



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and **Respondent**

British Airline Pilots' Association

**(1) Monarch Airlines Limited
(In Administration)**

**(2) Secretary of State for Business,
Energy and Industrial Strategy**

Watford

28 June 2019

Employment Judge Smail in Chambers

JUDGMENT

1. In breach of s.188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, the First Respondent failed to consult the claimant Union at all in respect of 20 or more redundancies it was proposing to make at each of Leeds/Bradford, Birmingham, Manchester, Luton and Gatwick Airports in respect of its pilot workforce. The redundancies took place on or about 2 October 2017.
2. Each of the 385 pilots made redundant is entitled to a 90-day protective award against the First Respondent, the protected period being 90 days from 2 October 2017.
3. In the event that the First Respondent is insolvent, the Second Respondent must meet the First Respondent's liability for the protective awards, subject to its maximum liability under s.184 of the Employment Rights Act 1996.

REASONS

1. Monarch Airlines Limited (the First Respondent) went into administration on 2 October 2017. The First Respondent's staff were made redundant without notice on the same day. The BA Pilot Association is an independent trade union recognised by the First Respondent in respect of its pilots. The union

brought group claims for a protective award, obtaining ACAS Early Conciliation Certificates as required, on behalf of 385 pilots. The claim form was issued on 11 January 2018. The claimants claim there was no consultation whatsoever. The administrators consent to and do not resist proceedings. Their consent was dated 21 December 2017. The reality is that any award will be paid by the Secretary of State, the Second Respondent. The Secretary of State puts the claimants to proof and has made written representations. There is no need for any hearing. I am able to deal with the matter on the papers.

THE LAW

2. By s. 188(1) of the Trade Union & Labour Relations (Consolidation) Act 1992, 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. By s. 188(1A), the consultation shall begin in good time, and in any event where the employer is proposing to dismiss 100 or more employees, at least 45 days - and otherwise, at least 30 days - before the first of the dismissals takes effect. By section 189(2) the tribunal finds the complaint well founded, it shall make a declaration to that effect may also make a protective award.
3. By section 189(3) a protective award is an award in respect of one or more descriptions of employees who have been dismissed as redundant or who it is proposed to dismiss as redundant, and 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. By section 189(4) the protected period 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 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.
4. Peter Gibson LJ gave Employment Tribunals the following guidance in Susie Radin Ltd v GMB [2004] IRLR 400 (CA) in respect of protective awards cases.

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.'

EVIDENCE FROM UNITE THE UNION

5. As I was aware that Monarch Airlines Ltd, whether by its administrators or otherwise, would not be putting in any evidence in this matter I suggested on 25 April 2019 that a trade union official set out information about communications that the Union had with Monarch before it went into administration so as to assist me in applying Peter Gibson LJ's guidance.
6. John Moore, the union's Head of Industrial Relations, provided information in a witness statement supported by a statement of truth dated 21 May 2019. I accept the information as accurate. The following represents what he told me.
7. In late September and early October of 2016 (so around 12 months before the Respondent went into administration), a crisis arose within the Respondent after it became public that the CAA was in talks with the Respondent in relation to the possible non-renewal of its ATOL licence due to apparent uncertainty over the Respondent's future. However, following talks between the Respondent and the CAA and after Greybull Capital, the Respondent's owner, agreed to inject an additional £165 million into the Respondent, the licence was granted. At the time, Andrew Swaffield, the Chief Executive of Monarch, was quoted in the press as stating that:

"It is testament to the extensive effort by all parties, over the past weeks and months, that we are able to announce the largest investment in our 48 year history, as well as the renewal of our ATOL licences."

