THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr J Rochester & Others	**AND**	**(1) Alex Smiles Limited (in administration from 31 August 2016 in creditors voluntary liquidation)** **(2) Waste Recycling Logistics Limited (in administration until 29 March 2017)** **(3) Secretary of State for BIS**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 21 March 2017**

Before: **Employment Judge Hargrove**

Appearances

For the Claimants: **Mr Gloag of Counsel instructed by Tom Street & Co Solicitors**

For the 1st & 2nd Respondents: **Ms L Kelly, Solicitor**

RESERVED JUDGMENT ON PUBLIC PRELIMINARY HEARING

The judgment of the Tribunal is that the claims for a protective award were presented outside the period of three months beginning with the date of the last of the dismissals to which the complaint relates and the Tribunal is not satisfied that it was not reasonably

practicable for the complaint to be presented during the period of three months and in any event it was not presented within such further time as the Tribunal considers reasonable.

REASONS

1 By an ET1 received by the Employment Tribunal on 1 July 2016, 36 claimants made claims against Alex Smiles Limited (first respondent) and Waste Recycling Logistics Limited (second respondent) of a failure of collective consultation in advance of dismissals contrary to section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992. The claimants had entered into early conciliation on 21 June 2016 and a certificate was issued on the same day in respect of each of them. In the ET1 the claimants did not specify which of the respondents employed each of them nor did they identify the establishment at which they worked nor the number of employees at each establishment nor the dates of their dismissals other than that the then lead claimant Mr Rochester identified that he had been dismissed on 27 March 2015. An Employment Judge ordered particulars to be given and on 23 September 2016 a schedule supplying information was provided to the Employment Tribunal by their solicitors. That schedule identified various dates of dismissal for redundancy, all in 2015, although one failed to identify any particular date in 2015.

2 No responses were entered by either the first or second respondent, but company searches indicate that the first respondent had been in administration between 1 April 2015 and 31 August 2016 and that the second respondent had been in administration up to 29 March 2017. The Tribunal declined at that stage to make a Rule 21 Judgment because there was no evidence that the administrators had consented to the commencement or continuation of proceedings; it was noted that on the face of it the claims appeared to have been brought out of time; and it was appropriate that the Secretary of State should be added as third respondent. The third respondent was added as from 7 November 2016 and submitted a response on 25 November putting the claimants to proof of entitlement to a protective award against the Secretary of State under the Insolvency Provisions in Part 10 of the Employment Rights Act. At a telephone preliminary hearing on 9 January 2017 the claimants were ordered to provide to the respondents full particulars of their claims that it was not reasonably practicable to present their claims within the appropriate time limit; and that their claims were presented within such further time as was reasonable. The claimants had also to provide witness statements. The first and second respondents were given leave to respond via the administrators/liquidators. A hearing was listed to take place on 21 March 2017. In response the claimants provided a single two page witness statement from Mr Rochester, the lead claimant. They applied for the conversion of the hearing to a preliminary hearing to consider only the time point. This was granted. On 20 February 2017 the first and second respondents provided a response in particular to the factual allegations made against the respondents.

3 At the preliminary hearing on 21 March 2017 the first and second respondents were represented by Ms L Kelly, Solicitor instructed by the administrators/liquidators. The Employment Tribunal considered evidence from

the witnesses Mr D Myers, former Health and Safety Manager at the first respondent, and Mr G Michel, former Plant Manager at the first respondent, Mr Rochester (former Garage Supervisor), Mr J Conlon who had previously worked for the first respondent in transport. All of these provided witness statements. Mr Rochester's statement had been countersigned on 20 March 2017 by 16 others most of whom were on the list of claimants. Mr Steven Robinson also gave evidence. Witness statements were submitted from Ms N Stevens, Ms S Langley, Mr I Machers and Mr Colin Hall.

