EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103816/2020 (A)

Hearing held by telephone conference call (open to the public) on 26 January 2021

Employment Judge I McFatridge

Mrs Diane McDonald	**Claimant** **In person**
Debenhams Retail Limited (In Administration)	**Respondent** **Not present or represented – no ET3 submitted**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) To declare that the respondent has acted in contravention of sections 188 and 188A of the Trade Union and Labour Relations (Consolidation) Act 1992.

(Two) The Tribunal makes a protective award of 90 days' pay in respect of the claimant. The protected period being the period of 90 days commencing on 31 May 2020.

REASONS

1. On 21 July 2020 the claimant submitted a claim to the Tribunal in which she sought a protective award. The respondent did not submit a response within the statutory period. In a letter sent to the Tribunal dated 10 September 2020 the administrators granted consent for the proceedings to start and be continued in terms of the Insolvency Act 1986. The final hearing of the case took place by telephone conference call on 26 January 2021. The call was listed in the Tribunal list as a public hearing and any member of the public who so desired had the opportunity to log in to the call. It was a public hearing. At the outset of the hearing the claimant confirmed that she was happy with the conditions on which the administrators had granted consent for the proceedings. These conditions are set out in the administrator's letter of consent dated 10 September 2020. The claimant then gave evidence on oath. On the basis of her evidence I found the following facts relevant to her claim to be proved.

Facts

2. The claimant commenced employment with the respondent on or about 9 November 2009. She worked as a Food Service Adviser at their instore restaurant situated at 17-21 Thistle Centre, Stirling, Scotland FK8 2EE. There were between 25 and 30 employees who worked in the restaurant. There were around 200 employees who worked in the store. The establishment at which the claimant worked was the Stirling store.

3. On 30 May 2020 the claimant was on furlough having been furloughed at the outset of the Covid pandemic. On 30 May 2020 the claimant received a text message that she should call in to a telephone conference call which was to take place that day. At that point the claimant had understood from the news that Debenhams Retail Limited had been placed in administration but understood that the administrators were keeping all stores open. The claimant called in to the telephone conference. She was advised that all employees within the Food Services Division of Debenhams were being dismissed by reason of redundancy with immediate effect. Within the Stirling store the 25-30 employees within the restaurant were all made

redundant on the same date (31 May). The claimant's employment terminated on 31 May.

4. The claimant was not an employee in respect of which an independent trade union was recognised by the respondent. There were no representatives appointed or elected by the affected employees within the restaurant and no steps were taken by the respondent to hold an election for employee representatives before the dismissals were made. There was no consultation whatsoever with the claimant or anyone on her behalf prior to her dismissal.

5. Following her dismissal the claimant applied to the Insolvency Service who paid her her statutory entitlements in terms of redundancy pay and notice pay.

Matters arising on the evidence

6. I was in absolutely no doubt that the claimant was giving truthful evidence. She was not entirely certain exactly how many employees were employed either in the store or in the restaurant. She understood that there were around 25-30 in the restaurant and I was entirely satisfied that there were more than 20 employees in the restaurant who were all dismissed on the same date. I was entirely satisfied that there had been no consultation whatsoever with anyone representing the claimant and indeed that no steps had been taken to appoint employee representatives for this purpose.

Issue

7. The sole claim being made by the claimant was a claim in respect of a protective award.

Discussion

8. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 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 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).”

9. On the basis of the evidence it was clear to me that the terms of section 188 were engaged in that, at least by 30 May, the employer was proposing to dismiss as redundant 20 or more employees at one establishment. I considered the establishment to be the Stirling store and I accepted the claimant’s evidence that at least the 25-30 employees who worked within the restaurant were all being dismissed on that date. It was clear to me that the respondent had entirely failed to comply with their responsibilities in terms of section 188 and that an appropriate declaration to that effect should be made. No attempt had been made by the employer to comply with the

terms of section 188A which deals with the method by which employee representatives should be elected and I considered that the claimant was entitled to the declaration sought in this respect also.

10. Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides

> "(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."

11. With regard to section 188(7) of the Act there were no special circumstances here which would render it not reasonably practicable for the employer to comply with section 188. It is trite law that the fact that the respondent was in administration does not amount to special circumstances.

12. In assessing the amount of the protective award I had regard to the fact that there was no consultation whatsoever regarding the redundancies. I required to have regard to the decision of the Court of Appeal in ***GMB v Susie Radin Ltd*** [2004] IRLR 400 on the issue of the amount of the

protected award in these circumstances. In that case the correct approach was said to be that in a case such as this where there has been no consultation whatsoever the starting point should be the maximum period of 90 days. This should only be reduced if there are mitigating circumstances. In this case I consider that there were no relevant mitigating circumstances and accordingly the full period of 90 days ought to be awarded. The employer shall pay remuneration for the protected period being the period of 90 days commencing on 31 May 2020.

Employment Judge:	**Ian McFatridge**
Date of Judgment:	**27 January 2021**
Date sent to parties:	**27 January 2021**