EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Van Tonder **Mr Chan**	**v**	**Weblight Ltd (In Administration)**

Heard at: Watford **On**: 9 October 2019

Before: Employment Judge C Palmer

Appearances

For the Claimants: In person
For the Respondent: did not appear and was not represented

RESERVED JUDGMENT

1. The Tribunal declares that the respondent failed to comply with section 188 and188A of the Trade Union & Labour Relations (Consolidation) Act (TULR(C)A) 1992 when dismissing over 20 employees for redundancy.

2. The respondent is ordered to pay a protective award in respect of each of the claimants for the period of 30 days beginning on 4 December 2018. This amounts to £3,242.68 for Mr Chan and £2,054 for Mr Van Tonder.

3. Mr Chan's claim for notice pay of £4,864.02 and holiday pay of £270.22 is upheld and the respondent is ordered to pay him the sum of £5,134.24;

4. Mr Van Tonder's claim for notice pay of £2,054 is upheld and the respondent is ordered to pay him £2,054.

REASONS

Claims

1. These are lead cases on the question of whether a protective award should be made to a number of employees, following the redundancies of over 20 employees made by the respondent. Regional Employment Judge Byrne considered that the claims gave rise to common or related issues of fact or law in relation to a protective award (Rule 36 of Employment Rules

of Procedure 2013). The linked claims are stayed pending the judgment in Mr Chan and Mr Van Tonder's cases.

2. By a claim filed on 18 January 2019, after Early Conciliation from 17-17 January 2019, Mr Chan claims:

    4.1 A protective award of 30 days, amounting to £3,242.68;
    4.2 Notice pay of 9 weeks, amount to £4,864.02;
    4.3 Holiday pay of £270.22 for 2.5 days.

5. By a claim filed on 2 March 2019, after Early Conciliation from 27-27 February 2019, Mr Van Tonder, claims:

    5.1 A protective award of 30 days, amounting to £2,054.
    5.2 Notice pay of one month, amounting to £2,054.

Issues

6. The issues in relation to the protective award under s188 and section 188A Trade Union & Labour Relations (Consolidation) Act 1992) (TULR(C)A) are:

    6.1 Whether the employer proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less;

    6.2 Whether the employer consulted representatives of affected employees, in good time, about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, reaching agreement with the representatives and mitigating the consequences of the dismissals;

    6.3 Whether the employer disclosed in writing to the appropriate representatives the reasons for the proposals, the numbers and descriptions of employees at risk of redundancy, the proposed method of selecting employees and carrying out the dismissal, the proposed method of calculating the amount of any redundancy payments;

    6.4 Whether the consultation was completed before notice of any dismissal was given;

    6.5 Whether the employer carried out the requirements for the election of employee representatives under section 188A and 188(1B)(b)(ii) TULR(C)A which includes conducting a proper election of representatives

Evidence

7. I heard evidence from the claimants and read the documents to which I was referred including a witness statement from Mr Chan. I find the following relevant facts.

Facts

8. Both the claimants worked at the respondent's office at Unit 1, Netherfield Lane, Ware Hertfordshire SG12 8HE.

9. Mr Chan was employed by the respondent from 7 December 2009 to 4 December 2018. He earned £2,341 per month gross, £1,818 net.

10. Mr Van Tonder, a Service Engineer, was employed from 3 April 2017 to 4 December 2018. He earned £24,650 pa gross.

11. Forty-two employees at the same establishment were at risk of redundancy and most of these were dismissed for redundancies. A few were offered alternative employment.

12. On 9 November 2018 the respondent sent advance notification of redundancies to the Redundancies Payment Insolvency Services (p22-23). This stated that there would be 50 redundancies in total and broke these down by occupational group. The notice said that the date of the first proposed dismissal was 5-6 weeks. The reason for redundancies was stated as lower demand for products or services and completion of all or part of contract. The section on consultation was left uncompleted, except to say that the representatives had not yet been elected.

13. On 15 November 2018 employees, including the claimants, were informed by email of the proposed redundancies. This was the first they knew of the proposed redundancies.

14. Employees were notified of the balloting procedures for the election of two employee representatives. Mr Chan was one of the representatives, having put himself forward. There were three other representatives. The respondents provided a document setting out Election Rules – Electing Employee Representatives (p24-28) but this was not followed by the respondent. No ballot was held and the claimants were not clear about the basis for selecting the representatives. The claimants were concerned that one representative, Claire Castleden, started employment with DWW immediately after being made redundant by the respondent.

15. On 22 November, representatives were given a letter stating that the first consultation meeting with them was to be held on 28 November 2018 and the proposed redundancies were to commence from 21 December 2018 to 4 January 2019, after at least two to three consultation meetings. They were also given a copy of the HR1 notification, dated 9 November, sent to the Insolvency Services. Mr Chan provided this to the other employees.