At the outset of the hearing Mr Gloag had indicated that he was unable to represent the claimant Mrs Usher due to a conflict with other claimants. Mr Robinson's witness statement made factual assertions against her part in the communications with the workforce at the time of the commencement of the dismissals, as HR Manager. Following a short adjournment, he also withdrew Mr Rochester's claim without any specific explanation. There were a series of issues raised by the Employment Tribunal as to dates when Mr Rochester, acting apparently as spokesman for other of the claimants, had first contacted Mr Tom Street, the claimants' solicitor, in 2016 prior to the commencement of the proceedings on 1 July. A statement was received from Mr Street with appendices after the end of the hearing on 24 March. The respondents have not responded to this statement. The case of the first and second respondents, as put at the preliminary hearing by cross-examination was only to challenge any criticisms made of the conduct of the administrators/liquidators' staff during the dismissal process.

4 The parts of section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 material to time issues at this hearing are as follows:-

> "(1) Where an employer has failed to comply with the requirement of section 188 (the duty to consult a proposal to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less) or section 188(a) the election of employee representatives, 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;
>
> (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
>
> (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".

It is common ground that there was no recognised trade union; there were no elections of appropriate representatives and in those circumstances it was open to any of the affected employees or employees who had been dismissed to bring their own individual claims. Note that in **Independent Insurance Company Limited v Aspinall & another [2011] ICR page 1234 (EAT)**, it was held that each employee affected had to bring his own claim and that it was not open to one employee to bring a claim for a protective award on behalf of all the other affected employees. That is material to the present case.

Section 189(5) states:-

> "(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".

It is appropriate first to identify the date upon which the three month limitation period commenced in respect of claims against Alex Smiles Limited (the first respondent) on the one hand and against Waste Recycling Logistics Limited (the second respondent) on the other hand. In that respect the only information provided to the Tribunal (apart from in the case of Mr Rochester who has withdrawn his claim, but remained as a witness) is the information contained in the schedule provided by the claimants' solicitors in response to an order of the Tribunal, on 23 September 2016, although it is to be noted that there is some reason to doubt the accuracy of the information provided. In the case of Alex Smiles Limited, according to the schedule, Mr Steven Robinson was not dismissed for redundancy until 11 October 2015, as was Steven Wilson. When he gave evidence, Steven Robinson asserted however that he was dismissed from his normal job earlier than that date on a date which he did not identify and that he had been retained as a Security Guard on a self employed basis until 28 September 2015, not 11 October 2015. The latest other date for dismissals of Alex Smiles' employees was 25 June 2015. The latest date of dismissal of any of the claimants who bring claims against Waste Recycling Logistics Limited is 26 March 2015. In their response to the claimants' further particulars of claim at paragraph 3 the first respondent asserts that the last dismissal by reason of redundancy in respect of the first respondent's employees took place on 26 June 2015. In respect of the second respondent they assert that the dismissal of the second respondent's employees took place on 27 March 2016. On this basis, I conclude that the three months time limit expired in respect of the claims for a protective award against the first respondent on 25 September 2015 and against the second respondent on 26 June 2015.

5 The essence of the claimants' case as presented to the Tribunal in the evidence given to the Tribunal was that they were never informed of their right to make a claim for a protective award by the licensed insolvency practitioner's staff; although they had been assisted in filling in the RP1 forms to claim for redundancy pay and notice pay from the Secretary of State which, it appears, were submitted on the claimants' behalf, and they received appropriate payments from the Secretary of State. Mr Rochester asserts that they were actively discouraged by the HR Manager (Gill Usher – who was one of the claimant's who submitted a claim as part of this multiple) from making any other claims by statements to the effect that the respondent companies had no money. Mr Rochester states that around 15 May 2015 there was a rumour going around that there was another type of claim relating to redundancy that other colleagues had taken legal advice about. In that connection, it was alleged that Ms Usher had said that the costs would have been in the region of £1,000; and that the company had no money. It may be that this is a reference to a separate claim that was made by other employees for a protective award, probably late in 2015, because, no response was entered and, it is now established that on 26 January 2016 Employment Judge Garnon made a protective award at a hearing in that case. This appears to have come to the attention of one or more of the present claimants because of a meeting in a public house where one of the successful claimants had indicated that they were to receive, or had received, more money. One of the more unusual aspects of this case is that Mr Street apparently acted for this first tranche of claimants in their protective award claims, but was, it appears, ignorant of the fact that there were other employees who had been dismissed who could have joined in the original claim.

