



EMPLOYMENT TRIBUNALS

Claimants: Mr E Reeve and others

Respondent: MediaMath UK Limited (in voluntary liquidation)

Heard at: London South (by CVP) **On:** 25 October 2024

Before: Employment Judge Leverton (sitting alone)

Representation

Claimants: In person

Respondent: No appearance or representation

JUDGMENT

1. The claimants listed in Schedule 1 (the 'Claimants') are permitted to amend their claim forms to include claims under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) (failure to consult about collective redundancies) and section 192 TULRCA (failure to pay remuneration under a protective award).
2. In the following cases, the claims for redundancy pay, notice pay, holiday pay and deductions from wages are dismissed on withdrawal by the claimants: Mr W Jones 2304990/2023, Mr J Prasser 2305188/2023, Ms C Silipigni 2305279/2023, Mr L Davis 2304024/2023, Miss S Botay 2305977/2023, Mr S Polak 2305261/2023 and Mr W Soriano 2304026/2023.
3. The Claimants' complaints under section 189 TULRCA of failure to consult about collective redundancies are well founded and the tribunal grants a declaration to that effect. The tribunal also makes a protective award ordering the respondent to pay remuneration to the Claimants for a protected period of 90 days beginning on 30 June 2023.

4. The Claimants' complaints under section 192 TULRCA of failure to pay remuneration under the protective award are well founded. The tribunal orders the respondent to pay the amounts set out in Schedule 2.

REASONS

1. This is a claim by the 19 claimants listed in Schedule 1 (the 'Claimants') for a protective award and for remuneration due under that award. The tribunal's decision on failure to consult and on the length of the protected period was given at the hearing, and the Claimants were directed to provide further details to assist in the calculation of the awards due. Although oral reasons were given, the procedural history is complicated and eight of the Claimants were unable to attend, so I will set out my reasons below.

Procedural background

2. The original claim was brought by Mr Reeve, the lead claimant, by an ET1 claim form issued on 31 July 2023. It was a multiple claim involving three other claimants: Mr K Tountas, Mr A Smith and Mr R Kovilpillai. The claim was for redundancy pay, notice pay, holiday pay and unpaid salary. The respondent company had gone into creditors' voluntary liquidation and did not submit a response.
3. On 25 September 2023, Mr Reeve – having received various sums from the Insolvency Service – emailed the tribunal seeking permission to withdraw the claims mentioned above, and to amend his ET1 to pursue a claim for a protective award.
4. On 3 November 2023, EJ Khalil wrote to the claimant and ten other former employees of the respondent who had brought proceedings separately, asking whether their claims should be combined and heard together. The ten new claimants were as follows: Mr M Kunarajah, Mr W Jones, Mr G Krunkauskas, Miss A Koutsosimou, Miss R Sperandio, Mrs W Mehiadin, Mr J Prasser, Mr S Polak, Ms C Silipigni and Miss A Hafeez. Their claims were subsequently added to the present proceedings, along with those of a further five claimants: Mr L Davis, Mr W Soriano, Ms M Hatano, Miss S Botay and Mr J Marini. This brought the total number of claimants to 19.
5. On 22 November 2023, Mr Reeve emailed the tribunal in response to an enquiry by EJ Fowell sent on the previous day. He confirmed that the Claimants had received various payments from the Insolvency Service and were all seeking a protective award.
6. On 3 January 2024, a preliminary hearing took place before EJ McLaren. Following that hearing, the individual claimants were asked to contact the tribunal confirming which claims they wished to pursue. Twelve of them emailed the tribunal confirming that they wished to withdraw their original

claims and bring a claim for a protective award. They were as follows: Miss R Sperandio, Mr A Smith, Mr M Kunarajah, Miss A Hafeez, Mrs W Mehiadin, Mr J Marini, Mr G Krunkauskas, Mr R Kovilpillai, Miss A Koutsosimou, Ms M Hatano, Mr E Reeve and Mr K Tountas. In a judgment dated 18 March 2024, EJ McLaren accordingly dismissed the claims originally brought by those 12 claimants (described as claims for redundancy pay, notice pay, holiday pay and deductions from wages) and confirmed ‘for the avoidance of doubt’ that the claims for a protective award would proceed.

