CASE NUMBERS 3200957/2019
to 3201101/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mr J-R Ward & Others		**Monarch Aircraft Engineering Limited (In Administration) (1)**
		Secretary of State for Business, Energy and Industrial Strategy (2)

Watford **18 February 2020**

Employment Judge Smail in Chambers

JUDGMENT

1. In breach of s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, the First Respondent failed to arrange for the election of - and failed to consult appropriate representatives - in respect of 20 or more redundancies it was proposing to make at each of its establishments at Birmingham and Luton airports.

2. The Claimants, being those made redundant at these establishments, are entitled to a 90-day protective award against the First Respondent, the protected period being 90 days from 4 January 2019.

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 Aircraft Engineering Limited (the First Respondent) went into administration on 4 January 2019. Monarch Airlines Limited had gone into administration on 2 October 2017. It had been hoped that the Engineering company could survive on its own account with contracts with other airlines. However, contracts were not secure and Engineering also went into administration. All the present Claimants were made redundant within 90 days of 4 January 2019, the vast majority on that day. The claimants claim the employer did not require the election of appropriate representatives for the purposes of redundancy consultation and there was no consultation whatsoever. There was no recognised trade union at the First Respondent, although some dealings were had with Unite but not for the purposes of redundancy consultation. There was no pre-existing representative forum for consultation of this type. The administrators consent to and do not resist proceedings. The claims were issued on 12 April 2019 with ACAS certificates covering the period 28 February 2019 to 15 March 2019.

2. There is no need for any hearing. I am able to deal with the matter on the papers. That said, I did order on 13 November 2019 that a senior trade union officer or senior manager do provide a detailed account of (1) the events leading to the First Respondent's administration and (2) the extent to which the claimants or any person representing the claimants were consulted about redundancies and any ways to avoid them; and that this was done by way of a witness statement containing a statement of truth.

THE LAW

3. 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.

4. 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.

5. By section 189(2) if the tribunal finds the complaint well founded, it shall make a declaration to that effect may also make a protective award.

6. By s.188(2) the consultation shall include consultation about ways of avoiding the dismissals; reducing the numbers of employees to be dismissed; and mitigating the consequences of the dismissals.

7. 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.

8. 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.

9. By s.188(1B) the appropriate representatives are representatives of the independent trade union, where recognised; in any other case, the employee representatives, at the choice of the employer, are either employee representatives appointed or elected by the affected employees in pre-existing fora; or employee representatives elected by the affected employees for the purposes of the section. The election has to comply with the provisions of section 188A and is to be organised by the employer.

10. The First Respondent did not have a recognised trade union and there was no forum, pre-existing or bespoke, to consult about redundancies. The Respondent did not conduct elections to have the employees represented for the purposes of consultation.

11. 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 MR JON-RYAN WARD

12. Mr Ward was employed as the Operations Manager (sometimes referred to as General Manager internally). He is the lead Claimant in this action. He tells me-

1. I was based at the aircraft hangar at Birmingham Airport. In this role I was responsible for the 24/7 output, delivering aircraft engineering and technical support for many major airlines from the UK and far afield. The facility had an annual revenue of £20m+ and over 200 staff, working a range of aircraft types at any one time. Aircraft inputs/projects would range from hours to months, depending on the engineering requirement. I was subsequently given more responsibility which included the Birmingham and East Midlands Airport's Line Maintenance operations to manage and support from approximately February 2018 onwards. This involved an increase in personnel and engineering responsibility for the aircraft being worked on operations at the airport.

2. Following Monarch Airlines (MAL) and the Monarch holiday tour operator going into Administration in 2017, MAEL continued to trade as a 'going concern' as the Senior Management Team (SMT) briefed to MAEL employees at the time.

3. During the year of 2018, MAEL created a new Vision and Mission created and this was presented to the management team by the Board, and we worked on rebuilding confidence in the Business for customers and all employees.

