



THE EMPLOYMENT TRIBUNAL

Claimant
Ms Gillian Drummond

Respondent
P.F. Burridge & Sons Ltd (in administration)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP)
EMPLOYMENT JUDGE GARNON

ON 9 December 2020

Appearances

Claimants Mr P Kerfoot of Counsel
Respondent No appearance

JUDGMENT

The respondent failed to comply with sections 188 (1) and (1A) of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended (the Act). I make a protective award that it pay to the claimant remuneration for the protected period of 90 days from the date of the earliest dismissal , being 17 March 2020 .

REASONS

1.The claimant and over 100 staff worked at an establishment at Units 8 & 9 Wesley Way, Benton Square Industrial Estate, Newcastle Upon Tyne .There was no trade union recognised there.

2. The claimant was employed as the Office Manager working 40 hours over five days per week with additional hours when required. On 17 March 2020, staff were all called into a meeting, informed the business was closing immediately and all were all redundant with effect from that day. Six employees (including herself) were asked to assist with the winding up of the business. She did not want to and asked if she could leave. She was told she had to stay and if she did not she would be leaving of her own accord and not receive a redundancy payment. During her remaining time working, she was expected to answer the phone which was constantly ringing as people wanted to know if the they were going to be paid. Some shouted abuse. She produced a spreadsheet of amounts owed based on information given to her. Apart from this, she did very little. She ended work on 23 March.

3. Sections 188 (1) and (1A) of the Act provides 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 employees who may be affected by the proposed dismissals or by measures taken in connection with them. There were no existing employee representative and none were elected

4. 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;

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant."

5. There follow two subsections about the burden of proof. Then the Act says what I must do, what I have a discretion to do, what a protective award is and what the protected period means:

(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"

6. The Court of Appeal's decision in Suzie Radin v GMB [2004] ICR893 has been 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.

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.

7. The administrators have consented to continuation of the claim and not entered a response. Rule 21 of the Employment Tribunals Rules of Procedure 2013 empowers an Employment Judge to decide on the available material whether a determination can be made and, if so, obliges him or her to issue a judgment which may determine liability only or liability and remedy. An Employment Judge decided against doing so in case an issue of fact needed to be determined.

8. I heard the evidence of the claimant. I am assured there was no recognised Trade Union, more than 20 employees were dismissed at a single establishment and no election of representatives took place, so she has the right to claim.

9. It is rare insolvency comes out of the blue and in the absence of any evidence to the contrary, I find this respondent could have consulted and make the protective award for the 90 day period.

Employment Judge TM Garnon

Judgment authorised by the Employment Judge on 9 December 2020.