8. It therefore seemed in the autumn of 2016 that disaster had been averted and that the Respondent had been saved by this additional significant investment. The Chairman and Vice-Chairman of BALPA's Company Council were subsequently able to meet with Greybull and Mr Swaffield on 2 December 2016 and received reassurances as to the Respondent's future. Following this meeting, BALPA's Company Council reported in its newsletter to members dated 21 December 2016 that:

"The recent recapitalization by Greybull provides the Company with a level of liquidity that should enable it to navigate the worst expected economic shocks. The current business plan expects the next few years to be extremely challenging as the hand back costs of the Airbus fleet filter into the accounts before the benefits of the new Boeing fleet come to fruition. Greybull are cognizant of these challenges but seem satisfied that the potential of the business to deliver returns in the future is worthy of such an enormous investment. They clearly have confidence in our future".

9. On 25 January 2017, David Margrie then emailed Mr Moore an update on the Respondent's trading position. He stated in his email, which was based on information provided by the Respondent, that:

"Trading - closed out Nov at a loss of circa £3M, winter is running on target with exception of March, other months are there or thereabouts. Summer is looking ok. Slide showing change in revenue with the change to prioritise volume not yield. Price war is on with [Ryanair] setting the lowest prices (£29 Iberia) and we are matching. Summer currently £3.9M ahead, Winter is £4M below - as is our traditional issue. Summer positives are only covering winter losses so very delicate balance.

Monarch Holidays felt the biggest bump for November (although small contribution by Nov) mainly due to consumer confidence following the ATOL cluster!

Advertising campaign kicks off today for 3 weeks, still previous advert but rebooted with latest deals at the end. New video coming in Easter to run for the Summer.

Budget Bridge gap shown for the FY17 - target for EBIDA of £46M. Windsor currently showing at £32M. Finance (Lynn Simons now heading it up) taking on the cost attack, £20M identified and £6M achievable with contracts. So the other £12M still to be found. Big sell on how if they don't hit the £46M Greybull won't be happy and there will be consequences. Discretionary spending embargoed so no pilot roadshows. TR induction courses all trimmed down too. Nil's target is about £8M, £2M identified through the Iberia contract so £6M to lose."

10. The business updates to members via the Company Council's newsletters subsequently continued during 2017, again based on information provided by the Respondent. Whilst there were challenges facing the Respondent and cost saving projects underway, there was no indication that, as the Respondent continued its turnaround following on from Greybull's investment, the Respondent was facing issues of such severity that they might threaten its immediate future. Indeed, the Respondent continued to seek to reassure the Company Council on the Respondent's long-term future and, for example, in early August 2017 made an improved pay offer, following pay negotiations with our Company Council.

11. In September 2017, as the deadline for the annual extension of the Respondent's ATOL licence again approached, there was again speculation in the press as to the Respondent's future. For example, on 18 September

2017, Sky News ran a story stating that the Respondent was considering shifting its strategy from short haul to long haul flights. In response, the Respondent was quoted in the article as saying:

“We are having regular discussions on a number of options with potential strategic partners and we will announce any material developments, if and when they happen.”

12. The press reports resulted in Andrew Swaffield emailing flight crew on 25 September 2017 stating as follows:

“If you regularly read my weekly updates you will know all this already, but it is worth recapping on the challenges that face our airline today, as Monarch Airlines is the biggest company in the group and represents 80% of our activity and costs. Effectively since 2015 we have seen a loss of over £160m of annual airline revenue and an increase in annual costs of over £40m. The revenue loss comes from the closure of Tunisia in summer of 2015 after the beach shootings, the closure of Sharm el Sheikh in November 2015 following the Metrojet terror attack and the 50% to 60% loss of Turkish demand caused by multiple bombings and the failed Coup d’Etat attempt. Turkey has picked up since and continues to improve, but is still down on 2015 – however the other two remain gone to us. To put it in perspective – we flew 18 times a week to Sharm and generated £67m of annual revenue, mostly in the winter. The effect of this terrorism was to force all airlines to redeploy their planes from Tunisia, Sharm and Turkey onto other short haul leisure destinations. The most popular choices being Mainland Spain, Balearics, Canaries, Portugal. These represent our heartland and still today over 80% of our flying.