4. It became evident that due to MAL going into Administration, and the debt that it had left behind, that the shareholders and/or creditors were attempting to claim debts from MAEL instead therefore the debt had to be written off somehow. I understand that on 9th November 2018 a CVA was approved in an attempt to get the creditors to agree a voluntary arrangement to reduce the company's debt. There were rumours at the time that the debt may have been in excess of a £100m however, we were assured by the SMT that it was just a process that we needed to work through and to continue working as normal.

5. At this time some of our major customers notably Boeing and Virgin Atlantic amongst others, started to cancel their winter maintenance programmes that were booked into the MAEL hangars. Efforts were made to replace them; however, it was late in the yearly planning cycle and the loss of revenue was being discussed at management level. During this time the Chairman and the SMT asked us to keep going and to reassure the staff, the customers and the suppliers. As we approached Christmas 2018 the Chairman decided to cancel to contract with Flybe (worth £3m a year to the Birmingham hangar alone, and our largest customer) and some of the staff associated with the Flybe contract transferred across to Flybe. The Chairman and the shareholder were concerned that they weren't able to pay their invoices, despite us knowing that Flybe hadn't breached any payment terms and

continuing to pay on time until we cancelled the contract on them without notice (he told me on the phone that he was cancelling the contract and reassured me that this is what he did for a living).

6. On reflection, after we went into Administration I suspected that the Chairman and the shareholder knew of the imminent collapse and wanted to bluff Flybe into paying the invoice early, as then they would have more cash prior to the administration, when it might not get paid or at least not quickly. The CVA process made it very difficult to get any aircraft spares or tooling purchased because we had to pay everything up front and only the FD could authorise any payments out of the business. Some suppliers simply wouldn't work with us. The FD wouldn't pay anything that wasn't desperate and that was when we could get hold of them, which was purely over email. The MD and the Head of Maintenance (which was my usual operational reporting chain couldn't authorise anything). As time went on more and more rumours about us going under were mounting and there was the odd story from people who had spoken to some of the directors, or colleagues that they had confided in at home (family etc), that MAEL was likely to go under soon - this was denied by the SMT when asked and we were again asked to reassure everyone.

7. On 4th January 2019 at 5am the managing director of MAEL, Chris Dare, sent an email to all MAEL employees informing us that administrators had that day been appointed and MAEL put into administration and that we would shortly be receiving an email from the administrators. Later than morning at 6:05am, the administrators sent an email to all employees confirming their appointment and asking all employees to come to work as usual.

8. All employees were asked to meet administrators KPMG and the majority of staff (circa. 200-300 at Birmingham and circa. 700-800 MAEL wide) were informed that they were being made redundant with immediate effect and the majority of staff then received letters from KPMG dated 7th January confirming the termination of their employment by reason of redundancy with effect from 4th January- sample letter attached.

9. I was not a member of any Union or staff committee that could represent me in the lead up to the administration. As far as I am aware there was no opportunity for any consultation or representation, and no official channel to seek support or information or to be consulted with as the company was denying that we were about to collapse, right up until the administration on 4th January.

10. I was told via email on 14 January 2019 that I was going to be employed until 15 Feb 2019 and possibly beyond if needed.

11. Once in administration a group was set up by KPMG to help assist with the administration (we had customer aircraft in the hangar needing to be made airworthy to fly out eventually, as one example). They asked for a volunteer from each site to be on a weekly call from then on, which was to discuss things such as when the equipment would be up for auction, when the hangar might be sold etc. however, there was no consultation with a view to reaching agreement about avoiding any further redundancies, reducing the number of employees to be dismissed, or mitigating the consequences of the dismissals between 4th January and 15th February (nor was there prior to 4th January).

12. On 15th February 2019 I was called in to talk to KPMG with approximately 5 other employees and told I was being made redundant that day, so I went home and was sent a letter confirming my redundancy as effective from 15th

February 2019. There was no consultation prior to my redundancy on 15th February. Some minimal information was shared by KPMG during this period, such as updates on the progress of selling the assets etc because we were helping them with it, however, there was no consultation at all and no opportunity to discuss options or employment with anybody, least of all any management.

