Case Numbers: 2500633/17, 2500634/17, 2500635/17, 2500636/17, 2500637/17 and 2500638/17

THE EMPLOYMENT TRIBUNALS

Claimants
Mr T Thompson
Mr M Malpass
Mr G Willis
Mr P Newton
Mr D Kendall
Ms E Reed

Respondent
Grorud Engineering Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
At and following a preliminary hearing

HELD AT NORTH SHIELDS ON: 18th August 2017
EMPLOYMENT JUDGE GARNON
Appearances:
For the claimants Ms L Hardy Solicitor
For the respondent No attendance

JUDGMENT

I strike out the response to the claim made under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992, as amended, (the Act).

JUDGMENT (Liability and Remedy)
Employment Tribunals Rules of Procedure 2013 –Rule 21

1 I find the claim under s.189 of the Act well founded. I make a protective award in respect of employees dismissed as redundant on or after 7th February 2017 that the employer pay remuneration for the protected period which begins on 7th February and is for 60 days. The Recoupment Regulations apply.

2 All claimants' references relating to the right to a redundancy payment are dismissed on withdrawal.

3. The claims of unlawful deduction of wages are well founded. I order the respondent to repay to the claimants the following sums gross of tax
Mr T Thompson £280.80
Mr M Malpass £122.40
Mr G Willis £637.93
Mr P Newton £446.76
Mr D Kendall £349.91
Ms E Reed £244,80

4. The claims of breach of contract by Mr Newton and Mr Kendall are well founded. The other claims of breach of contract are dismissed on withdrawal. I order the respondent to pay damages, on which no tax is payable, to Mr Newton of £ 384 and to Mr Kendall of £ 936

5. The claim for compensation for untaken annual leave by Mr Malpass is well founded. The other claims for compensation for untaken annual leave are dismissed on withdrawal. I order the respondent to pay to Mr Malpass compensation of £21 net of tax.

REASONS

1. The claimants presented a claim on a single form on 15th May 2017 for a protective award, compensation for untaken annual leave, a redundancy payment, notice pay and wages owed. It was sent to the respondents on 23rd June 2017.

2. The facts alleged are perfectly pleaded. The claimants received a letter dated 24th January from the respondent stating its largest customer had failed to pay so staffing would have to be reduced. It said 3 consultation meetings were planned. A letter dated 30th January told them they were at risk of redundancy would not be required to work their notice but would be paid to their termination date. Two letters were sent on 7th February confirming their employment was terminated but purporting to do so with effect from 30th January. In February the respondent consulted an insolvency practitioner, Mr A.J. Whelan of WSM Marks Bloom. On 10th April 2017 a Company Voluntary Arrangement (CVA) was approved.

3. A response was due by 21st July 2017. One was received from the respondent on 14th July. It was in manuscript and ticked the box saying it intended to defend the claim. All details of pay and dates of employment were agreed. The text of grounds of resistance however only asserted the claimants had, or should have, received their notice pay, holiday pay and arrears of pay from the Secretary of State.

4. The Employment Tribunal Rules of Procedure 2013 as amended include
28.—(1) If the Employment Judge considers that the response to the claim, or part of it, has no reasonable prospect of success the Tribunal shall send a notice to the parties—
(a) setting out the Judge's view and the reasons for it;
(b) ordering that the response, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the respondent has presented written representations to the Tribunal explaining why the response (or part) should not be dismissed; and
(c) specifying the consequences of the dismissal of the response, in accordance with paragraph (5) below.
(2) If no such representations are received, the response shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
(5) Where a response is dismissed, the effect shall be as if no response had been presented, as set out in rule 21 above.

5. I would have concluded it disclosed no defence to any claim. Employment Judge Hargrove signed a standard form notice to the respondent on 2nd August 2017 to that effect listing every claim except the one under s189 of the Act. I can only think this was an omission

of his part or a clerical error. Having spoken with him he agrees. No reply was received. This preliminary hearing remained listed. The respondent having failed to comply with the order made by Employment Judge Hargrove by the given date of 11th August 2017, its response to the claims relating to the right to a redundancy payment, unlawful deduction of wages, breach of contract and compensation for untaken annual leave have already been struck out.

6. The Rules include
37.—(1) ***At any stage of the proceedings,*** *either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
(a) that it … has no reasonable prospect of success;
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

7. The respondent has not attended today. Rule 56 requires a preliminary hearing at which strike out is to be considered to be in public and 14 days notice of such a hearing to be given but Rule 3 empowers me to shorten any time limit specified in the Rules . Rule 2 contains the overriding objective of dealing with cases fairly and justly which includes avoiding delay and saving expense. Had the respondent attended, I would have given it the opportunity to show cause why the response to the s189 claim should not be struck out too as having no reasonable prospect of success, at least as to liability. I would have heard what they had to say about the length of the protected period. Employment Judge Hargrove's Order was, at his direction, sent to the respondent not only at the address on its response but copied to the insolvency practitioner. They have shown no interest in defending probably because doing so would involve cost which diminishes funds available to creditors. I therefore strike out their response to the s189 claim.

8. Section 189, so far as material, says:
"(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;

(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."

(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied."

9. There was no recognised union and no employee representatives. These claimants have the right to claim. More than 20 were likely to be made redundant, and were. The respondent had an obligation to begin consultation at least 30 days before the first dismissals took effect.

It did not. The respondent has not pleaded an exceptional circumstances defence under s 188(7).

10. In all the claims, I am required by rule 21 to decide on the available material whether a determination can be made and, if it can, I am obliged to issue a judgment which may determine liability and remedy. I consider the above judgments appropriate because the claim form coupled with further information supplied in response to orders as to the sums involved give sufficient information to enable me to find the claims proved on a balance of probability and to determine the amounts to be awarded which are purely arithmetic calculations save in one respect. .

11. I have a discretion as to the length of the protected period .S 189 says

*(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 …."

12. The Court of Appeal's decision in Suzie Radin v GMB [2004] ICR893 has been resoundingly endorsed on several occasions. Peter Gibson L.J. said

45. 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.

13. The period is 90 days unless there are reasons for making it less. This applies even where the consultation period is only 30 days because less than 100 are dismissed. The facts as pleaded by the claimants show this situation was brought about by a creditor failing to pay. I accept this makes consultation in good time more difficult, but in nearly every case a business has signs of late payment , knows it puts its own viability at risk and " should see it coming ". I accept this is a mitigating factor and with the claimant's representative's consent fixed a period of 50 days.

14. The Working Time Regulations 1998 say in Regulation 14 that where a worker's employment is terminated during the course of his leave year, and on the date on which the termination takes effect the proportion he has taken of the leave to which she is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired his employer shall make him a payment calculated by a formula. I accept the formula was wrong applied in the case of Mr Malpass.

15. A contract of employment may be brought to an end by reasonable notice, which is effective only when communicated on 7th February. It cannot be "backdated". Damages are the pay, net of tax, due to the employee during the notice period (see Addis v The Gramophone Company) less sums earned in mitigation of loss. In a schedule of loss Ms Hardy shows those sums were miscalculated in the cases of Mr Newton and Mr Kendall. Whether they are asked to work or not employees are entitled to their wages up to the termination date which, in the case of each claimant was a week later than the day to which they were paid Section 13(3) of the Employment Rights Act.1996 empowers me to deem that non payment to be a deduction and order the respondent to pay it.

EMPLOYMENT JUDGE GARNON
SIGNED BY EMPLOYMENT JUDGE ON
18th August 2017

SENT TO THE PARTIES ON
5 September 2017

P Trewick
FOR THE TRIBUNAL OFFICE