



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105014/2020 & others (see attached schedule) (V)

Held by Cloud Video Platform on 29 April 2021

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Employment Judge J Hendry

Mr G Anderson & others

**Claimant
Represented by:
Ms A Buchanan,
Solicitor**

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J & I Scaffolding Limited (in Liquidation)

**First Respondent
No appearance**

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

Second Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The judgment of the Tribunal is as follows:

1. The Tribunal finds that the complaints that the respondent company failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 are well-founded and the Tribunal makes a protective award in terms of section 189 of the Trade

E.T. Z4 (WR)

Union and Labour Relations (Consolidation) Act 1992 in respect of the claimant Graeme Anderson and the other employees in the attached schedule; and

- 5 2. Orders the respondent company to pay remuneration to the said employees for the protected period from 26 June 2020 for a period of 90 days.

REASONS

- 10 1. The claimants in their ET1 seek findings that they are entitled to a protected award.
2. The issue to be determined was whether the claimant's application for a protective award was well-founded and if so what the appropriate protected period should be.
- 15 3. The respondent company was not represented at the hearing having gone into liquidation.

The facts

- 20 4. The claimants were employed by the respondent company in their scaffolding business at Unit 38, Mayfield Industrial Estate, Dalkeith. The claimants were made redundant without prior warning on 26 June 2020. Many of the claimants took part in a telephone conference call that day when they were told representatives of the insolvency firm Begbies Traynor that a liquidator had been appointed and they were being immediately made redundant. Some of the claimants who did not take part in the call only discovered they had been made redundant at a later date.
- 25 5. There was no consultation by the company prior to the liquidation and redundancy. Staff were not advised either formally or informally that the company had financial difficulties. There was no recognised trade union.
- 30 There were no workers' representatives. An excess of 20 employees were

made redundant on 26 June all of whom were based at the respondent's establishment in Dalkeith. There was no collective consultation.

6. The claimants made an application to the Employment Tribunal for protective awards. In this instance the Tribunal heard evidence from Graeme Anderson the "lead claimant" and from Mr William Bolling of Starav Consulting instructed by the claimants to represent their interests in this matter and to prepare the supporting documentation for the claim.

Decision

7. The Tribunal firstly had regard to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which is in the following terms:

88 Duty of employer to consult . . . representatives.

- (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 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.*

(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.*

(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 by their employer, representatives of the trade union, or*

(b) *in any other case, whichever of the following employee representatives the employer chooses:—*

5 (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;*

10 (ii) *employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).*

(2) *The consultation shall include consultation about ways of—*

- 15 (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.

20 (3) *In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.*

(4) *For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—*

- 25 (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,*
30 (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 the 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 an 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 those agency workers are carrying out.*
- (5) *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.*
- (5A) *The employer shall allow the appropriate representatives access to the affected employees] and shall afford to those representatives such accommodation and other facilities as may be appropriate.*
- (6).....
- (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.*
- (7A) *Where—*

(a) *the employer has invited any of the affected employees to elect employee representatives, and*

(b) *the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,*

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the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

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(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).

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(8) This section does not confer any rights on a trade union, a representative or an employee except as provided by sections 189 to 192 below.

8. The Act provides that 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 employers are under obligation to consult the appropriate employee representatives of any of the employees who may be affected by the proposed dismissal. Subsection 1A of the Act provides that the consultation shall be given in good time and in any event where the number to be dismissed is 100 or more, consultation shall be at least 90 days before the first dismissal takes place. If there are special circumstances which would render such consultation not reasonably practicable to comply with the requirements, the employer is still under an obligation to take such steps towards compliance as are reasonably practicable in the circumstances (section 188(7)). No such steps were taken.

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9. The purpose of consultation with employees was stated by way of consulting about ways of avoiding redundancy, reducing the number of employees to be dismissed, mitigating the consequences of dismissal and

so forth. An employer fails to comply with the duty to consult in section 188 any of the employees who have been dismissed as redundant may present a complaint to an Employment Tribunal on that ground, and if the Tribunal finds the complaint to be well-founded it shall make a declaration to that effect and may also make a protective award. This the Tribunal now does.

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10. In the present case the respondent company were in breach of section 188 which contains the absolute obligation on the employer to consult meaningfully. To comply such consultation should have begun no later than 90 days prior to the proposed date of dismissal for redundancy. Accordingly the Tribunal find the complaint to be well-founded. There appears to be no reason from the circumstances of the liquidation that consultation should not have occurred at an earlier stage. The Court of Appeal has held in the case of **Suzi Raddon Ltd v GMB and others** [2004] IRLR 400 the “purpose of the protective award is to ensure that consultation in accordance with the requirements of section 188 takes place by providing a sanction against failure to comply with the obligations imposed on the employer” The required focus is not on compensating employees but on the default of the employer and its seriousness.