13. At no point prior to or after the administration was consultation or explanation in any form ever offered either to the individual staff members or as a collective group of employees. So we helped where we could until we were told on our respective days that we were now redundant and we could go home to find another job.

EVIDENCE FROM MR ASHLEY WOODRUFF

13. Mr Woodruff was a HR Business Partner. He had inside information as to the consultation strategy, which was to have no consultation. He tells me-

1. Due to my position, I was made aware and/or actively involved in discussions regarding the administration and redundancies.

2. Following the Monarch Airlines Limited (MAL) administration in 2017, MAEL set about operating as a standalone business. Six months post the MAL Administration (middle of 2018), it seemed MAEL was doing well and it was going to be successful as a standalone Company. With the productivity outputs at record highs, an aggressive 5 year plan strategy around growth and acquisitions.

3. However, towards the end of the Summer 2018, the debt of MAL caught up with MAEL with creditors chasing for money due to the cross-Company guarantee signed by MAL/MAEL some years early. The debt was something MAEL or the owners, Greybull couldn't pay, so MAEL entered into a CVA process on 9th November 2018 to try and reduce the Company's debt liabilities. It seemed initially that this was going to be successful and assurances were made to employees that this should secure the future of MAEL. However, the process rocked confidence with customers. Important and vital suppliers wouldn't work with MAEL due to some losing vast amounts of money through the CVA process. It then lost a key contract (Flybe) which terminated immediately, resulting in a transfer of c50 employees who worked the Flybe contract to Flybe.

4. Around November 2018, it was evident that the pipeline of work was disappearing and an urgency placed on current maintenance being carried out in the Hangar, needing to be completed by the end of the year. In early December I was informed by the CEO (due to a close working relationship) that his plan was that MAEL was to be wound up on the 2nd January with very slim hopes of survival with potential buyers of MAEL wanting to purchase the assets but did not want the costs of restructuring staff who would transfer under TUPE. Therefore, the plan was that Greybull would put MAEL into Administration, then sell the assets and make their money as a secured creditor. Employees were not made aware of or consulted with about any of these proposals and I was under strict orders not to say anything to anyone.

5. The steps then taken were to try and 'sell' off some parts of the business (line maintenance work) in which in December we had to immediately TUPE

multiple groups of employees to new employers who were going to carry out the work on behalf of the customers.

6. Prior to Christmas it was confidentially known (by the Board of Directors, the HR team, the Joint National Consultation Committee (JNCC) representatives and some selected informed employees) that MAEL was going to be placed into Administration in the new year (original plan was 2nd January). I was part of planning conversations around which employees would be retained by the administrations for activities required once the administration was announced. and further immediate TUPE out of some employees over Christmas. At no point throughout this was there a plan for redundancy consultations to be had.

7. I was away on holiday between Christmas and into the new year therefore I wasn't present on the 4th January 2019 when the announcement of administration was made and employees were informed due to being away. However, I received a message from the CEO at 04:57am informing that at 05:00am an email will be going out to inform that at 04:30am MAEL had been placed into Administration. I received an email shortly after from the administrators stating that I was retained for the time being and was to report to the Birmingham Hangar on Monday 7th January 2019. Most of the employees apart from a very small group (Directors, senior Management and HR) were not aware of Administration until it happened on 4th January 2019. Absolutely no consultation or prior communication was had with me or employees until the Administration was announced by KPMG on the morning of 4th January 2019.

8. On 4th January 2019 MAEL was placed into administration and it was proposed to dismiss all employees as redundant. There were various waves of redundancies and for those who are involved in this claim the redundancy dates were as follows:

a) 4th January 2019
b) 1st February 2019
c) 3rd February 2019
d) 8th February 2019
e) 15th February 2019
f) 28th February 2019
g) 1st March 2019
h) 8th March 2019
i) 29th March 2019
j) 31st March 2019

9. Around 450 employees were made redundant and over 20 employees were made redundant at each site.

10. This situation was a mirror situation of the Monarch Airlines Administration process, in which no prior redundancy consultation was had with employees. No redundancy consultations were conducted by KPMG to the retained staff either, with some people being retained for as little as a few weeks with some being retained for several months. I was retained by the Administrators KPMG from the point the Company went into Administration on the 4th January, until I was called into a room on the 15th February to be informed that I was being made immediately redundant without notice, consultation or redundancy payment. Both my direct reports were also

retained by the Administrators, they too weren't consulted with and just let go from being retained by being informed on same day notice that they were no longer retained or employed.