The essence of these claimants' cases is that they were ignorant of their rights to bring a claim for a protective award against whichever of these insolvent companies who employed them, and unaware of their rights to bring a claim for a payment under the protective award against the Secretary of State. It is not however sufficient for a claimant merely to say that he or she is ignorant of his/her rights. The ignorance must itself be reasonable. The starting point for the principle was laid down by Lord Scarman in **Dedman v British Building & Engineering Appliances Limited [1974] ICR page 53**:-

> "Does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion no. it would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not why not? Was he misled or deceived? Could that prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it relying on the maxim 'ignorance of the law is no excuse'. The word 'practicable' is there to moderate the severity of the maxim and require examination of the circumstances of his ignorance".

It was put this way in the judgment of Waller LJ in **Porter v Bandridge Limited [1978] IRLR page 271**:-

"The onus of proving that it was not reasonably practicable to present the complaint within a period of three months is open to the applicant. That imposes a duty on the applicant to show precisely why he did not present his complaint. He has to satisfy the tribunal that he did not know of his rights …. during the whole of the period in question and that there was no reason why he should have made enquiries or should have known of his rights during that period".

6 I have taken into account the following in the claimant's favour:-

6.1 The right to make a claim for a protective award to a Tribunal in the event of collective redundancy is not a type of claim that one would expect an employee who is not a member of a trade union to know about. This is to be contrasted with a right to make a claim for unpaid wages or for unfair dismissal or for an ordinary redundancy payment, which they did know about in this case, or certainly ought to have known Furthermore protective award claims are of some complexity and require a two stage process. Not many legal practitioners know that where there is no recognise trade union or appropriate representatives, it is necessary for each individual to make a claim for a protective award.

6.2 I have accepted that the respondent's HR Manager Ms Usher did make comments in reference to individual claims which were being made for a protective award around May 2015 and that such comments did have the effect of discouraging any other potential claimants from making a claim even though they could at that stage at least have made enquiries about potential claims. The comments by Ms Usher were not endorsed in any way by the licensing insolvency practitioners or their representatives. Furthermore, neither the licensing insolvency practitioners nor Ms Usher were under any obligation to give advice to the claimants that they could or should bring a claim for a protective award against the insolvent respondents.

I am prepared to accept in these circumstances that there initial ignorance of their rights was, in the initial period at least, reasonable. However, there came a time probably around Christmas 2015 where their state of knowledge as to what had occurred should have put them on enquiry. They did know that they could obtain payments at least for redundancy payments and notice pay via the Secretary of State for BIS, which they had in fact done. It is a fact that there is information available via the Redundancy Service website which indicates that a claim under a protective award may also be made to the Secretary of State on insolvency. This explains in simple terms the contents of section 184(1)(a) of the Employment Rights Act.

It was thanks to Mr Rochester that it was discovered that the others' claims had succeeded he having apparently obtained access to the judgment handed down in January 2016. Mr Rochester's witness statement did not mention this at all and it only became known when he gave evidence to the Tribunal. He did not make it clear precisely when he obtained that information including that they had been represented by Mr Street, but it is known now that he did not contact Mr

Street until 10 May 2016. Thereafter he was contacting the other potential claimants but there appears to have been little urgency in actually commencing the proceedings, which were not actually commenced until 1 July 2016 following an application for an early conciliation certificate on 21 June. This was approximately nine months out of time for one group of claimants and six months in respect of the other.

In these circumstances I find that although initially the claimants' ignorance was reasonable, it ceased to be reasonable some time in the early Spring of 2016; and it was at that time reasonably practicable for them to have brought a claim. It would not be reasonable to extend time for the three months or so until the claims were in fact presented. In these circumstances the claimants' claims must fail.

EMPLOYMENT JUDGE Hargrove

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
22 May 2017
JUDGMENT SENT TO THE PARTIES ON

26 May 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL