

THE INDUSTRIAL TRIBUNALS

CASE REF: 108/13

CLAIMANT: Maurice Stephen Johnston

RESPONDENT: David Patton & Sons (NI) Ltd (in administration)

DECISION

The unanimous decision of the tribunal is that:-

- (i) The tribunal finds, and so declares, the claimant's claim for a protective award is well-founded.
- (ii) The tribunal makes a protective award in respect of the claimant and orders the respondent to pay remuneration for the protective period, namely for a period of 90 days, beginning *on 9 November 2012*.
- (iii) The attention of the parties is drawn to the Recoupment Notice which is attached to this decision.
- (iv) The address of the respondent is:-

*C/o Keenan Corporate Finance Limited
Arthur House
Arthur Street
BELFAST
BT1 4GB*

Constitution of Tribunal:

Chairman: Mr N Drennan QC

Members: Dr C Ackah
Mr B McAnoy

Appearances:

The claimant appeared in person and was not represented.

The respondent did not appear was not represented.

Reasons

1.1 In his claim form, which was presented to the tribunal *on 2 January 2013*, the claimant made a number of claims, pursuant to the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order'), including a claim for a protective award, pursuant to Article 217 of the 1996 Order. The respondent presented to the tribunal a response to the said claim *on 6 February 2013*. The respondent is in administration. Following a Case Management Discussion *on 20 February 2013*, as set out in the Record of Proceedings, the claimant, at the outset of the hearing, confirmed to the tribunal the only outstanding claim which required to be determined by the tribunal was his claim for a protective award, pursuant to Article 217 of the 1996 Order.

By letter, *dated 17 June 2013*, the administrator for the respondent gave his consent to the said claim for a protective award being pursued by the claimant, provided the said letter was submitted to the tribunal, together with the claimant's claim form. The said letter formed part of the tribunal's case papers and the contents of the letter, to which further reference will be made elsewhere in this decision, was considered, in the absence of the respondent, by the tribunal before making its decision, pursuant to Rule 27(5) of the Industrial Tribunals Rules of Procedure 2005.

2.1 Having heard oral evidence from the claimant, which was unchallenged, the tribunal made the following findings of fact, namely:-

- (a) The claimant was an employee of the respondent. He was dismissed *on 9 November 2012*, because of redundancy. Approximately 190 employees were also dismissed by reason of redundancy on that date and approximately 150 further employees were dismissed *in or about December 2012* by reason of redundancy. The employees were not unionised, albeit some were members of a union. No relevant employee representatives (for collective consultation purposes) had been elected. The respondent made no arrangements in relation to the election of relevant employee representatives and no relevant collective consultation took place in relation to the said redundancy.
- (b) The administrator, in his letter *dated 17 June 2013*, confirmed that he was appointed administrator of the company *on 6 November 2012*. He also stated:-

"Upon my appointment as administrator, I decided to continue to trade the company for a limited period to enable me to form a view on the longer term viability of the business and with a view to maximising the value of realisations for the benefit of creditors, which is one of the statutory purposes of

administration. This initially included continuing the company's employment of its employees in order to assist me in managing the day-to-day running of the business. However, due to financial constraints, it became apparent to me that significant redundancies will be required within a short timescale. There were various dates of redundancy from 9th of November 2012 onwards"

2.2 In his letter dated 17 June 2013, the administrator also stated:-

" ... in relation to the claimant's claim for a protective award, it is denied. Due to the poor financial position and the significant workforce of the company, it was not reasonably practicable for the company post-administration to comply with the duty to inform and consult. The company had to make significant redundancies almost immediately after my appointment, as the company was unable to finance the ongoing payroll cost. As administrator I contend on behalf of the company post-administration that this amounted to special circumstances rendering it not reasonably practicable to comply with the requirements to inform and consult"

3.1 In light of the foregoing, it was therefore not disputed that there was a failure to comply with the statutory duty to inform and consult, pursuant to Article 216 of the 1996 Order.

Under Article 216(9) of the 1996 Order it is provided, insofar as relevant and material, that:-

"If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of Paragraph (2), (4) or (6), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

Further, at Article 217(6) of the 1996 Order, it is provided:-

"If on a complaint under this Article a question arises –

- (a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of Article 216; or*
- (b) whether he took all steps towards compliance with that requirement as were reasonably practicable in those circumstances;*

it is for the employer to show that there were and that he did."

3.2 In his letter dated 17 June 2013, the administrator has sought to rely on this provision but he has given in his letter no details of why it was not reasonably practicable for the respondent to comply with its statutory duties, other than the mere assertion, without more, of the respondent's poor financial position and the

significant workforce of the company. It has long been established that the fact that a company is insolvent does not, in itself, constitute 'special circumstances' for the purposes of the protective award provisions in the 1996 Order. Further, the administrator, on behalf of the respondent, chose not to give evidence and to be the subject of any cross-examination in circumstances where, as set out above, the onus is on the employer to establish the matters set out in Article 217(6) of the 1996 Order. There was no evidence that any steps were taken with a view to complying in any way, partially or otherwise, with the relevant statutory duty to inform and consult. The tribunal can understand and accept that the financial situation of the respondent was very difficult; but, in the absence of any other relevant evidence, it could not accept that there could not have been some proper consultation with the claimant, albeit for a short period; whereas, the claimant was merely informed that he was required to attend a meeting at the respondent's premises *on 9 November 2012* and was told, by the administrator, without more, that he was dismissed with immediate effect on the grounds of redundancy. Other employees, who were also working on the same site as the claimant immediately prior to the termination of his employment were not made redundant *on 9 November 2012*. No reason or explanation for the necessity to retain these other employees and not the claimant was given to the claimant.

