



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

AND

Respondent

**Mr Gary Collier**

**Health Stores (Wholesale) Limited (In  
Administration)**

**Mr Sam Kelly**

**HELD AT:** Birmingham

**ON:** 19 April 2024

**Appearances: No attendance from any party. Decision made on the papers as no objection received from any party to this course of action (all parties having been given the opportunity to do so by 5 March 2024).**

## JUDGMENT

The judgment of the Tribunal is as follows:

1. In this judgment “the claimants” means all those individuals named above.
2. The claimants’ claims were presented in time. The Tribunal has jurisdiction to hear their claims.
3. The complaints that the respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 are well founded.
4. I make a protective award in respect of the claimants in respect of such failures by the second respondent, being one upon the claim of each claimant.
5. The description of employees to which the protective award made on the claim of claimant relates is that same claimant (and no one else).
6. In respect of each and all of the protective awards the protected period is 90 days and begins on 22 August 2022.
7. The complaints of breach of contract and unfair dismissal are dismissed upon withdrawal.

# REASONS

1. The claims were presented by a claim forms presented on 23 November 2022 and contained a complaint for failure to consult pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
2. On 22 August 2022 the respondent entered into administration and on 26 August 2022, the respondent appointed administrators to commence liquidation.
3. No response was presented to the claim on behalf of respondent by the administrators or liquidators. The administrators confirmed by a letter dated 7 September 2023 that they consented to the continuance of proceedings and also confirmed that no consultation took place prior to the dismissal of more than 20 employees.
4. The claimants provided written information about the circumstances leading to the termination of their employment. This was contained in their respective claim forms and also in a written document and attached bundle of documents submitted by Mr Rixon of Simpsons Solicitors on 5 March 2024.
5. The respondent was in business as a supplier of health goods throughout the United Kingdom. It operated from leasehold premises in Bulwell, Nottingham. At the time the claimants were dismissed, there were 85 employees.
6. On 23 August 2022 the claimants were informed that the respondent was going into administration and that they would not be paid for August 2022. On 25 August 2022 the claimants received a letter from the respondent confirming that their employment had terminated by reason of redundancy with effect on 22 August 2022.
7. Accordingly, I find the claimants were dismissed as were 65 other employees of the respondent on 22 August 2022.
8. The claimants conciliated via ACAS starting on 4 October 2022 and the process finished on 6 October 2022. I find the claim was presented (or early conciliation was started) within three months of the date of dismissal (or within a month of conciliation terminating). The claim was presented in time.
9. The effect of s. 195 (2) TULRCA is that where an employee is or is proposed to be dismissed, it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant. I find in the absence of evidence to the contrary the claimants were dismissed by reason of redundancy.
10. I find that 20 or more employees were employed by the respondent at one establishment on 22 August 2022 when the company went into administration an employees named in this claim were among 85 employees employed by the respondent prior to dismissed. .
11. As to who may bring a complaint pursuant to s. 188 or 188A to an Employment Tribunal, s.189(1) TULRCA states:-
  - “(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.”*

12. The respondent did not have a recognised trade union and no attempt was made to elect representatives with whom it could consult or an attempt to consult. No consultation took place prior to the dismissals.
13. I have considered Independent Insurance Co Limited v Aspinall [2011] IRLR 716 and the earlier decision of the Court of Appeal in Northgate v Mercy [2008] IRLR 222. Neither a recognised union nor employee representatives were in place and that this complaint falls within s.189(1)(a) (or (d)).
14. I therefore find that the employees have standing to make claims and as Aspinall makes clear, individually they must do so within the statutory time limit in order to bring a claim. The claimants each individually pursued a valid claim.
15. The main relevant provisions of the Trade Union and Labour Relations (Consolidation) Act (as amended) ("TULRCA"), are as follows:-

*"s. 188 (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 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.*

*s. 188 (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.*

*s. 188 (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, representatives of that 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 purpose of this section, in an election satisfying the requirements of section 188A (1).*

*s. 188 (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.*

and

*“s. 188 (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.*

*s. 188A The requirements for the election of employee representatives under section 188 (1B) (b) (ii) are that –*

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

*[(b to (h) make detailed provision for the elections, including secret voting and accurate counting of votes].”*

16. The respondent does not allege pursuant to s.189(6) that there were special circumstances and that he did take such steps as were reasonably practicable to carry out consultation. I do not find that the respondent has done so in this case
17. I am satisfied that the respondent failed to comply with its obligation to consult in section 188 and in order to allow such consultation to take place failed to elect representatives in accordance with section 188A. Accordingly, I find the complaint well founded.
18. By virtue of s. 189(2) in such circumstances I may make a protective award. If I do the statute provides as follows:-

*“(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 the requirement of section 188;*

*but shall not exceed 90 days.”*

19. Accordingly, I find the protected period in this claim commences on 22 August 2022.
20. As to the length of the protected period, Peter Gibson LJ in the Court of Appeal in Susie Radin Limited v GMB and Others [2004] IRLR 400 [45] gave the following guidance:-

*“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.”*

21. In this case there was no consultation or attempt to comply with the statutory consultation provisions; no relevant mitigating factors are advanced. The starting point for the assessment of the protective award is the maximum, 90 days, and whilst I have a wide discretion to do what is just and equitable, in the absence of any evidence that points to the respondent attempting to comply with its obligations or any mitigating circumstances, I conclude there are no grounds for me to reduce the same and the protective award shall therefore be set at the maximum of 90 days.

Employment Judge Flood  
Dated: **22 April 2024**