



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107552/17

Held on 28th January 2020

Employment Judge J Hendry

Mr A Smith

**Claimant
Represented by
Mr D Hutchison
Solicitor**

Daviot Group Limited

Respondents

Daviot Group Limited (In Liquidation)

**Respondents
Represented by
Mr K Tudhope
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The complaint that the respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act c1992 is well founded:

ETZ4(WR)

2. A protective award should be made in favour of the claimant, Mr A Smith, in terms of section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 and orders the respondent to pay remuneration to the claimant for the protected period of 90 days from 4 October 2019.

Reasons

1. The claimant in his ET1 sought a finding that he was entitled to a protected award. The claim was defended and an ET3 lodged on behalf of the respondents acting through their liquidator. A hearing was arranged for the 28th of January 2020.
2. The solicitors acting for the respondents indicated that they would not be attending the hearing or making representations. After representations from the claimant's solicitors it was accepted that in accordance with the overriding objective the claimant could give evidence by telephone and that the hearing should be conducted by telephone conference call.
3. Prior to the hearing the claimant's solicitors lodged an Inventory of Productions and also written submissions.
4. The essential facts appear not to be in dispute but I made the following findings:
 1. The claimant was employed by the respondents as a Site Manager. He worked 55 hours per week and was paid £1153.80 gross per week.
 2. The company was involved in civil engineering works and works in association with the energy industry.

3. The claimant was based at the ABB Compound, Blackhill at Keith but the respondents had their head office at Harbour Road, Inverness.
4. There were 21 members of staff based at the Keith depot.
5. The claimant returned from holiday on the 2nd of October. He spoke to a Director of the company Derek Mitchell. The claimant was told that finances were “tight” but was reassured that everything was okay.
6. The claimant was not of a description in respect of which an independent trade union was recognised by the respondent; there were no representatives appointed or elected; there was no provision made by the respondent for the election of any employee representatives or any consultation.
7. The claimant heard nothing further until on attending work on the 4th of October he found a letter addressed to him dated the 3rd of October containing his dismissal on the grounds of redundancy. He was given notice that his last day of work would be the 21st of November.
8. The company petitioned for voluntary liquidation which was granted. A liquidator was appointed on or about the 6th of October at which point the claimant was immediately dismissed along with all other staff at the Keith depot.

Protective Award

5. The relevant sections of Section 188 of the 1992 Act as amended are in the following terms:-

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.

(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.

6. It is clear that more than 20 employees were made redundant through the respondent company going into administration.
7. The company was obliged to consult about dismissals and that consultation ought to have begun in good time prior to 6 October 2019.
8. There was no consultation with staff and there was no recognised Trade Union. The proceedings were initially defended and it was argued that there was a special circumstance defence in terms of section 188(7) of the 1992 Act. The proceedings became effectively undefended but it was clear from the claimant's evidence that the finances of the company were 'shaky' and staff had some concerns for a period before the redundancies. In these circumstances a prudent employer would have begun consultations with staff as to the likelihood of redundancy and ways of mitigating those considerably before the liquidation became inevitable.

9. In the circumstances, I shall make a declaration in terms of section 189(2) that the complaint is well founded and that the company failed to comply with the consultation requirements under section 188.
10. Section 189(2) of the 1992 Act also provides that in addition to making such a declaration, a Tribunal may also make a protective award. As I understand it the issue and the basis upon which any such award is calculated is entirely a question for the Tribunal. I start with the maximum award of 90 days and consider whether that should be reduced. In reaching my decision I was assisted by the terms of the judgment of the Court of Appeal in the case of ***Suzy Radin Ltd v GMB and others [2004] IRLR 400.***
11. In the present case the protected period commenced on 6 October. As there was no consultation whatsoever the claimant had no opportunity of proposing alternative measures either by himself or through any representative to avoid or reduce redundancies. There was no exploration of alternatives to redundancy or defence or explanation put forward for the failure. The respondent did not attend the Tribunal hearing.
12. In my view therefore, there are no mitigating circumstances which justify a reduction in the maximum period and I have decided, therefore, that it would be just and equitable to make a protective award for a period of 90 days commencing 4 October 2019 and so do.

Employment Judge:
Date of Judgment:
Date sent to parties:

James Hendry
02 March 2020
03 March 2020