7. The probable reason why EJ McLaren’s judgment related to only 12 of the Claimants is that the tribunal has no record on its system of any responses from the other seven. Those seven are as follows: Mr W Jones, Mr J Prasser, Ms C Silipigni, Mr L Davis, Miss S Botay, Mr S Polak and Mr W Soriano. I was told that at least some of them did in fact contact the tribunal following the hearing in January 2024, but their responses appear to have gone astray. During or shortly after today’s hearing, all seven of them confirmed that they wished to withdraw their original claims and pursue a claim for a protective award. Their original claims are therefore dismissed by the tribunal on withdrawal.
8. A notice of today’s hearing was sent to Mr Reeve on 22 April 2024 but he did not receive it. As a result, the 19 Claimants were unaware that a hearing was to take place until they received details of the video link the day before, and eight of them were unable to attend at such short notice.

Amendment of claims

9. The judgment of EJ McLaren dated 18 March 2024 confirmed that the claims for a protective award would proceed, but it is unclear whether there was a formal decision on an application to amend. In any event, any such decision would have applied to only 12 of the 19 Claimants. Applying the principles set out in the case law on amendments, including *Selkent Bus Co Ltd v Moore* [1996] ICR 836 and *Vaughan v Modality Partnership* [2021] ICR 535, and the Presidential Guidance on General Case Management, I have concluded (to the extent that this point has not already been decided) that all the Claimants are permitted to amend their claim forms to include claims under sections 189 and 192 TULRCA.
10. In reaching that decision, I have taken particular account of the fact that Mr Reeve, the lead claimant, applied to amend his claim on 25 September 2023, i.e. within the primary time limit for bringing a claim set out in section 189(5) TULRCA (see below). Had the respondent played an active part in the proceedings, it would have been clear to it at that point that Mr Reeve was seeking a protective award under section 189 TULRCA and that the other employees who had been dismissed would also be likely to do so; this was confirmed by Mr Reeve two months later, on 22 November 2023. Furthermore, there is no indication that the respondent took any steps to consult about the redundancies, and so the claims appear to be well founded.

There is no evidence relating to any possible hardship that would be suffered by the respondent if the amendment were permitted. I conclude that the balance of hardship and injustice favours the Claimants.

11. Another factor relevant to the amendment application is that a protective award must actually have been made in order for a complaint of non-payment under section 192 to be brought – *Howlett Marine Services Ltd v Bowlam and ors* [2001] ICR 595, EAT. If the section 192 complaints had been brought as freestanding complaints rather than by way of an amendment application, they could not have been presented within the primary time limit (three months following the end of the protected period). None of the Claimants could have presented a claim under section 192 until the date of this judgment.

Failure to consult and protective award

Findings of fact

12. Having heard from Mr Reeve, who gave sworn evidence on behalf of all the Claimants, I am satisfied that the following facts are established on the balance of probabilities.
13. The 19 Claimants were all employed by the respondent company. On 30 June 2023, they received an email from Neil Nguyen, the respondent's CEO, dismissing them with immediate effect. There had been no warning or consultation. There was no recognised trade union, and no employee representatives had been elected. In total, around 50 employees who worked at the same establishment were dismissed. Mr Nguyen's email referred to uncertainty over the past nine months and an unsuccessful attempt to sell the company in the previous ten to 12 weeks. In fact, the company had been in financial difficulty for at least a year, with loss of clients, falling revenues and several rounds of redundancies.
14. A follow-up letter dated 7 July 2023 from Viktor Zawadzki, General Manager EMEA, confirmed that the company was facing 'irreparable solvency issues' and had been forced to appoint a liquidator to shut down the entirety of its business operations in the United Kingdom. The company has since entered into creditors' voluntary liquidation, and the Claimants have received various outstanding payments (including redundancy payments, holiday pay and notice pay) from the Insolvency Service.

Law

15. Section 188 TULRCA provides, so far as is relevant:

'(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.

(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.’

16. Complaints about a breach of section 188 are brought under section 189, which provides:

‘(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;

[...]

(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.

(3) A protective award is an award in respect of one or more descriptions of employees –

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,
ordering the employer to pay remuneration for the protected period.

(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.

(5) An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the date on which the last of the dismissals to which the complaint relates takes effect, or

(b) during the period of three months beginning with that date, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such further period as it considers reasonable.

(6) If on a complaint under this section a question arises –

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances, it is for the employer to show that there were and that he did.’

