EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		**Respondents**
Mr K Adams and 12 others	AND	Simonstone (Bristol) Limited (In Administration) (1) The Secretary of State For Business, Energy and Industrial Strategy (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 22 January 2021

BY Cloud Video Platform

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms C Monaghan
Dr J Miller

Representation

For the Claimants: **Mr D Kelly, Solicitor**
For the First Respondent: **Did not attend, Written Submissions**
For the Second Respondent: **Did not attend, Written Submissions**

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The complaint that the respondent failed to comply with a requirement of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

2. The tribunal makes a protective award in respect of the Claimants who were employees of the respondent at its premises at 803 – 805 Bath Road, Brislington, Bristol, BS4 5NL and who were dismissed as redundant on or after 2 January 2020 and orders the respondent to pay the Claimants remuneration for the protected period of 90 days beginning on 2 January 2020.

REASONS

1. This is a claim for a protective award brought by 13 claimants in their individual capacity who are referred to in this judgment as the Claimants. For the avoidance of doubt their names and their tribunal reference numbers are as follows: Mr Kevin Adams 1401693/2020; Mr Shelim Ali 1401694/2020; Mr Dan Blewett 1401695/2020; Mr Shane Paul Dorrington 1401696/2020; Mr Michael Gerrish 1401697/2020; Ms Kerry Taylor Holbrook 1401698/2020; Mr David Hussey 1401699/2020; Mr Philip Kirkman 1401670/2020; Mr Michael Lansbury 1401671/2020; Mr Lee Millard 1401672/2020; Mr Danny Moore 1401673/2020; Mr Joseph Morgan 1401674/2020; and Mr Tim Reay 1401675/2020.
2. This has been a remote hearing on the papers which has been consented to and/or not objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
3. Mr Kevin Adams gave evidence on his own behalf and on behalf of the other claimants. The first respondent adduced witness statements from Mr Steve Sowerby and Ms Michelle Wilson but they did not attend the hearing and were not present to be questioned on their evidence. Accordingly, we can only attach limited weight to their evidence. The first respondent also made written submissions which we have considered. Similarly, the second respondent has made written submissions which we have considered.,
4. We have considered the evidence before us, both oral and documentary, and we have considered the legal and factual submissions made by and on behalf of the respective parties. We find the following facts proven on the balance of probabilities.
5. The first respondent company Simonstone (Bristol) Limited was a wholly-owned subsidiary of the Simonstone Motor Group plc. It was a dealership for the Fiat group of companies known as FCA. During November and December 2019 it encountered financial difficulties, and sought to increase its overdraft facilities. The first respondent suggests that there was a misunderstanding with its bank, but in any event on 17 December 2019 it was required to make a direct debit payment to FCA in accordance with its franchise agreement, but it became clear on 18 December 2019 that the bank had not authorised the payment. FCA then attended the first respondent's premises on the morning of 19 December 2019 and terminated the franchise agreement. The termination notice was dated 19 December 2019 and was effective immediately. This meant that the first respondent was unable to trade and it called a staff meeting on 19 December 2019 to explain the position. On the following day 20 December 2019 the staff were told to go home early for Christmas and to report back in the New Year.
6. When the Claimants returned to work on 2 January 2020 they were informed by the first respondent that there was now no chance of the branch

reopening and that they were all to be made redundant with immediate effect. This applied to approximately 30 employees.

7. There was no recognised trade union at the first respondent's business, and the first respondent did not elect employee representatives for the purposes of collective consultation.
8. The first respondent did not take any steps to elect employee representatives nor to consult with any of the individual employees on or after 19 or 20 December 2019, nor during the period before their return to work on 2 January 2020. The first respondent failed to undertake any or any adequate consultation with the Claimants prior to their dismissals.
9. The first respondent subsequently entered administration on 14 January 2020.
10. Having found the above facts, we now apply the law.
11. The relevant law is in the Trade Union and Labour Relations (Consultation) Act 1992 ("TULRCA").
12. Section 188(1) of TULRCA provides as follows: "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". S188(1A) provides that "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 90 days, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect.
13. S 188(1B) provides that: "For the purposes of this section the appropriate representatives of any affected employees are – (a) if the employees 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 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 purposes of this section, in an election satisfying the requirements of section 188A(1)."
14. S 188(2): provides that; "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."
15. Section 188(4) provides: "For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives – (a) the reasons for his proposals, (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant, (c) the total number of employees of

