EMPLOYMENT TRIBUNALS

Claimant: Mr A Wilkins

Respondent: Cosmur Construction London Limited

Heard at: Watford (by Cloud Video Platform)
On: 17 July 2024

Before: Employment Judge Caiden

In Attendance
Claimant: Mr A Wilkins (Litigant in Person)
The Respondent did not attend

JUDGMENT

The judgment of the Tribunal is that the Claimant's complaint under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 of a failure by the respondent to comply with the requirements of section 188 of the 1992 Act succeeds. The Tribunal orders the Respondent by way of protective award under section 189(3) of the 1992 Act to pay to all employees working in Administration, Pre-Construction or Accounts, who were dismissed for redundancy on 31 March 2023 remuneration for the period of 90 days beginning on 31 March 2023. The Recoupment Regulations apply (see Annex to the Judgment).

Notes

CVP Hearing

The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46.
The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. The participants were told that it was an offence to record the proceedings.
The Tribunal was satisfied that none of the witnesses from whom evidence was heard was being coached or assisted by any unseen third party while giving their evidence.

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.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

REASONS

A) Introduction

1. By ET1 presented on 29 May 2023, having undertaken ACAS early conciliation on 16-18 May 2023, the Claimant made various complaints in relation to the Respondent's decision to terminate his and some 32 other employees for redundancy on 31 March 2023. He attended the hearing by himself and submitted several documents to the Tribunal electronically which it considered. At the hearing the Claimant took an affirmation and confirmed the truth of the statement he prepared for the hearing, save that he confirmed he was now only seeking a protective award, and answered questions from the Tribunal.

2. The Respondent did not attend the hearing. The Respondent had failed to enter any response to the claim, but an Employment Judge determined that it was not possible to have a rule 21 judgment without a hearing and directed that a hearing take place, which duly occurred on 17 July 2024.

3. The Respondent by email of 9 May 2024 had informed the Tribunal that it was presently in a Creditors Voluntary Arrangement. The Tribunal confirms that as at the 17 July 2024, Companies House indicated that it had not been dissolved and it was still active. Indeed, there was no information suggesting any form of administration or liquidation had occurred as at 17 July 2024.

4. The Claimant as at the 17 July 2024 was not sure of the situation at the Respondent and had understood it was in effect insolvent. Indeed, the Claimant had received notice pay, redundancy pay and holiday pay from the Insolvency Service. The Claimant explained that the only claim that was outstanding in his ET1, which previously claimed these sums, that was being pursued was one for a protective award as it appeared the Respondent was insolvent, and he understood that the Insolvency Service may make further payments to cover some of any awarded protective award.

B) Findings of fact

5. The Respondent, who has one establishment only, provides construction services and the Claimant had been its employee, until his dismissal by reason of redundancy on 31 March 2023, since 18 October 2018. Throughout this time, he worked as an Estimator.

6. The Claimant, who is relatively senior, was told on 20 March 2023 at an informal meeting by directors at the Respondent that it was facing financial difficulties. This included that significant number of redundancies would be likely, but no material details were provided. He was informed that a letter setting out the position would be soon sent. In fact, nothing was received until 27 March 2023 and there was no other information provided prior to that date.

7. On 27 March 2023, the Claimant and others received a letter headed "*Consultation – Possible Redundancies*". This informed the Claimant, and others in receipt of materially the same letter, that "*Given that redundancies are being considered, we have notified the Redundancy Payment Service by filing an HR1 form (Advance Notification of Redundancies).*". It also stated that "*We will now start a consultation process*", it set out what would be part of the consultation, and later that "*We will be writing to elected representatives…shortly to discuss ways of avoiding or reducing the need for redundancies*". The Claimant and others were told by a director at the Respondent on 29 March 2023 that the consultation process would commence once the elected representatives had been elected (there was no recognised trade union at the Respondent). That same day the Claimant was an elected representative of the Administration, Pre-Construction and Accounts staff group. The Claimant, as an Estimator, was part of the Pre-Construction team.

8. On 31 March 2023, the Claimant and he understands some 32 others, were told they were made redundant with immediate effect. A letter of the same date was eventually received which stated, "*As discussed earlier today, the Company is having to restructure the business, reducing the number of roles available, and after applying the organisation's redundancy selection criteria, we are very sorry to confirm that you have been selected for redundancy.*". The Claimant's evidence, which was accepted by the Tribunal, was he had absolutely no knowledge of any redundancy selection criteria and that since the 29 March 2023 when the 'consultation' was due to commence nothing occurred and all the matters that were meant to be canvassed in consultation, which were outlined in the 29 March 2023 letter, did not take place. He, and his colleagues, were made redundant. He never received notice pay, outstanding holiday pay, or statutory redundancy pay. Fortunately, for the Claimant he obtained other employment on 9 May 2023.