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11. Following the guidance of the court in that case the Tribunal in exercising its discretion to make a protective award and for what period should have regard to:

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1. the purpose of the award as a sanction for breach by the employers of their obligation to consult;
2. to exercise its discretion to do what is just and equitable, while focusing on the seriousness of the employer’s default which may vary from the technical to complete failure as here, and provide any of the required information and to consult; and
3. to adopt what Lord Justice Gibson described as the “proper approach” in the case where there’s been no consultation by starting with the maximum period and reducing it only if there are mitigating circumstances justifying the reduction. I find no such evidence of mitigating circumstances here.

12. Accordingly, I found the application well-founded and grant judgment as above for the full period of 90 days.

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Employment Judge:	Mr J Hendry
Date of Judgment:	17/05/2021
Date sent to parties:	17/05/2021

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Schedule for 4105014/2020 & others

4105014/2020	Mr Graeme Anderson
4105015/2020	Mr James Gebbie
15 4105016/2020	Ms Andrea Hill
4105017/2020	Mr James Robertson
4105018/2020	Mr Wayne Cadle
4105019/2020	Mr David Stevenson
4105020/2020	Mr David Duff
20 4105021/2020	Mr Paul Armour
4105022/2020	Mr Alan Collins
4105023/2020	Mr John Redden
4105024/2020	Mr John Young
4105025/2020	Mr Ian Shade
25 4105026/2020	Mr James Shade
4105027/2020	Mr Steven McNeice
4105028/2020	Mr Jeff Reynolds
4105029/2020	Mr Graeme Horsburgh
4105030/2020	Mr Duncan Yorkston
30 4105031/2020	Mr Vincent Montgomery
4105032/2020	Mr Lewis Cadle
4105033/2020	Mr Paul Lindsay
4105034/2020	Mr Ryan Scott
4105035/2020	Mr Jak Robertson
35 4105036/2020	Mr Kevin Roarty
4105037/2020	Mr Scott Waterston
4105038/2020	Ms Lisa Shade

	4105039/2020	Mr Wayne Purcell
	4105040/2020	Mr Reece Handren
	4105041/2020	Mr Brian Terry Tully
	4105042/2020	Mr Ronald Goodfellow
5	4105043/2020	Mr Darren Gormley
	4105044/2020	Mr Adam Lorimer
	4105045/2020	Mr Stuart Steel
	4105046/2020	Mr Robert Dawson
	4105047/2020	Mr Douglas Lamb
10	4105048/2020	Mr Thomas O'Donnell
	4105049/2020	Mr Matthew Miller
	4105050/2020	Mr Kieran Smith
	4105051/2020	Mr Dene Cranston
	4105052/2020	Mr Calum Gallagher
15	4105053/2020	Mr Tony Chalmers
	4105054/2020	Mr Sean Paget
	4105055/2020	Mr T-Jay Duffy
	4105056/2020	Mr Jack Weir
	4105057/2020	Mr Paul O'Brien
20	4105058/2020	Mr Declan Anderson
	4105059/2020	Mr Michael Young
	4105060/2020	Mr Steven Lindsay
	4105061/2020	Mr Nicolas Bain
	4105062/2020	Mr Peter Leonard
25	4105063/2020	Mr Angus McLeod
	4105064/2020	Mr Jack Leake
	4105065/2020	Mr Jay Cadle
	4105066/2020	Mr Scott Lewis
	4105067/2020	Mr Darryl Allison
30	4105068/2020	Mr John Hedley
	4105069/2020	Mr John Mason
	4105070/2020	Mr David Haining
	4105071/2020	Mr Brett Grant
	4105072/2020	Mr Robert Glasgow
35	4105073/2020	Mr Lee Ridgway
	4105074/2020	Ms Gayle Wyllie

	4105075/2020	Mr Nadeem McKenzie
	4105076/2020	Mr Logan Evans
	4105077/2020	Mr Kevin Ross
	4105078/2020	Mr Robert Maxton
5	4105079/2020	Mr Martin Blair
	4105080/2020	Mr Marc Cole
	4105081/2020	Mr Steven Shore
	4105082/2020	Mr John Morris
	4105083/2020	Mr Tony McGowan
10	4105084/2020	Mr Daniel Annandale
	4105085/2020	Mr Jamie Moore
	4105086/2020	Mr Daniel Mayhew
	4105087/2020	Mr James Beaton