EMPLOYMENT TRIBUNALS

Claimants: Mr D Crowther
Mr J Ellard
Mr K Hulse
Mr M Higgins
Mr R Leavey
Ms K McCluskie
Mr N Yoxall
Mr L Warren
Mr J Lowe

Respondents: Alliance Transport Technologies Limited (in Administration) (R1)
Secretary of State for Business, Energy and Industrial Strategy (R2)

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 22 April 2024

Before: Employment Judge Brewer

Representation

Claimants: Ms N Toner, Solicitor
Respondents: No attendance

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claims of Mr Ellard, Mr Warren and Mr Hulse fail and are dismissed.

2. The claims of Mr Crowther, Mr Higgins, Mr Leavey, Ms McCluskie, Mr Yoxall and Mr Lowe succeed.

3. The protected period is 45 days.

REASONS

Introduction

1. This case came before me for a one day hearing to deal with the question of whether the claimants should be entitled to compensation for their employer's failure to consult over collective redundancies.

2. The Secretary of State was joined as an interested party.

3. I had witness statements from seven of the claimants but essentially other than some personal details all of the information is identical. I had a bundle of documents running to 67 pages and I had a skeleton argument from Ms Toner. Neither of the respondents attended the hearing although the Secretary of State has asked that the response filed on their behalf should be treated as submissions for this hearing. Finally, Ms Toner made oral submissions and I have taken those along with the documents and the witness statements into account in reaching my decision.

Issues

4. The issues are:

   4.1. in the case of each claimant, should they have been included in collective consultation within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and, if so,

   4.2. what protected period, if any applies.

Law

5. The relevant law is as follows:

188 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.

(2) (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…

189 Complaint and protective award.

(1) Where an employer has failed to comply with a requirement of section 188 or section 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;

(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.,,

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award…

(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 any requirement of section 188;

but shall not exceed 90 days…

6. I shall refer to relevant case law below.

Findings of fact

7. The first respondent operated across two sites, Chesterfield and Pontefract a period at the material time the first respondent employed 51 employees including all of the claimants.

8. The first respondent did not recognise any trade unions.

9. On 18 April 2023 the company director Mr Keane sentain e-mail to all staff which was by way of an update following what he referred to as recent media speculation about the future of business. The e-mail recognises that there were a number of business challenges recently but confirms that the business was looking for additional investment. The e-mail states

"the good news is that since embarking on this process, we have received positive interest from a number of parties, and so we are currently working hard alongside our advisors to ensure we secure the investment that we need. In the meantime, however, we have had to take legal steps to protect the position of the business to afford us at the time to be able to find a solution to the

challenging situation we face, including the filing of a notice of intention to appoint administrators."

10. On 27 April 2023 the then engineering manager, Mr Forbes send a text message to a number of recipients including some who appeared to be claimants in this case by way of an update stating that the search for further investment is

"fairly well underway and at this moment in time I can tell you that there are two interested businesses with good synergies with what we already do that are interested…"

11. On 2 May 2023 Mr Forbes sent a further update, the material part of which is as follows:

"We have just had a meeting… Where we have been told the company has gone into administration. This was always going to be the case as no one would ever buy the legacy. We have been split into two groups some of which have been told they are being made redundant with immediate effect. All of you are not on the list. The administrators will now try and progress the sale of the business. If you have any questions please give me 15 minutes and then feel free to call."

12. On five may 2023 Mr Forbes sent a further message the material part of which is as follows:

"Gents, I'm really sorry for the news. Never expected it to go that way…"

13. The administrators, Interpath, have provided a report on what transpired during the administration. From that report the following points are material:

13.1. Interpath were introduced to the first respondent in April 2023 and were engaged to undertake an options process. At that time there were several potential interested parties who were identified and contacted.

13.2. An initial notice of intention was filed on 14 April 2023 to allow the business more time to explore its available options. A second notice of intention was filed on 27 April 2023 to allow sufficient time to progress offers for the business.

13.3. The joint administrators were appointed on 2 May 2023.

13.4. Following the appointment of joint administrators the strategy was to continue to trade the business in the short term lost a search for an acquirer continued. Initially 15 of the 51 total staff were identified as non business critical and were made redundant.

13.5. On 5 May 2023 confirmation was received from the final interested party that an offer for the business as a going concern would not be forthcoming. At that stage the majority of the remaining workforce was made redundant and a wind down of the company was initiated.

