



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5 **Case Nos: 4104162/2016 & 4104163/2016**

**Held at Dundee on 10 January 2017**

10 **Employment Judge: Mr N M Hosie (sitting alone)**

**Mr Christopher Keenan**

**First Claimant  
Represented by:  
Mr D Martyn  
Solicitor**

15 **Mr David B Alexander**

**Second Claimant  
Represented by:  
Mr D Martyn  
Solicitor**

20 **Secretary of State for Business, Energy  
& Industrial Strategy**

**Respondent  
No appearance**

25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The Judgment of the Employment Tribunal is that the respondent is ordered to pay each of the claimants a protective award of 56 days' pay in terms of s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992.

**ETZ4 (WR)**

35 **REASONS**

**Introduction**

1. An ET1 claim form was presented on behalf of both claimants on 8 August 2016 (P12) seeking payment from the National Insurance Fund of remuneration under a protective award in terms of s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”).

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2. On 6 September 2016, the respondent presented an ET3 response form (P13) any liability for payment.

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3. Accordingly, a hearing was fixed for 10 January 2017 in Dundee to determine the issues between the parties.

### **The Evidence**

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4. Both claimants appeared at the hearing along with their solicitor. They spoke to written “Precognitions” which are referred to for their terms. Both claimants presented as entirely credible and reliable and I had no reason to doubt their evidence, which I accepted.

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5. There was no appearance by or on behalf of the Secretary of State at the hearing but in the response form (P13, pages 99-102) the Secretary of State intimated that the “letter” annexed to the response form should be taken as the Secretary of State’s written representations in this matter.

### **The Facts**

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6. By and large, these were not disputed. Helpfully, in addition to the aforesaid written Precognitions, the claimants’ solicitor lodged a bundle of documentary productions (“P”).

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7. Having heard the evidence and considered the documentary productions I was able to make the following material findings in fact, relative to the issue with which I was concerned.

8. I was satisfied that the chronology as set out in the claim form was reasonably accurate.

9. The claimants were employed under contracts of employment by Tullis Russell Papermakers Ltd (In Administration) (“the employer”).

10. The respondent is the Secretary of State with responsibility for administration of the National Insurance Fund in terms of the powers set out in relation to insolvency of employers in Part XII of the Employment Rights Act 1996.

11. The employer entered formal administration on 27 April 2015. Several hundred employees were dismissed as redundant with immediate effect.

12. Between 28 April 2015 and 17 December 2015 in excess of 100 dismissals by reason of redundancy took place on various dates.

13. The first claimant, Christopher Keenan, was dismissed as redundant on 28 August 2015.

14. The second claimant, David Alexander, was dismissed as redundant on 26 June 2015.

### **Failure to Consult**

15. Throughout the entire period from 28 April 2015 to 17 December 2015 the employer dismissed as redundant 20 or more employees at one establishment within a period of 90 days or less.

16. The employer was obliged to consult with the appropriate representatives of the affected employees about each of the dismissals occurring during that period.

17. The employer did not formally recognise any Trade Union. It was therefore under an obligation to facilitate the election of employee representatives with whom it

could consult in respect of the dismissals of the affected employees. The employer failed to facilitate the election of employee representatives.

### **Claims to the Employment Tribunal**

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18. By applications dated 7 July 2015, 21 September 2015 and 21 December 2015, 372 employees raised Employment Tribunal claims against the employer under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). They claimed that the employer had breached their obligations under  
10 s.188(a) of TULRCA to elect employee representatives.

19. By Judgment dated 6 April 2016 (and amended by Certificate of Correction dated 1 June 2016) the Dundee Employment Tribunal ordered the employer to pay to the 372 claimants 56 days' pay (P9).

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20. The claimants did not submit claims against the employer and were not named in that Judgment.

21. The claimants were of the same description as some of the employees to whom  
20 the protective award relates.

### **Applications to the Respondent for Payment**

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22. Following his dismissal on 28 August 2015 the first claimant, Christopher Keenan, joined Unite the Union and an Employment Tribunal claim seeking a protective award was submitted on his behalf by the Union's solicitors.

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23. However, on or about 1 March 2016 Mr Keenan was advised by the Union's solicitors that they understood from the administrator that he had been dismissed on 27 April 2015; as a result, he was advised that his claim was out of time and they recommended that he instruct them to withdraw his claim. Accordingly, Mr Keenan completed a mandate authorising them to do so. His claim was withdrawn and a Judgment dismissing his claim was issued on 15 March 2016 (P8).

