hours. He went to the office on 9 January as related by the other Claimants.

Miss Claire Moore

43. Miss Moore was employed as a Building Estimator and Surveyor from 6 March 2000 until 9 January 2023.

44. She did not receive the text on 8 January 2023, as the others had but when she arrived at the yard as usual on 9 January, Mr Ditton told her that the firm in ceased trading with immediate effect.

45. Miss Moore said she was mystified, given the ongoing jobs, as to why the company suddenly closed down.

Mrs Lisa Hogan

46. Mrs Hogan was employed as the Office Manager from 7 September 2015 until 9 January 2023. She was office based at the yard.

47. She received a call from Mr Ditton on the morning of 9 January 2023 just as she was leaving for work and was told that the company had gone into liquidation and had ceased trading with immediate effect. She was told there was no point her going to the office.

Mr John Beeslee

48. Mr Beeslee was employed as Contracts Manager from September 1977 until 9 January 2023.

49. He received same the text as the above Claimants have said but he only saw it on Monday 9 January 2023, when he turned on his mobile phone that morning.

50. He had similar concerns to Mr Brown and Mr Bourne as to it not being normal to receive a message outside working hours. He also attended the yard that morning as the other Claimants have related.

Mr Chris Brown

51. Mr Brown was employed as a Carpenter from 19 July 2004 until 9 January 2023.

52. He received the same text on 8 January 2023. It made him feel worried because it was not normal to receive such a message on a Sunday, as Mr Sturmer has related.

53. He also attended the yard on 9 January 2023 as set out by Mr Sturmer and Mr Fry above.

The Response to the claims

54. The first Respondent has not attended this hearing or taken any active part in the proceedings beyond submitting responses to two but not all of the claims. I have taken this into account in reaching my conclusions. In the responses before me, the first Respondent set out the same wording at box 6 of both, in effect its grounds of resistance (at B163 and 171):

> *"We believe employees were notified as soon as practicable after a decision was made to cease trading. The company was insolvent and action was taken regarding the employees as soon as the company received advice to cease trading and place the company into liquidation."*

55. I am also grateful to the second Respondent for its responses to eight of the claims and have taken these into account. This is in effect a generic defence to the claims.

56. As I have said above, I have instructed the Tribunal's administration to serve a copy of Miss Moore's claim form on the second Respondent. Whilst the second Respondent has not formally had the opportunity to enter a response to her claim, I do not believe that any response presented will have any material effect on this Judgment.

Conclusions

57. From the evidence before me, it was clear that the announcement of redundancies and closure of the first Respondent's business came as a bolt out of the blue to all of the employees. From their various perspectives, each Claimant stated that they had no indication that the company was struggling, some referred to jobs being lined up and ongoing and they were all expecting to work at normal the week of the announcement. In particular, Mr French stated that he had been told where he was working on the Monday. Further, Mr Sturmer stated that they were to start a high value job on the Wednesday and had been told by one of the quantity surveyors that they had three big jobs promised to them. Miss Moore said she

was mystified as to why in these circumstances the company suddenly closed down.

58. The first Respondent has only provided a short paragraph setting out its grounds of resistance within its responses (to some but not all of the claims) as to the circumstances in which the company suddenly ceased trading. Frankly, I do not accept on balance of probability that a company would suddenly without warning and with immediate effect be plunged into insolvency and in any event they have not satisfied me that this is the case and so the onus switches to them to show that special circumstances defence applies.

59. I am satisfied from the evidence that all of the Claimants were employed at the same establishment, namely the company's office/yard at Unit 11, Hawkhurst Station Business Park, either physically working in there or assigned there albeit working elsewhere on jobs/projects/sites.

60. I am also satisfied that a total of 23 employees were dismissed as redundant on 9 January 2023.

61. Further am satisfied that, in the absence of a Trade Union or elected employee representatives, the individual Claimants have the legal standing to bring these claims for entitlement to protective awards.