any such description employed by the employer at the establishment in question, (d) the proposed method of selecting the employees who may be dismissed, (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which any dismissals are to take effect, (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with the obligation imposed by or by virtue of any enactment) to employees who may be dismissed, (g) the number of agency workers working temporarily for and under the supervision and direction of the employer, (h) the parts of the employer's undertaking in which those agency workers are working, and (i) the type of work are those agency workers are carrying out."

16. Section 188(5) provides: "That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or in the case of representatives of a trade union sent by post to the union at the address of its head or main office."
17. Section 188(7) provides: "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."
18. In this case there was no recognised trade union, and the first respondent did not elect employee representatives. It had the opportunity to do so and/or to consult with individual employees between 20 December 2019 and 2 January 2020, but failed to do so. Approximately 30 employees were all dismissed with immediate effect by reason of redundancy on 2 January 2020, and this included the 13 Claimants. The first respondent was in clear breach of its statutory obligations with regard to group consultation as explained above.
19. In its Grounds of Resistance the first respondent admits that it did not consult with the Claimants at least 30 days before the first of the dismissals took effect, but asserts there were special circumstances under section 188(7) because of the unforeseen and unprecedented circumstances which prevented the respondent from complying with its statutory collective consultation requirements. The first respondent refers to Clarks of Hove Ltd v The Bakers Union [1978] ICR 1076 CA.
20. However, the first respondent failed to attend this hearing, and we can only attach limited weight to the two witness statements adduced in support of the special circumstances defence. In any event an employer must still take all steps towards compliance with the statutory obligations as are reasonably practicable in the circumstances of the case (see for example Shanahan Engineering Ltd v Unite the Union EAT 0411/09). The first respondent took no steps to comply with its statutory obligations between 20 December 2019 on 2 January 2020.

21. Accordingly, we are unanimous in our view that the special circumstances defence under section 188(7) does not apply in this case, and we have made the protective award confirmed above.

Employment Judge N J Roper
Dated: 22 January 2021

Judgment sent to Parties: 29 January 2021

FOR THE TRIBUNAL OFFICE

ANNEX TO THE JUDGMENT (PROTECTIVE AWARDS)

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance and Income Support

The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996, SI 1996 No 2349, Regulation 5(2)(b), SI 2010 No 2429 Reg.5.

The respondent is under a duty to give the Secretary of State the following information in writing: (a) the name, address and National Insurance number of every employee to whom the protective award relates; and (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the Tribunal announced its judgment at the hearing. If the Tribunal did not announce its judgment at the hearing, the information shall be given within the period of 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the respondent to do so within those times, then the information shall be given as soon as reasonably practicable thereafter.

No part of the remuneration due to an employee under the protective award is payable until either (a) the Secretary of State has served a notice (called a Recoupment Notice) on the respondent to pay the whole or part thereof to the Secretary of State or (b) the Secretary of State has notified the respondent in writing that no such notice is to be served.

This is without prejudice to the right of an employee to present a complaint to an Employment Tribunal of the employer's failure to pay remuneration under a protective award.

If the Secretary of State has served a Recoupment Notice on the respondent, the sum claimed in the Recoupment Notice in relation to each employee will be whichever is the lesser of:

(i) the amount (less any tax or social security contributions which fall to be deducted therefrom 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 Secretary of State receives from the employer the information referred to above; OR

(ii) the amount paid by way of or paid as on account of Jobseeker's Allowance, income-related Employment and Support Allowance or Income Support to the employee for any period which coincides with any part of the protective period falling before the date described in (i) above.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award is then payable to the employee, subject to the deduction of any tax or social security contributions.

A Recoupment Notice must be served within the period of 21 days after the Secretary of State has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State or as soon as practicable thereafter.

After paying the balance of the remuneration (less tax and social security contributions) to the employee, the respondent will not be further liable to the employee. However, the sum claimed in a Recoupment Notice is due from the respondent as a debt to the Secretary of State, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State as to the amount specified in the Recoupment Notice.