24. However, when he later discovered that other employees who were dismissed after 28 August 2015 had received a protective award he contacted his Union's solicitors again and provided them with a copy of his letter of dismissal on 28 August and not 27 April as the administrators had maintained. It was only then discovered that he had inadvertently instructed his solicitors to withdraw his Employment Tribunal claim. Apparently, the administrator had confused the first claimant with another Mr Keenan who was dismissed on 27 April 2015.
25. On 7 April 2016, the first and second claimants' solicitors wrote to the respondent requesting payment of 56 days' pay in accordance with the terms of the protective award (P10).
26. However, on 10 May the respondent wrote to the claimant's solicitors refusing the application on the ground that the first and second claimants were not listed on the Judgment (P10).

### **Employment Tribunal Claims**

27. It was against that background that a claim form was presented on behalf of the claimants on 8 August 2016 (P12).
28. However, on 6 September 2016 the respondent submitted an ET3 response form in which the Secretary of State denied any liability to PAY a protective award to the claimants (P13).
29. In short, the respondent's position was that as the claimants were not named in the list attached to the aforesaid Judgment of 5 April 2016 (P9) they are not of a description to which a protective award relates, pursuant to s.190 of TULRCA.
30. In support of the respondent's position in this regard the respondent referred to **Harford & others v Secretary of State for Trade and Industry** **UKEAT/0313/07/LA**.

### **Conclusion**

31. Although the claimants were not listed on the Judgment, their solicitor submitted that they still had an “entitlement” to be paid. I was satisfied that his submission was well-founded.

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32. The Insolvency Directive (2008/94/EC) provides the background for Member States.

33. Paragraph 3 addresses the need “*to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection to guarantee payment of their outstanding claims*”.

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34. Article 3 directs Member States to take measures to guarantee: “*payment of employees’ outstanding claims ....*”

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35. The claimants’ solicitor referred me to the definition of an insolvent employer in s.183 of the Employment Rights Act 1996 (“the 1996 Act”) and I accepted his submission that the claimants’ **entitlement** to be paid by the respondent arose as they had satisfied the terms of s.182: -

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**“182 Employee’s rights on insolvency of employer**

*If, on an application made to him in writing by an employee, the Secretary of State is satisfied that –*

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- (a) the employee’s employer has become insolvent,*
- (b) the employee’s employment has been terminated, and*
- (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,*

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*the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt.”*

36. S.184 details the debts which are due to be paid in these circumstances and these include a “protective award” under s. 189 of TULRCA (s. 184 (2) (d)).

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37. The claimants’ solicitor also referred me to s.190 which gives the Secretary of State power to obtain certain information where such an application is made. This

can include consideration of an Employment Tribunal Judgment and the Secretary of State may also obtain information from an Insolvency Practitioner. However, it was submitted, that the Employment Tribunal Judgment is not determinative and in support of his submission the claimants' solicitor referred me to **Banks and others v Secretary of State for Employment and others EAT424/82.**

38. In that case the EAT decided that the Secretary of State was not bound by the decision of the Industrial Tribunal that the applicants were entitled to redundancy payments out of the redundancy fund.

39. It was submitted that this principal still applied and that meant that a claimant seeking a protective award does not have to apply to an Employment Tribunal. All the claimant has to do is to apply in writing to the Secretary of State. The Secretary of State then has power to make enquiries obtain information and authorise the payment. In the present case, the claimants had already received from the Secretary of State redundancy payments, payments in respect of arrears of wages, holiday pay and notice entitlement. However, they had not received a payment in respect of a protective award in terms of s.184 (2) (d).

40. I was satisfied, on a plain reading of the statute, that the submissions by the claimants' solicitor were well-founded.

41. In his submission, the respondent referred to **Harford and others v Secretary of State for Trade and Industry UKEAT/0313/07/LA** (P13, page 100).

42. In that case the EAT took a different approach and suggested that the claimants make an application to the Employment Tribunal to be joined to the original case raised by the GMB Trade Union.

43. However, I was persuaded that that case could be distinguished from the present case. In **Harford** the GMB was a recognised Trade Union. Accordingly, it was only the GMB which could bring a claim in respect of all the employees affected. However, the GMB limited the claim to only the protected period which affected its members and this excluded Mr Harford and the other claimants. That is different

from the present case where it is not possible to review the original Judgment to include the claimants, particularly as Mr Keenan's claim has been dismissed and is *res judicata*.

- 5 44. I was satisfied, on the evidence, that the claimants' position was identical to the claimants detailed in the list which was attached to the Judgment dated 6 April 2016 (P9). Accordingly, the claimants are entitled to protective awards of 56 days' pay.

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Employment Judge: Mr NM Hosie  
Date of Judgment: 12 April 2017  
Entered in register: 13 April 2017  
and copied to parties

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