62. At the first stage of the process, my role is to make a declaration that the employer has failed to consult and I have the discretion to award compensation to each affected employee. The second stage applies if the employer fails to pay, in which case the individual employees must apply to the Employment Tribunal, in effect for the Tribunal to declare that the employer has to make payment of the protective award.

63. The period of the protective award starts when the first dismissal takes effect, which in the case of all of the Claimants was 9 January 2023 and lasts as long as I decide is just and equitable having regard to the seriousness of the employer's default subject to a maximum of 90 days' pay. The rate of remuneration is one week's gross pay for each week of the protective without any ceiling on the amount of a week's pay and it is calculated on a daily rate.

64. The purpose of the award is to ensure that consultation takes place and not to compensate the individual Claimants. In deciding how much to award, my emphasis is therefore on the extent of the employer's failure to consult and whether it was deliberate. Where there is been no consultation at all, the starting point is to consider the 90 day maximum (regardless of the minimum statutory consultation period applicable) and to reduce it only if there are appropriate mitigating circumstances. Mitigating circumstances could be that the employer already discussed matters at earlier stage or that they would have been unable to consult for the 30 days anyway because they suddenly became insolvent. However, insolvency in itself is not a reason not to make a protective award.

65. As I have said, there was no prior warning or notice of the company's impending insolvency and that it was ceasing trading. Indeed, quite the opposite impression had been given. Further, as I have said, I do not find it probable that a company

would suddenly be plunged into insolvency in the way that this occurred without there being opportunity to raise the matter with its workforce prior to the date of notification that it was ceasing trading with immediate effect.

66. To the extent that the company did not say anything and the indication being generally given that it was business as normal prior to 8 January 2023 it does concern me that it may well be the case that the company simply choose deliberately not to say anything until the last moment. I believe that this is a valid and appropriate inference to draw. The limited response to the claims from the first Respondent provides very little credible information on which to find that there were mitigating circumstances.

67. I therefore make a protective award in respect of each claimant for the maximum of 90 days.

68. The following awards are made to each of the Claimants (the calculations as to their weekly pay are taken from their witness statements, oral evidence and supporting wage slips/bank statements within the bundle):

Mr David Sturmer

69. £876 gross weekly pay. Daily pay = £125.14. 90 days protective award = £11,262.60.

Mr Christopher Bourne

70. £667.35 gross weekly pay. Daily rate = £95.34. 90 days protective award = £8,580.60.

Mr Daniel French

71. £697.05 gross weekly pay. Daily rate = £99.58. 90 days protective award = £8,962.20.

Mr Richard Longstaff

72. £604.50 gross weekly pay. Daily rate = £86.36. 90 days protective award = £7,772.40.

Miss Clare Moore

73. £4,065.35 gross monthly pay. Divided by 4 = £1016.33 weekly pay. Daily pay = £145.19. 90 days protective award = £13,067.10.

Mrs Lisa Hogan

74. £2379.10 gross monthly pay. Divided by 4 = £594.75. Daily pay = £84.96. 90 days protective award = £7,646.40.

Mr Robert Fry

75. £781.20 gross weekly pay. Daily pay = £111.60. 90 days protective award = £10,044.

Mr John Beeslee

76. £1164.82 gross weekly pay. Daily rate = £166.40. 90 days protective award = £14,976.32

Mr Chris Brown

77. £781.20 gross weekly pay. Daily rate = £111.60. 90 days protective award = £10,044.

Further disposal

78. Whilst Miss Tillotson asked me to set a provisional date for a second stage hearing, I did feel it better to leave this to be determined if there is a need for the Claimants to bring such claims. I suggested if any claims are submitted, they should be made as a multiple and that for the sake of expediency be directed to me.

79. I would sincerely apologise for the delay in sending out this written Judgment.

Employment Judge Tsamados
Date: **7 May 2024**

Attached: Schedule of Claimants

Sent to the parties on:
16 May 2024
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For the Tribunal Office:

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