11. As far as I am aware there was no independent trade union recognised by MAEL for the purposes of collective bargaining or collective consultation on behalf of non-members. There was a partnership agreement between Unite and MAEL although it didn't apply to/enforce collective bargaining rights or consultation. The full time regional Unite representative always wanted "full recognition" but the HR department would never entertain it especially as Unite did not have enough members. As such, a collective agreement was never enforced nor was there any mention of such in the employee contracts of employment. The internal body of trade union representatives, the JNCC, were made aware prior to the 4th January 2019 that MAEL was going to be placed into administration but were subsequently asked to sign Non-Disclosure Agreements (NDAs) to ensure they did not tell any employees. They were not consulted with about the administration or proposed redundancies, this was just to inform them of the situation. I understand that one of the Claimants in this matter, Mandy Nicholl, was a non-union member of the JNCC. I have no recollection of Unite ever making decisions on behalf of or representing anyone who was not one of their members. In any event there was no such consultation as far as I am aware.

12. I was part of the retained staff and still based with KPMG administrations at Birmingham Airport hangar. The first redundancies of the retained staff happened on the 1st February 2019 at both Luton and Birmingham. Those individuals being made redundant by KPMG where called into a room by a KPMG Partner and informed that they were now no longer retained and would be terminated with immediately without notice and that we would be informed how to claim our Statutory Redundancy from the Redundancy Payment Service (RPS) and we would be sent the Case Number to claim. The KPMG personnel on-site did mention that this could happen, that when the retained employees where no longer needed, they would potentially be called in and terminated. This was difficult for me and the retained staff, who had just seen many employees redundant, but were then faced with not knowing when we were to be discarded when no longer required. Despite not being present at the initial KPMG meeting on the 4th January, I was informed directly by many of the retained staff that the KPMG Partner stated, that should I/we want to leave whilst retained, we would have to resign and honour our notice periods, however as the Administrators they will let us go when we're no longer required with immediate effect without notice.

13. I was made redundant effective from 15th February 2019. I received no consultation whatsoever regarding my redundant. I only received a letter from the administrators, KPMG confirming my redundancy date. No attempt was made to avoid any redundancies.

DECISION

14. There was no consultation at all with the workforce in respect of proposed redundancies. There was no opportunity at all given to the workforce to make proposals as to how the business and jobs might be saved in whole or in part. The First Respondent did not require the election of authorised representatives so that consultation about these matters could take place. It seems that the possibility of redundancies was a feature of the working

relationship since Monarch Airlines went into administration. There was ample opportunity to consult. Instead, management kept it all to themselves.

15. 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 in these cases. 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 all claimants of 90 days' pay. The protected period is 90 days from 4 January 2019. The claimants were not consulted about decisions before 4 January 2019 from when it was clear the business was lost.

16. I have considered whether the position is different in respect of the retained staff. Following 4 January 2019 (and in some cases before) these claimants were aware of what was happening and the stakes. However, in respect of their own jobs no consultation took place with them prior to the decision to go into administration on 4 January 2019. The fact that the administrators kept them on for limited purposes for a while does not detract from that fundamental position. Similarly that some, like Mr Woodruff, knew what was likely to happen because it was their job to know; there was still a material failure of consultation in respect of their own positions prior to 4 January 2019. Even if a case could be made out for a reduced award for them, it would still exceed the statutory maxima for claims against the Second Respondent.

_____

Employment Judge Smail

Dated……..24 February 2020

South East Region

_____24 February 2020_____
Judgment sent to the parties on

_____