This over supply, coming so suddenly in response to terror led to a 25% decline in our ticket prices to these massive destinations. We responded by increasing our marketing and our load factors went up by 10 points. So this year we are carrying more passengers than last year, but for much less revenue.

The collapse in the British pound was a reaction to the decision in the 2016 EU referendum to leave. Effectively the pound collapsed 18% against the US dollar and the euro. Monarch’s income is 88% in pounds but we pay our plane leases and fuel in dollars, and our ground handling and navigation often in euros – so we had to adapt to a permanent annual £40m cost increase in addition to the revenue fall of £200m.

We had some good news – the company responded well to the challenge and managed to reduce its costs (mainly head office overhead costs and discretionary costs) by £40m and we saw fuel price reductions which saved us a further £30m. However you can see that the net result is a £130m negative swing.

We received £165m capital injection from our owners Greybull Capital in October last year and our fleet renewal programme, which starts in March 2018, is economically transformative. However, the loss of £130m due to terror and the exchange rate means that our short haul business is now heavily loss making and we need to act to correct this.

You will have read the story in the press last week speculating that we are planning to fly long haul. We were not ready to announce this yet because of commercial sensitivity, but I am happy to confirm that we have a long-haul plan which involves both narrow body and wide body aircraft. Greybull are supportive of the plan and we have had it validated by respected outside consultants. Our strategy is to reduce our dependency on the short haul market and pivot as quickly as we can to long haul. This is not easy to achieve and that is why we have said that there is a strategic review under way. I will update you on progress when we have any. Meanwhile you can

expect to see continued press speculation about how we may achieve this and I recommend you try to ignore it.

Michael O'Leary's recent press statement that Monarch would not survive the winter has caused much consternation, not least amongst our employees judging by the number of you that have written to me about it. He is clearly trying to manage a crisis of his own making with his pilot shortage and his aggressive attack is irresponsible and unhelpful. Again, my advice is to ignore him.

We also have speculation from the media and our partners about our Atol renewal due at the end of this week. The whole world now knows about this deadline after what happened last year and this too is unhelpful. The Atol relicense is different from last year as it only covers Monarch package holidays so it's much smaller.

I realise that speculation and rumour is stressful for you. I cannot stop stories appearing in the media, but I will try to keep you up to date as much as I can. These are challenging times, but the best way you can help is - as always - to continue to look after our customers day in day out, to do your job to the best of your abilities and do not believe everything you read in the press."

13. Mr Moore suggests, and I agree, that whilst Mr Swaffield's email indicated a number of significant challenges for the Respondent and a potential change in strategy, it provided no indication that the Respondent could imminently go into administration. The long-haul business was floated as a real contender. He also specifically asked members to ignore negative press stories.
14. The first clear indication that the Respondent provided to BALPA that administration was, in fact, an imminent possibility, was on Sunday, 1 October 2017. Brian Strutton, BALPA's General Secretary, was told by the Respondent that discussions between the Respondent and Greybull Capital were ongoing but that things were becoming "difficult". On Monday, 2 October 2017, Mr Swaffield then sent a follow up email to flight crew:

"This is the update I hoped I would never have to write. Despite our best efforts, today Monarch Airlines Limited and Monarch Travel Group (Monarch Holidays) are ceasing operations and going into administration. Soon you will hear from the administrator, KPMG, who will now be running these two entities in administration and will explain what this means for all of us who work for either company.

Please note that Monarch Aircraft Engineering Limited continues to operate normally and is not entering administration.

Our owners, Greybull Capital, showed great courage when they bought us in 2014 and have provided us with continuous support. We had a turnaround year in 2015. But since then, outside influences have badly affected us and we've seen yields collapse by a quarter, resulting in £160m less revenue. This has especially affected Spain and Portugal which is 80% of our business. This year the airline is carrying 14% more passengers than last year for £100m less revenue. The root cause is the closure, due to terrorism, of Sharm-El-Sheikh and Tunisia and the decimation of Turkey.