17. In *Susie Radin Ltd v GMB and ors* [2004] ICR 893, the Court of Appeal gave guidance on how tribunals should exercise their discretion under section 189 TULRCA. It held that the tribunal has a wide discretion to do what it considers just and equitable, but the focus must be on the seriousness of the employer’s default. The length of the protected period is a matter for the tribunal, but a proper approach where there has been no consultation is to start with the maximum period of 90 days and reduce it only if there are mitigating circumstances justifying a reduction.

18. If a group of individual claimants applies to the tribunal for a protective award, the tribunal cannot make an award that applies more generally to a class of employees who were affected by the employer’s failure to consult but who are not party to the proceedings – *Independent Insurance Co Ltd v Aspinall and anor* [2011] ICR 1234, EAT. Employees who find themselves in that position can apply to the employment tribunal under rule 34 of the Employment Tribunal Rules of Procedure 2013 to be joined out of time as parties to the case on the basis that they have an interest in the outcome of the proceedings. They can then apply, under rule 70 of the Tribunal Rules, for the tribunal’s decision to be reviewed in the interests of justice – *Harford and ors v Secretary of State for Trade and Industry* EAT 0313/07.

19. Entitlement to remuneration under the protective award is addressed by section 190 TULRCA:

‘(1) Where an employment tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 191, to be paid remuneration by his employer for the protected period.

(2) The rate of remuneration payable is a week’s pay for each week of the period; and remuneration in respect of a period less than one week shall be calculated by reducing proportionately the amount of a week’s pay.

(4) An employee is not entitled to remuneration under a protective award in respect of a period during which he is employed by the employer

unless he would be entitled to be paid by the employer in respect of that period –

- (a) by virtue of his contract of employment, or
- (b) by virtue of sections 87 to 91 of the Employment Rights Act 1996 (rights of employee in period of notice), if that period fell within the period of notice required to be given by section 86(1) of that Act.

(5) Chapter II of Part XIV of the Employment Rights Act 1996 applies with respect to the calculation of a week's pay for the purposes of this section. The calculation date for the purposes of that Chapter is the date on which the protective award was made or, in the case of an employee who was dismissed before the date on which the protective award was made, the date which by virtue of section 226(5) of that Schedule is the calculation date for the purpose of computing the amount of a redundancy payment in relation to that dismissal (whether or not the employee concerned is entitled to any such payment).'

20. Complaints about an employer's failure to pay remuneration under a protective award are brought under section 192 TULRCA:

'(1) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.

(2) An employment tribunal shall not entertain a complaint under this section unless it is presented to the tribunal –

- (a) before the end of the period of three months beginning with the day (or, if the complaint relates to more than one day, the last of the days) in respect of which the complaint is made of failure to pay remuneration, or
- (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the period of three months, within such further period as it may consider reasonable.

(3) Where the tribunal finds a complaint under this section well-founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.'

Protective award

21. The respondent was proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days. Accordingly, collective consultation should have begun at least 30 days before the dismissals took effect – section 188 TULRCA. No collective or individual redundancy consultation took place. There was no recognised trade union, and the respondent failed to make arrangements for the election of employee representatives. The Claimants are therefore entitled to a protective award.

22. The respondent did not submit an ET3 and has played no part in these proceedings, having gone into voluntary liquidation. The evidence indicates that the business had been in financial difficulties for at least a year, and no explanation has been offered for the failure to consult. In these circumstances, there are no mitigating factors that would justify a reduction in the maximum protected period of 90 days. The respondent bears the onus under section 189(6) TULRCA of establishing that there were special circumstances that rendered compliance with the duty to consult not reasonably practicable. It has failed to do so. In these circumstances, I consider that the just and equitable period for the protective award is the maximum of 90 days, beginning on 30 June 2023 (the date on which the dismissals took effect).

