



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Burrows

**Respondent:** Monks and crane in administration

## JUDGMENT

### Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The claim was issued in the Midlands West Employment Tribunal on 8 March 2023. Although the respondent (via the administrators) submitted a response to the claim, it stated in that response that it did not defend the claim. In those circumstances, Rule 21 of the Rules of Procedure applies and the Employment Judge has decided that a determination can properly be made of the claim on the available material (without the need for hearing) in accordance with rule 21 of those Rules of Procedure.
2. The respondent has failed to comply with section 188 of the Trade Union & Labour Relations (Consolidation) Act 1992 as to consultation about proposed dismissals. The claimant's claim is well-founded.
3. The Tribunal makes a protective award that the respondent shall pay remuneration to the claimant for the protected period specified in paragraph 4 below.
4. The protected period is 90 days from 28 February 2023.
5. The Recoupment Regulations apply to the award.

## REASONS

1. The claimant was employed by the respondent from 23 September 2013 to 28 February 2023, at which time he was dismissed by reason of redundancy. He was only told 30 minutes before he finished his shift that he was to be made redundant. The respondent does not defend the claim. Accordingly, and in accordance with Rule 21 of the Employment Tribunal Rules of Procedure, I have considered whether, on the available material (including the further information provided to the Tribunal by the administrators on 10 May 2024), a determination can properly be made of the claim. I have concluded that it can, as set out in this Judgment and Reasons.

2. Although the respondent is in administration, the administrators have given consent for this claim to proceed by email dated 10 August 2023.
3. The respondent's administrators have explained in their further information dated 10 May 2024 that they were appointed on 24 February 2023 and that the initial hope had been to sell the respondent as a going-concern however an immediate buyer could not be secured. This resulted in 61 redundancies shortly after their appointment (which would have included the claimant). As there were more than 20 redundancies proposed within a period of 90 days, collective consultation for a minimum of 30 days prior to the first dismissal taking effect was required. The administrators concede that there was a failure to comply with section 188 and/or section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A").
4. Whilst not defending the claim, the administrators have by email sought to argue that there existed "special circumstances" such as to render it not reasonably practicable for the respondent to have complied with TULR(C)A. Their submission is that the attempt to rescue the respondent as a going concern amounted to special circumstances. Ultimately a sale was eventually achieved on 16 March 2023, after the claimant's dismissal, resulting in the transfer of 40 employees to the purchaser. However, the claimant was not one of those employees. The administrator says that because of the rapid pace of the sales process and changing financial conditions, the administrators, bound by their duty to all creditors, were unable to fully adhere to the consultation period requirements.
5. I conclude that there were no "special circumstances" under section 188(7) of TULR(C)A. In accordance with **Clarks of Hove Ltd v Bakers' Union 1978 iCR 1076, CA**, a "special circumstance" is something exceptional, out of the ordinary or uncommon. Insolvency and/or administration is not of itself a special circumstance. Where the cause of the financial difficulties is in itself exceptional, out of the ordinary or uncommon, that would be relevant, however the Tribunal has not been provided with any information from the respondent to suggest that this is the case. Equally, dismissing employees (including the claimant) to make the company more attractive to buyers is not in itself a special circumstance (**GMB v Messrs Rankin and Harrison (as joint administrative receivers of Lawtex plc and Lawtex Babywear Ltd) 1992 IRLR 514, EAT**).
6. This claim has been brought by the claimant as an individual and not by an employee representative. No specific information has been provided to the Tribunal about employee representatives however I note from the information that has been provided that:
  - a) The claimant has said that he was only told 30 minutes before he finished his shift that he was being made redundant. He says that "we" were called into the office to be told that information. This suggests that communications were made directly with individual employees;
  - b) The administrators, in their email dated 10 May 2024, have commented that "Weekly updates were provided to employees regarding the status of

potential business closures and job losses”. This in fact refers not to the claimant but to those employees who remained employed following the claimant’s dismissal, however it suggests more generally that communications were with employees rather than employee representatives;

c) The respondent has said that they do not defend the claim and has said in the Response Form that “We understand that the Tribunal may award a protective award in respect of this claim...”, and are therefore not putting forward a defence to argue that the claim should have been brought by employee representatives rather than the claimant.

7. Taking into account the above, and noting also that the respondent has not shown that the requirements of section 188A of TULR(C)A have been satisfied, I conclude that there was a failure to elect employee representatives under section 188A of TULR(C)A and/or that there was no trade union or other body already elected for that purpose at the respondent and therefore that the Tribunal has jurisdiction to consider this claim brought by the claimant as an individual. For the avoidance of doubt, I do not consider that the claimant has brought a separate claim about the failure to elect employee representatives, but only in respect of the lack of consultation.
8. The claimant was dismissed on 28 February 2024, commenced ACAS early conciliation on 6 March 2023 and submitted his Tribunal claim on 8 March 2023. The claim has therefore been brought within the required time limits.
9. For the reasons set out above, I therefore declare that there has been a failure to comply with section 188 of TULR(C)A.
10. I consider that it is appropriate to issue a protective award against the respondent. In accordance with section 189 of TULR(C)A, this should be for a protected period of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the respondent’s default, but shall not exceed 90 days.
11. Protective awards are punitive rather than compensatory (**Susie Radin Ltd v GMB and ors ICR 893, CA**) and the respondent’s inability to pay the award is not determinative. In considering the level of award, it is appropriate to start at the maximum of 90 days and only reduce it where there are mitigating circumstances rendering it just and equitable to do so.
12. I have considered whether the respondent’s financial situation and the fact that it was in administration renders it just and equitable to reduce the protective award. I have concluded that it does not. Whilst the respondent was in financial difficulties, the respondent has not provided any information to show that it would not have been possible to carry out some form of consultation with those employees who were to be made redundant shortly after the administrators’ appointment, and/or it has not been shown that it would not have been obvious to the respondent at an earlier stage that it would need to make redundancies and therefore could have commenced consultation earlier. The respondent has not shown that it could not

have carried out some form of collective consultation prior to dismissing the claimant. I therefore make a protective award that the respondent is ordered to pay remuneration for the protected period which begins on 28 February 2023 and is for a period of 90 days.

13. In accordance with Regulation 5(1) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, the Recoupment Regulations apply to this award.

**Employment Judge Edmonds**

**Date: 12 November 2024**