Despite these challenges we managed to cut £40m out of our cost base by reducing overheads and being more efficient and wasting less, however the yield reductions have turned our airline from one that made £70m profit in 2015 to one that made a £60m loss in 2017 and was scheduled to lose over £100m in 2018.

We asked a respected aviation consulting firm to review how we could improve our short haul network and they came to the conclusion that it was pretty much out of our control. At the same time we built our long-haul plans and asked them to validate these plans, which they did, and agreed that they were attractive and viable. The next challenge was how to pivot our airline from short haul to long haul to reduce losses. We decided to ask KPMG to run a sales process to see if anyone would be interested in taking on all or some of our short haul operations or assets. This would have allowed us as Monarch to start long haul flying in spring of 2018. Regrettably although there was considerable interest, there was no deliverable offer, and so we have run up to the 30 September ATOL renewal deadline without a viable plan for the next twelve months and the CAA has understandably been unable to license us.

As a consequence of all this we lost any prospect of avoiding an insolvent liquidation and have been left with no option but to file for insolvency and cease operations. Unlike many other countries, the UK does not offer a viable insolvency track for airlines to keep operating during administration and so we were forced to cease operations.

Millions of customers have flown and holidayed with Monarch over the last 50 years. I am so sorry that thousands now face a cancelled holiday or trip, possible delays getting home and huge inconvenience as a result of our failure. We are working with the joint administrators and the CAA to do everything we possibly can to help minimise disruption where we can, but are under no illusion as to the problems this will cause.

And many suppliers will suffer hugely as a result of our insolvency – for which I am equally sorry. Many of you have spent years working for this company and I want to thank you again for your service and loyalty. I am truly saddened that it has ended like this.

You can all hold your heads up high and be proud of what you achieved at Monarch. It has been a company that has cared for its customers and which has been like a family for many people for five decades. I cannot tell you how much I wanted to avoid this outcome and how truly sorry I am.

I wish you all well in your future careers and hope you will all retain a fond memory of the “spotty M” and all it stands for.

The MAEL team will be doing everything possible to ensure that our engineering business survives and prospers and carries forward the Monarch name with pride and dedication to professionalism and service.

Thank you and I wish you well, wherever you are based.”

15. This was, suggests Mr Moore, a very different message to the message Mr Swaffield had provided just 7 days before on 25 September 2017. On the same day and following on from Mr Swaffield’s email, KPMG, the Respondent’s appointed administrators, then wrote to all 385 of BALPA’s members who were pilots with the Respondent terminating their employment on redundancy grounds with immediate effect.

DECISION

16. I am satisfied that each of the airports constituted an ‘establishment’ for the purposes of s.188. At each establishment 20 or more employees were proposed to be made redundant within 90 days or less. The British Airline Pilots’ Association, the recognised union, was an appropriate representative of the workforce at each of those establishments in respect of pilots. There was no consultation at all of the Union in respect of proposed redundancies.

There was no opportunity at all given to the Union to make proposals as to how the business might be saved in whole or in part. The union was given 1 days' notice of the possibility of insolvency. There was no consultation.

17. Applying, then, the guidance given by Peter Gibson LJ in the Susie Radin case, on the information I have I can identify no mitigating circumstance justifying a reduction from the maximum. Giving 1 days' notice of a possible insolvency event is not consultation. It is unlikely that the company's financial position deteriorated so immediately that consultation was not possible. It seems more likely that the Union was kept out of the loop deliberately. Be that as it may, there is no evidence upon which I can find it appropriate to reduce the maximum award, and so a protective award must be paid in respect of each employee covered of 90 days pay. The protected period is 90 days from 2 October 2017.

Employment Judge Smail

South East Region

_____ 1 July 2019 _____

Judgment sent to the parties on

_____ 1 July 2019 _____