Failure to pay remuneration under protective award

23. The procedure for seeking a protective award is usually a two-stage process. First, an application is made for a protective award under section 189. If an award is made, the claimants may in due course apply to the employment tribunal to enforce the award under section 192 and for their entitlement to be ascertained. In this case, however, the two stages were addressed at a single hearing because it is clear that the respondent is insolvent and is not in a position to pay remuneration under the protective award. It would be pointless and contrary to the overriding objective for me to grant a protective award, and to require the Claimants to make a separate application to the tribunal for remuneration due under that award.
24. After the hearing on 25 October 2024, I issued directions requiring each of the Claimants to send to the tribunal a calculation of a week's gross pay together with supporting evidence, such as a payslip or a copy of an employment contract. Where that information had been received by the date on which this judgment was finalised, I have calculated the sum due to each claimant – see Schedule 2. A further judgment will be issued setting out the calculations for the remaining claimants once their information has been received by the tribunal.
25. One of the claimants, Miss R Sperandio, was on unpaid maternity leave at the start of the protected period. I have concluded that section 190(4) TULRCA does not apply to her, whatever its effect might otherwise have been, because she was no longer 'employed by the employer' during the relevant period; like the other claimants, she had been dismissed at the start of the protected period, on 30 June 2023. She is entitled to a 'week's pay', based on her normal contractual remuneration, for the duration of the protected period.
26. I explained at the hearing that the Claimants are unlikely to recover the full amounts awarded by this tribunal. Where an employer is insolvent, the Insolvency Service will pay the protective award, but the amount that can be recovered is limited to eight weeks' pay and capped at £5,144 (for dismissals between 6 April 2023 and 5 April 2024). Furthermore, certain payments (such

as outstanding wages) already received from the insolvency Service will be offset against that sum.

Employment Judge Leverton

30 October 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

6Th November 2024

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-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-practicedirections/>

Schedule 1 – Full list of Claimants

| | |
|--------------|----------------------------|
| 2304001/2023 | Mr E Reeve (Lead Claimant) |
| 2304987/2023 | Mr M Kunarajah |
| 2304990/2023 | Mr W Jones |
| 2305027/2023 | Miss R Sperandio |
| 2305121/2023 | Mrs W Mehiadin |
| 2305188/2023 | Mr J Prasser |
| 2305279/2023 | Ms C Silipigni |
| 2305500/2023 | Miss A Hafeez |
| 2304003/2023 | Mr A Smith |
| 2304002/2023 | Mr K Tountas |
| 2304024/2023 | Mr L Davis |
| 2305977/2023 | Miss S Botay |
| 2305244/2023 | Mr J Marini |
| 2304992/2023 | Mr G Krunkauskas |
| 2305026/2023 | Miss A Koutsosimou |
| 2305261/2023 | Mr S Polak |
| 2304004/2023 | Mr R Kovilpillai |
| 2304026/2023 | Mr W Soriano |
| 2304996/2023 | Ms M Hatano |

Schedule 2 – Remuneration due under protective award

Calculations are for a protected period of 90 days
(12.86 weeks x a week's pay)

2304001/2023 – Mr E Reeve

Week's pay: £3,076.92

Total due: £39,569.19

2304987/2023 – Mr M Kunarajah

Week's pay: £2,009.62

Total due: £25,843.71

2304990/2023 – Mr W Jones

Week's pay: £2,557.69

Total due: £32,891.89

2305027/2023 – Miss R Sperandio

Week's pay: £1,639.42

Total due: £21,082.94

2305121/2023 – Mrs W Mehiadin

Week's pay: £1,057.69

Total due: £13,601.89

2305188/2023 – Mr J Prasser

Awaiting details

2305279/2023 – Ms C Silipigni

Awaiting details

2305500/2023 – Miss A Hafeez

Awaiting details

2304003/2023 – Mr A Smith

Week's pay: £1,538.46

Total due: £19,784.60

2304002/2023 – Mr K Tountas

Week's pay: £1,730.77

Total due: £22,257.70

2304024/2023 – Mr L Davis

Week's pay: £2,884.62

Total due: £37,096.21

2305977/2023 – Miss S Botay

Week's pay: £480.77

Total due: £6,182.70

2305244/2023 – Mr J Marini

Week's pay: £1,769.23

Total due: £22,752.30

2304992/2023 – Mr G Krunkauskas

Week's pay: £1,769.23

Total due: £22,752.30

2305026/2023 – Miss A Koutsosimou

Week's pay: £1,836.54

Total due: 23,617.90

2305261/2023 – Mr S Polak

Week's pay: £1,250

Total due: £16,075

2304004/2023 – Mr R Kovilpillai

Week's pay: £1,740.39

Total due: £22,381.42

2304026/2023 – Mr W Soriano

Awaiting details

2304001/2023

2304996/2023 – Ms M Hatano

Week's pay: £769.23

Total due: £9,892.30