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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4121646/2018**

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**Held in Glasgow on 21 October 2019**

**Employment Judge: R Gall**

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**Mr M Sherlock**

**Claimant  
In Person**

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**John McGeady Ltd**

**Respondent  
Represented by:  
Mr Crumlish –  
Director**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the hearing scheduled to proceed on 21 and 22 October is spawned. A fresh diet is set down, being a continued hearing from 10 March 2019. That continued diet of hearing is set down for 9 and 10 January 2020. Being a continued hearing, it requires to be before Employment Judge Eccles.

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### **REASONS**

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1. This case was due to proceed to a hearing on 21 and 22 October 2019. The claimant appeared on his own behalf. The respondents were represented by Mr Crumlish, a Director.
2. Shortly before the hearing was due to commence, the Tribunal office had received a telephone call from Ms McPartland. She was a witness scheduled

**E.T. Z4 (WR)**

to appear for the claimant and was subject of a Witness Order. She said that she was unwell and unable to attend. She was asked to confirm that in writing. She sent an email to the Tribunal office prior to 10am stating that she was unwell and unable to attend as a witness. She did not provide any detail as to what the nature of her illness was. There was no backup provided by way of a doctor's certificate or indication that she was visiting the doctor to obtain treatment and any letter or note from the doctor.

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3. I explained the position to both parties when the time for commencement of the hearing arrived. Mr Sherlock said that he believed it was important to hear evidence from Ms McPartland. She had worked in HR with Enviro-clean Ltd. It was that company which had initially employed the claimant. The claimant understood that she accepted that there had been a TUPE transfer of the claimant's employment to the respondents in this case in June 2018. It was the claimant's position that several of his colleagues had transferred to the respondents at that time. He had been absent through ill health.

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4. In the absence of Ms McPartland at Tribunal, Mr Sherlock said that he wished a postponement of the case given what he understood to be the nature and effect of her evidence.

5. Mr Crumlish said that the claimant had not appeared with the respondents as an employee. I understood him to say that the claimant was on the list of prospective employees who would be transferring to the respondents. He had not however become an employee as he had not appeared for work.

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6. I explained to Mr Crumlish that given the claimant's absence from work through ill health, the Tribunal would have to consider the position on the basis of what would have happened had he been at work. From what Mr Crumlish said, albeit not by way of evidence taken under oath or affirmation, the respondents had an awareness of the claimant but he had simply not appeared when he was due to have started working for them.

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7. The claim brought is one in respect of failure to consult and also in respect of holiday pay and payment in respect of the notice period which the claimant

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would have had to have worked or, in the alternative the value of which she might have received from the respondents.

8. I explained to Mr Crumlish that TUPE would operate as a matter of law as I saw it, if TUPE was applicable. It might therefore be the case that although  
5 the claimant had not appeared to work for the respondents due to his illness, his employment had been TUPE transferred over. The fact that the claimant had not appeared at the respondents' premises to commence work with them, due to his absence, might have led to consideration being given by the respondents of possible disciplinary action and dismissal. In general terms  
10 however it would not enable them to say that, if the legal test was met, his employment had not been transferred such that he became an employee of their is in terms of TUPE.
9. All of this is of course subject to evidence being led and facts being established.
- 15 10. It is the claimant's position that there was no consultation with him and that the respondents are liable for that. He also maintains that he is due to receive holiday pay and payment which ought to have come to him during a period of notice. The respondents deny liability for these elements.
- 20 11. The claimant also says that there was a failure to consult with him. The respondents say that they consulted with Mr Gordon, who was an employee representative. The claimant says that there was no consultation with him. As I understand that he does not accept that Mr Gordon was an employee representative.
- 25 12. The respondents did not oppose a postponement due to the absence of Ms McParland. What they said however was that given that she was now to be appearing as a witness, they would wish a Witness Order in respect of Jim McCluskey of Enviro-clean. His evidence would be of assistance in establishing what consultation had been carried out.
- 30 13. In short therefore both parties wish a postponement. It seemed to me that a postponement was necessary on the basis that it appeared that Ms

McParland had relevant evidence to give. The Clerk to the Tribunals is requested to write to Ms McParland underlining the fact that there is a Witness Order in place and that she requires to attend Tribunal in response to that. The potential consequences if she does not attend in the face of there being a Witness order have also been set out to her.

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14. The Clerk to the Tribunals is requested to prepare for signature a Witness Order in relation to Jim McCluskey, his address being that of Enviro-clean as used in the Witness Order for Ms McParland.

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15. The Clerk to the Tribunals is also requested to issue Hearing Notices in respect of 9 and 10 January 2020.

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16. In course of the discussion as to next steps in the case, I was asked whether Mr Gordon should appear as a witness. I explained that it was for parties to organise witnesses being parties who they believed had relevant evidence to give. From what had been said to me, it seemed that Mr Gordon might indeed be a relevant witness.

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17. It then became apparent that Mr Gordon had already given evidence in the case. This led to information being received that there had already been evidence taken at the hearing by Employment Judge Eccles. This had occurred in March 2019. The case had gone "part heard". The Employment Judge who was sitting in the case was Francis Eccles. It will therefore be necessary for her to hear the continued element of the case. I had not appreciated, nor had the Clerk, that the hearing set down for 20 one on 22 October was in fact a continued diet.

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18. At the continued diet therefore it is likely that there will be evidence from Mr Sherlock insofar as not given, Ms McPartland, Mr Crumlish and Mr McCluskey.

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19. In relation to the alleged failure to consult, consideration will have to be given, as I see it from what was said to me, as to whether Mr Gordon was an employee representative and whether therefore any discussion with him met the obligations of Enviro-clean. There's also been some form of settlement

with Enviro-clean Limited. I think it would be necessary to hear from them as to what that settlement was attributed to as there cannot be “double recovery”. It is appreciated that the settlement terms between the claimant and Enviro-clean are regarded as being confidential. It may be of importance however to obtain details in that regard to avoid the possibility of double recovery.

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20. The Clerk to the Tribunals is requested also to write to Ms McParland intimating the new dates of hearing in January 2020 and underlining the fact that the witness order remains in place and that she should therefore obtain the diet on those days under compulsion due to the existence of the Witness Order.

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Employment Judge:

Robert Gall

Date of Judgement:

25 October 2019

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Entered in Register,

Copied to Parties:

30 October 2019

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