C) Relevant legal principles

9. By s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") 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. By s.188(1A) TULCRA, the consultation shall begin in good time, and in any event where the employer is proposing to dismiss 100 or more employees, at least 45 days - and otherwise, at least 30 days - before the first of the dismissals takes effect. By s.189(2) TULCRA if the Tribunal finds the complaint well founded, it shall make a declaration to that effect may also make a protective award. That protective award is governed by ss.189(3)-(4) TULCRA.

10. In respect of a claim of failure to inform and consult an appropriate representative (that is claims that do not relate to recognised trade unions or failing to arrange elections of representatives which are not relevant for the present case), that can only be brought by one or more of the representatives to whom the failure relates (s.189(1)(b) TULCRA).

11. In terms of relevant case law:
    11.1. the purpose of the protective award is punitive, not compensatory, and the Tribunal has a wide discretion to determine what is just and equitable, but should primarily focus on the employer's default (*Susie Radin Ltd v GMB* [2004] IRLR 400;
    11.2. ordinarily the approach taken will be to start with the maximum 90-day award and reduce it for mitigating circumstances (*Susie Radin Ltd*, *Cranswick Country Food plc v GMB* UKEAT/0225/05/ZT). However, this is not a mechanistic approach, especially in circumstances where something had been done (it being argued that *Susie Radin Ltd* only applied to 'nothing at all' cases): *London Borough of Barnet v Unison* UKEAT/0191/13;
    11.3. a 90-day maximum protective award is possible even where the employer's breach only related to a 30-day consultation period (*Newage Transmission Ltd v Transport and General Workers Union* UKEAT/0131/05 and UKEAT/0132/05);
    11.4. the purpose of a protective award is to provide a sanction for breach of the employer's collective consultation obligations and so it should be awarded despite the employer's insolvency (*Smith and Moore v Cherry Lewis Ltd (in receivership)* [2005] IRLR 86).

D) Analysis and conclusions

12. As noted above the only claim that the Tribunal now needs to determine is one for a protective award. The ET1 made the claim for a protective award in time. Further still, the Claimant as an elective representative so has 'standing' to bring the claim.

13. It is clear that the Respondent was proposing to dismiss as redundant 20 or more employees within a period of 90 days or less. Not only is there no evidence to the contrary but that is consistent with it the Respondent completing an HR1 form (the Tribunal nor Claimant has seen it, but it is referred to in the letter of 27 March 2023).

14. In this case pursuant to s.188(1A) TULCRA, it appears that the consultation period should have been at least 30 days. It is not clear, given the discussions that the Respondent had with the Claimant on 20 March 2023 why there was delay in commencing any consultation – as presumably the risk was already present given the informal discussion and the reasons set out in in the later letter of 27 March 2023. Moreover, whilst an election for representatives, of which the Claimant was one, was undertaken and supposed information was going to be provided pursuant to 29 March 2023 letter to them, in fact no information was provided to any elected representative. In effect employees were warned of potential redundancies and, despite assertions in writing of avoiding these and discussing various matters in due course being canvassed, some 33 employees were made redundant just two days later on 31 March 2023.

15. Accordingly, the present case is tantamount to one where there has been in effect virtually no compliance with any of the consultation requirements (in the Tribunal's view an election of representatives which do nothing and one letter

before dismissal is akin to a complete failure to comply with any of the requirements). Further still, there is no mitigating circumstances before the Tribunal. The fact that the Respondent was in financial difficulties is not in and of itself sufficient to mean an award being made that is less than the maximum. After all, there has been serious breaches of the consultation requirements and from the written letters provided to employees the matters were not 'sudden' unforeseen events or the subject of any disclosed legal advice as to why consultation could not continue. It appears from the evidence, as noted in the ET1 also, that the Respondent continued to trade but just in a vastly slimmed down form (so just over half the workforce being dismissed or put another way, just under half the workforce remained). Having regard to the law set out at paragraphs 9-11 above the present case is one where it is appropriate to make the maximum 90 day award with the protective period running from 31 March 2023.

16. In respect of who this award applies to it is to all those to whom the Claimant, as an elected representative, was due to be informed and consulted on behalf of. That is those who were working in the Administration, Pre-Construction or Accounts teams and made redundant on 31 March 2023. As the Claimant worked in the Pre-Construction team, he falls within this class and is entitled to an award. Any award is subject to the Recoupment provisions, for which see the Annex to the Judgment.

Employment Judge Caiden
17 July 2024

JUDGMENT AND REASONS
SENT TO PARTIES ON 28 August 2024

FOR EMPLOYMENT TRIBUNALS