3.3 In the decision of the Court of Appeal in the case of ***Susie Radin v GMB [2004] ICR 893*** it was held:-

"45 I suggest that employment tribunals, 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 Section 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.*
- (2) The tribunal 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 Section 188.*
- (5) *How the tribunal assesses the length of the protected period is a matter for the tribunal, 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 tribunal consider appropriate.”*

(See further ***Haine v Day [2008] EWCA Civ 626.***) It is apparent from a recent decision of the Employment Appeal Tribunal in the case of ***AEI Cables Ltd v GMB & Others [2013] UKEAT/0375/12*** that, when describing the purpose of making a protective award as penal and not compensatory, it is penal in the sense that it is designed to encourage employers to comply with their obligations. The decision also confirmed that the starting point in considering the length of a protective award is 90 days. However, the Employment Appeal Tribunal emphasised that employment tribunals are bound to take account of mitigating factors and are bound to ask the important question why did the respondent employer act as it did. On the facts of that particular case, the Employment Appeal Tribunal reduced the protective award from 90 days to 60 days on the grounds that the employment tribunal had failed to take account of the fact that the employer was insolvent and could not lawfully carry on trading, following legal advice, to enable it to consult for a period of more than 10 days or so. In the present case no such detailed evidence of any relevant mitigating factors has been given to this tribunal to enable it to be satisfied there could be no consultation whatsoever, not least in the circumstances where the claimant was made redundant, without any explanation or reason but other employees, who were working on the same site as the claimant immediately prior to the termination of his employment, were not made redundant on 9 November 2013.

Chairman:

Date and place of hearing: 6 August 2013, Belfast

Date decision recorded in register and issued to parties:

CLAIMANT: Maurice Stephen Johnston
RESPONDENT: David Patton & Sons (NI) Ltd (in administration)

ANNEX TO THE DECISION OF THE TRIBUNAL

Recoupment Notice

- [1] In the context of this Notice, "the relevant benefits" are jobseeker's allowance, income support and income-related employment and support allowance.
- [2] Until a protective award is actually made, an employee who is out of work may legitimately claim relevant benefits because, at that time, he or she is not (yet) entitled to a protective award under an award of an industrial tribunal. However, if and when the tribunal makes a protective award, the Department for Social Development ("the Department") can claim back from the employee the amount of any relevant benefit already paid to him or her; and it can do so by requiring the employer to pay that amount to the Department out of any money which would otherwise be due to be paid, to that employee, under the protective award, for the same period.
- [3] When an industrial tribunal makes a protective award, the employer must send to the Department (within 10 days) full details of any employee involved (name, address, insurance number and the date, or proposed date, of dismissal). That is a requirement of regulation 6 of the Regulations which are mentioned below.
- [4] The employer must not pay anything at all (under the protective award) to any such employee unless and until the Department has served on the employer a recoupment notice, or unless or until the Department has told the employer that it is not going to serve any such notice.
- [5] When the employer receives a recoupment notice, the employer must pay the amount of that recoupment notice to the Department; and must then pay the balance (the remainder of the money due under the protective award) to the employee.
- [6] Any such notice will tell the employer how much the Department is claiming from the protective award. The notice will claim, by way of total or partial recoupment of relevant benefits, the "appropriate amount"; which will be computed under paragraph (3) of regulation 8 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 ("the Regulations").

- [7] In the present context, "the appropriate amount" is the lesser of the following two sums:
- (a) The amount (less any tax or social security contributions which fall to be deducted from it by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Department receives from the employer the information required under regulation 6 of the Regulations, or
 - (b) The amount paid by way of, or paid on account of, relevant benefits to the employee for any period which coincides with any part of the protected period falling before the date described in sub-paragraph (a) above.
- [8] The Department must serve a recoupment notice on the employer, or notify the employer that it does not intend to serve such a notice, within "the period applicable" or as soon as practicable thereafter. (The period applicable is the period ending 21 days after the Department has received from the employer the information required under regulation 6).
- [9] A recoupment notice served on an employer has the following legal effects. First, it operates as an instruction to the employer to pay (by way of deduction out of the sum due under the award) the recoupable amount to the Department; and it is the legal duty of the employer to comply with the notice. Secondly, the employer's duty to comply with the notice does not affect the employer's obligation to pay any balance (any amount which may be due to the claimant, under the protective award, after the employer has complied with its duties to account to the Department pursuant to the recoupment notice).
- [10] Paragraph (9) of regulation 8 of the 1996 Regulations explicitly provides that the duty imposed on the employer by service of the recoupment notice will not be discharged if the employer pays the recoupable amount to the employee, during the "postponement period" (see regulation 7 of the Regulations) or thereafter, if a recoupment notice is served on the employer during that postponement period.
- [11] Paragraph (10) of regulation 8 of the 1996 Regulations provides that payment by the employer to the Department under Regulation 8 is to be a complete discharge, in favour of the employer as against the employee, in respect of any sum so paid, but "without prejudice to any rights of the employee under regulation 10 [of the Regulations]".
- [12] Paragraph (11) of regulation 8 provides that the recoupable amount is to be recoverable by the Department from the employer as a debt.