16. The first consultation meeting with representatives was held on 28 November with Mr Dean, a director of the respondent, and Julie Collins, Head of HR. The representatives put forward suggestions for way to avoid redundancies where possible, such as voluntary redundancies, a shorter working week, wage cuts and employees buying into the company. Mr Dean said he would look into these. When asked about the time line, Mr Dean confirmed that all roles were currently at risk, that it had to be 30 days or more and confirmation of the numbers to be affected would be given nearer the end of the process. Mr Dean confirmed that the second meeting had been set for 4 December when there would be an update on the issues raised at the first meeting. The representatives were not asked to approve the minutes of the meeting and Mr Chan said they were not accurate (p27-28).

17. Mr Van Tonder did not attend any consultation meetings as he was not an employee representative.

18. A second consultation meeting with was fixed for 4 December 2018.

19. On 4 December the claimants went to work as usual but there was no second redundancy consultation meeting. At about 3.30pm Mr Dean came into the office with two persons whom he introduced as 'the Administrators', though they had not at that time been formally appointed. The Administrator said that the respondent was terminating employment of all employees and they were all given the redundancy factsheet. The claimants, and the rest of the staff, were told to leave immediately and expect a written confirmation of termination by post. These were sent on 4 December but received by the claimants on about 7 December. The letter stated that the employees' services were terminated from 4 December due to redundancy and any claims would be covered under the insolvency provisions.

20. On 5 December 2018 the respondent was placed in administration. It did not make any payments to the claimants.

21. The claimants were not paid notice pay nor any outstanding annual leave.

The law

22. Although not binding, the claimants provided Employment Judge T.V. Ryan's decision in the case of Mr P Rothwell v Weblight Ltd (in Administration) Case No. 2401806/2019. EJ Ryan held that the respondent failed to comply with section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 and ordered the payment of a protective award in respect of Mr Rothwell for the period of 30 days beginning on 4th December 2018. I accept that the claimants' case was very similar in relation to the protective award.

23. S188 TULRCA 1992 sets out the employer's duty to consult representatives. It provides:

(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.

(1B) For the purposes of this section the appropriate representatives of any affected employees are–

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:–

(i)employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii)employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

(2) The consultation shall include consultation about ways of—

(a)avoiding the dismissals,

(b)reducing the numbers of employees to be dismissed, and

(c)mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons for his proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.

(g the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.

(5) That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

(5A) The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7A) Where—

(a)the employer has invited any of the affected employees to elect employee representatives, and

(b)the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).

(8) This section does not confer any rights on a trade union a representative or an employee except as provided by sections 189 to 192 below.

24. Section 188A deals with the requirements for the election of employee representatives. It provides.

(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;

(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;

(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that–

(i) so far as is reasonably practicable, those voting do so in secret, and

(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

25. Under section 189 TULR(C) Act 1992 an employee can bring a complaint to the Tribunal. Section 189 provides:

(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;

(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.

(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.

(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.

(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 c 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 . . .

Conclusion in relation to the protective award

26. Based on the facts set out above, I find that the respondent failed to comply with the requirement to consult employee representatives and to carry out an election of employee representatives under s 188 and s188A TULR(C) Act 1992. This is for the following reasons.

27. There was no election or ballot to decide who should be the employee representatives.

28. The respondent did not provide all the relevant information. There was no written information about the selection method, the proposed method of calculating redundancy payments.

29. The respondent did not consult in time for meaningful consultation and the employee representatives did not have sufficient information and adequate time in which to respond.

30. The respondent did not consult for the minimum period of 30 days. The employees were first told about the redundancies on 15 November and the dismissals took place on 4 December 2018. This is well short of 30 days. The consultation was not completed before notice of dismissal was given.

31. While the employees made proposals to avoid redundancies at the first meeting and the respondent said these would be discussed again on 4 December, this did not happen. There was no proper consultation about alternatives to redundancy nor any attempt to reach agreement.

32. In the circumstances, I accept that the claimants should be awarded the period they requested, which is 30 days pay beginning on 4 December 2018. This is the same as awarded to Mr Rothwell.

Conclusions relating to notice and holiday pay

33. The claimants were not paid notice pay, or, in Mr Chan's case, outstanding holiday pay.

34. Mr Chan's claim for notice pay of £4,864.02 and holiday pay of £270.22 is upheld and the respondent is ordered to pay him the sum of £5,134.24.

35. Mr Van Tonder's claim for notice pay of £2,054 is upheld and the respondent is ordered to pay him £2,054.

Employment Judge C Palmer

Dated: 30 October 2019

Sent to the parties on:

…30 October 2019.

For the Tribunal:

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