

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: S/4102412/2017 S/4102413/2017 and S/4102414/2017

Held at Glasgow on 22 November 2017

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Employment Judge: F Jane Garvie

Mr T Wilson

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First Claimant  
Represented by:  
Mr D Hutchison -  
Solicitor

Mr Patrick Mooney

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Second Claimant  
Represented by:  
Mr D Hutchison -  
Solicitor

Mr Robert Galloway

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Third Claimant  
Represented by:  
Mr D Hutchison -  
Solicitor

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Land Engineering (Scotland) Limited  
(In Administration)

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Respondent  
Not Present and  
Not Represented

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

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- (1) the respondent failed to comply with their duties to inform and consult with the claimants in terms of Section 188 and 188A of the Trade Union and Labour Relations Act 1992;

(2) the complaint is well-founded in terms of Section 189(2) of the Trade Union and Labour Relations Act 1992 and

5 (3) the respondent is ordered to pay remuneration to the claimants for a protected period beginning on 31 May 2017 for a period of 90 days, being a protective award, again in terms of Section 189 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992.

### Background

10 1. In the claim presented on 16 August 2017 the three claimants assert that they are entitled to a Protective Award in terms of Section 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, (referred to as the 1992 Act).

15 2. The claim was served on the respondent under cover of Notices dated 17 August 2017 directing that a response, (the ET3) should be received by 14 September 2017.

20 3. The response was received on 29 August 2017 from Ernst & Young (referred to as "EY") as Administrators for the respondent. They indicated that they did not intend to defend the claim. The response was accepted under cover of letter dated 6 September 2017 and Notices for this Hearing were issued on 28 September 2017.

### The Final Hearing

4. At the start of the Final Hearing Mr Hutchison provided a bundle of documents.

25 5. He confirmed that the Administrators' consent had been provided and there is reference to that effect in a letter from EY dated 29 August 2017, (page 19).

6. The claimants each gave evidence.

**Findings of Fact**

**The First Claimant - Mr Wilson**

7. Mr Wilson was employed by the respondent for approximately 6 or 7 years. He worked as a Foreman. He would cover various sites depending on what work was being undertaken by the respondent and to which squad he was assigned at any particular time. The work could be either in the public or the private sector. The respondent's Registered Office is in Edinburgh but they have a site at Gardrum House, Stewarton Road, Fenwick, Kilmarnock. Mr Wilson would have to visit this site from time to time in his capacity as a Foreman to collect materials. Gardrum House was the administrative base for the respondent and it is also where their plant maintenance was carried out as well as being the base for receiving equipment or orders which were then uplifted and distributed to various sites. Mr Wilson thought there were between 40 and 50 people based at Gardrum House permanently. As with himself there would be many other employees coming to and from Gardrum House, depending on whether they had to collect materials and so forth for the various sites to which they were assigned at any one time. On occasions, Mr Wilson would have to travel to Fenwick two or three times a week but it very much depended on where he was working and what materials were required from the Gardrum House facility.
8. On 30 May 2017 Mr Wilson received a telephone call from one of the Contract Managers, a Mr Kevin Gallagher who told him that he was to attend Gardrum House the following day. Mr Wilson duly attended that meeting as did his two colleagues. Mr Wilson anticipated that there must have been over 100 and possibly 140 individuals at the meeting which was chaired by the respondent's Managing Director, Mr Stuart Dillet. There was also another individual present who Mr Wilson understood was one of the administrative staff although he did not know his name. He found it difficult to hear what was being said but he understood that the respondent was ceasing business with immediate effect and the purpose of the meeting was to inform the employees, including the three claimants, that they were now being made redundant with immediate effect on 31 May 2017.

9. Mr Wilson subsequently received a letter dated 31 May 2017 which he thought arrived at his home either a week or two weeks later from EY. It was in the same terms as the one provided to Mr Mooney which is at page 29 of the bundle. That letter confirmed that the claimant's employment was being  
5 terminated with effect from 31 May by reason of redundancy, that he was not required to work out his notice and so his employment would end on 31 May 2017. There was also reference made to the Redundancy Payment Service with a web link to follow and also a sheet to be completed in relation to claims such as holiday pay, arrears of pay, redundancy pay, payment in lieu of  
10 notice. There was no discussion about electing employee representatives nor was there any discussion about what might be done to avoid the redundancies taking place.

**The second Claimant - Mr Mooney**

10. Mr Mooney worked for the respondent as a Labourer and was employed by  
15 them for more than 2<sup>1</sup>/<sub>2</sub> years.

11. The types of work that Mr Mooney would undertake as a Labourer varied. On some days he would be directing traffic while on others he would be carrying slabs or assisting in work such as grading stones for roadworks. There would be one manager in charge of his squad and occasionally one or two foremen.  
20 Mr Mooney would be told by his Foreman where he was to report to each day. Some contracts lasted for a considerable period of time while others were of much shorter duration. Examples he gave were of working on a garden wall at someone's house while another was working on the Cathkin By-Pass which was work being done by the respondent for a local authority.

25 12. On occasions, Mr Mooney would also have to travel to Fenwick to collect goods and, on one or two occasions, he also visited the respondent's premises at Skypark in Glasgow.

