THE EMPLOYMENT TRIBUNALS

Claimants
Mr Colin Gardner
Mr Christopher Bell

Respondent
Joyce Construction and Civils Limited
(in Administration)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
Employment Tribunals Rules of Procedure 2013 –Rule 21

Made at Newcastle On 28 July 2020
EMPLOYMENT JUDGE GARNON

JUDGMENT

1 I find the claims under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) ("the Act") well founded. I make a protective award in respect of the claimants who were dismissed as redundant on 3 December 2019 that the employer pay remuneration for the protected period which begins on 3 December 2019 and is for 90 days. The Recoupment Regulations apply.

2. The claim of breach of contract by Mr Gardner remains stayed. Unless he applies within 14 days of this judgment being sent to him to lift the stay, that part of his claim will stand dismissed without further order (see paragraph 10 of the Reasons**).**

REASONS

1. The claimants presented claims on separate claim forms on 2 January and 14 February 2020 respectively for a protective award and Mr Gardner for "notice pay" also. On 3 December 2019, the respondent had entered administration and changed its registered office to that of the administrators without whose consent the claims could not proceed. Therefore, the claims were stayed at service which in the case of Mr Gardner was on 3 January 2020 and Mr Bell on 26 February. Mr Gardner obtained written confirmation of consent **to the protective award** claim on 27 April Mr Bell obtained written confirmation on 17 April. Both claims were re-served on the administrators on 18 May. A response was due by 15 June but none was received .

2. The facts alleged are simple. The claimants were dismissed as redundant on 3 December 2019 without consultation along with over 20 others The respondent has not defended probably because it would involve cost which diminishes funds available to creditors.

3. Section 189 of the Act , 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."

4. I am aware of no recognised union and no employee representatives, so 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. It has not pleaded an exceptional circumstances defence under s 188(7).

5. I am required by rule 21 of the Employment Tribunal Rules of Procedure 2013 as amended to decide on the available material whether a determination can be made and, if it can, obliged to issue a judgment which may determine liability and remedy. I consider the above judgment appropriate because the claim form coupled with further information supplied in response to orders gives sufficient information to enable me to find the claims proved on a balance of probability.

6. I have a discretion as to the length of the protected period.Section 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 …."

7. 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.

8. 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. In nearly every case a business has signs of imminent insolvency, knows it puts its own viability at risk and " should see it coming " that dismissals may be inevitable. I fix a period of 90 days.

9. Part 12 of the Employment Rights Act 1996 obliges the Secretary of State to pay certain debts of insolvent employers including arrears of "wages" which are defined as including remuneration due under a protective award . There are limits but each claimant should now apply to the Secretary of State for such sums as are due.

10. A contract of employment may be brought to an end by reasonable notice and notice pay is one of the debts which the Secretary of State may be required to pay. Mr Gardner , if he has not already done so should apply for that too. However, the written confirmation of administrators consent **to the protective award** claim does not extend to his notice pay claim which must remain stayed . I cannot make an award in his favour for that . He does not need a judgment to make his claim to the Secretary of State and although his notice pay may be more that the limits which the Secretary of State will pay, there is no real prospect of him recovering the balance from the respondent.

EMPLOYMENT JUDGE T M Garnon
JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 28 JULY 2020