14. In relation to the claimants the following are the material facts.

    14.1. Seven of the claimants worked on site at Chesterfield.

    14.2. Mr Yoxall worked from home.

    14.3. Mr Crowther and Mr Leavey were field based and worked nationally.

    14.4. Mr Ellard, Mr Hulse and Mr Warren were dismissed as redundant on 2 May 2023.

    14.5. The remaining claimants were dismissed as redundant on 5 May 2023.

    14.6. In the case of Mr Yoxall, Mr Crowther and Mr Leavy, I accept that their effective base was Chesterfield.

15. Prior to each redundancy dismissal there appears to have been no individual or collective consultation. There was no election or appointment of employee representatives.

Discussion and conclusions

16. Given that all of the claimants were assigned to Chesterfield it is not necessary for me to determine whether in this case there was one establishment across two sites two establishments.

17. What is significant, and indeed the key point in this case, is the question of the proposal to dismiss.

18. Essentially the claimants argue that the appointment of the administrators, or if not that, then the potential for the business to close effectively amounted to a proposal to dismiss more than 20 employees within a 90 day period at one establishment.

19. The question of what amounts to a proposal to dismiss has been the subject of a number of domestic and European decisions over many years largely because the wording in the Collective Redundancies Directive refers to dismissal is being 'contemplated' whereas in TULRCA the wording used is 'propose' and there has been much debate about whether contemplation is earlier than proposing and essentially there has been no satisfactory conclusion to that debate.

20. As to when collective redundancies are proposed, domestically the leading case is **UK Coal Mining Limited v NUM (Northumberland Area) and another** 2008 ICR 163 EAT.

21. In that case the then president of the EAT said that it is not sufficient to amount to a proposal to dismiss as redundant "*when the closure is mooted as a possibility*". He said that redundancy dismissals must be "*fixed as a clear, albeit provisional intention*".

22. Going into administration is not synonymous with business closure. When a company goes into administration, they have entered a legal process (under the Insolvency Act 1986) with the aim of achieving one of the statutory objectives of an

administration. This may be to rescue a viable business that is insolvent due to cashflow problems. An appointment of an administrator (a licensed insolvency practitioner) will be made by directors, a creditor or the court to fulfil the administration process.

23. The administration puts in place a statutory moratorium. This is a 'breathing space' that frees a company from creditor enforcement actions, while financial restructuring plans are prepared to rescue the company as a going concern where possible. This may take the form of a sale to an unrelated party. If the business cannot be reasonably saved, the administrator will aim to achieve a better return for creditors than would be likely if the company were wound up (without first being in administration).

24. In my judgment it is entirely clear at the date Interpath were engaged and subsequently appointed as administrators the clear intention was to sell the first respondent as a going concern. It does not seem to me to matter whether there was a high, medium or low prospect of that.

25. It is not uncommon for administrators to make redundancies immediately to reduce overheads and what occurred in this case was that 15 employees were identified as non-critical to the continued running of the business during the period where a sale was a possibility. Those are the employees dismissed on 2 May 2023. In my judgment at that stage there was no proposal to dismiss as redundant 20 or more employees of the first respondent.

26. I am bolstered in this view by all the written evidence before me including the text messages from Mr Forbes and the report from the administrators all of which suggests there were genuine efforts being made to find a buyer for the business. There is no evidence to support Ms Toner's argument that all employees were bound to be dismissed and therefore there was only one "proposal" covering all the employees. I go back to the judgment in **UK Coal Mining Limited** which confirms that there must be a fixed, clear intention to amount to a proposal to make collective redundancies and, as I have found, all the evidence here suggests that the proposal to make the majority of staff redundant was not made until the last possible purchaser was no longer interested in buying the business and that appears to have occurred on 5 May 2023.

27. In relation to the employees dismissed on 2 May 2023, given that there were only 15 of them that proposal did not reach the threshold which required collective consultation under the 1992 Act, and it follows that the claims of Mr Ellard, Mr Warren and Mr Hulse fail and are dismissed.

28. However, for the remaining claimants who were dismissed on 5 May 2023, they clearly should have been the election of representatives, information should have been given to those representatives about the proposals and collective consultation entered into, none of which was done, and in the absence of any further evidence I find that the protected period is 90 days.

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Employment Judge Brewer

Date: 22 April 2024

JUDGMENT SENT TO THE PARTIES ON

....17 May 2024.....

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FOR THE TRIBUNAL OFFICE

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