13. On 30 May he was telephoned by a colleague by telephone and who told him that he was to attend the Gard rum House premises the next morning. He duly  
30 attended the meeting. He thought there were about 150 people present. He

too recalled that Mr Dillet addressed the meeting as well as someone from EY although he did not know the individual's name.

14. He knew some of the other people from various squads. He also recognised some of the office and maintenance staff from seeing them at Gardrum House in the past.

15. There was no indication of there being any consultation about redundancies nor was there any suggestion that employee representatives should be elected. This mirrored Mr Wilson's recollection of the meeting.

16. Mr Mooney received the letter dated 31 May 2017, (page 29). Again, this was sent to him by post some time after the meeting on 21 May 2017.

#### **The Third Claimant - Mr Galloway**

17. Mr Galloway also attended the meeting on 31 May 2017. He had been employed by the respondent for about 8 years. He worked as a General Labourer on various sites and the length of time he would spend on each site depended on the length of the contract.

18. His recollection was that there was between 40 and 50 employees permanently based at Fenwick. This was a mix of administrative and maintenance staff.

19. Mr Galloway received a text from a colleague telling him he was to attend the meeting on 31 May 2017. Arrangements were made for him to be collected by a colleague and driven to Fenwick. He too thought there were between 100 and 150 people present at the meeting. He was aware that Mr Dillet addressed the meeting but he did not know the name of the person from EY. As with Mr Wilson and Mr Mooney he thought the meeting had lasted for about 35 to 40 minutes.

#### **Closing Submission**

20. Mr Hutchison seeks a Protective Award in favour of the three claimants who were employed by the respondent and dismissed by reason of redundancy with effect from 31 May 2017. The claimants seek a Protective Award in

terms of Section 189(2) of the Trade Union Labour Relations (Consolidation) Act 1992 (referred to as the 1992 Act).

21. The claimants request an award of 90 days in terms of Section 189(4) of the 1992 Act from 31 May 2017 be made.

5 22. The claimants' position is that there were more than 100 members of staff made redundant on 31 May 2017. The respondents were under an obligation to consult at least 45 days in advance of the redundancies since more than 100 employees were being made redundant within a 90 day period. Even if there were less than 100 redundancies since there were more than 20  
10 redundancies, the respondents were under an obligation to consult for at least 30 days before the redundancies took place since more than 20 redundancies were being made within a 90 day period.

23. There had been no discussion as to how the respondent could avoid redundancies nor consideration given to reducing the number of employees  
15 affected or any way to mitigate the consequences of the dismissals as is required by Section 188(2) of the 1992 Act.

24. In terms of the question of what is an establishment all the claimants has a connection with Gardrum House, Stewarton Road, Fenwick as that was where they would go to collect materials and so forth and it was the  
20 Admin/Maintenance base for the respondents in relation to the works carried out by them.

25. Mr Hutchison drew attention to **Rockfon A/s [1996] ICR 173** and, in particular, to paragraph 32 which states:-

25 *“the term ‘establishment’ appearing in article 1(a) of the aforesaid Directive (75/129/E.E.C.) must be understood as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an ‘establishment’ for the unit to be endowed with a management which can independently affect collective  
30 redundancies. ”*

26. Mr Hutchison also drew attention to **Renfrewshire Council v Education Institute of Scotland EAT S/0018/12** at paragraph 28 which refers to the decision of **Athinaki Chartopla AE v Panaglotidis [2007] IRLR 284**. In **Athinaiki** at paragraph 27 it states:-

5                   “for the purposes of the application of Directive 98/59, an  
‘establishment’, in the context of an undertaking, may consist of a  
distinct entity, having a certain degree of performance and stability,  
which is assigned to perform one or more given tasks and which has  
a workforce, technical means and a certain organisational structure  
10                   allowing for the accomplishment of those tasks.”

27. Mr Hutchison submitted that all the claimants had their base at Gardrum House and so it was the relevant establishment.

28. In terms of the request to invite the Tribunal to make a 90 day award in terms of Section 189(4) of the 1992 Act, this should take effect from 31 May as that  
15                   was the date when the redundancies took place. He drew the Tribunal's attention to the case of **Susie Radin Ltd v GMB [2004] IRLR 400** at paragraph 45, sub paragraph 5 which states:-

20                   “How the tribunal assesses the length of the Protective Award is a matter for the tribunal, but a proper approach in a case where there has been no consultation needs to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the tribunal consider appropriate. ”

29. Here, it was submitted there were no circumstances to justify such a reduction.

25 30. There was no recognition of the Trade Union, Unite to which the claimants belong. The respondents were required to allow the claimants to appoint their own representatives but this was not done and this was confirmed by the claimants' evidence. Accordingly, an award for 90 days should be made.

The Law

31 . **“Section 188 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 sub section (1), at least 45 days,

(b) otherwise, at least 30 days,

before the first of the dismissals take effect.”

**Section 189(2) states:**

“(2) If the Tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award”

**Section 189 (4) states:**

“(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 any requirement of Section 188;

but shall not exceed 90 days."

Deliberation

- 5 32. The Tribunal was satisfied from the claimants' evidence which was given clearly and succinctly that they were notified of their dismissal by reason of redundancy at the meeting held on 31 May 2017. No efforts were made to carry out any consultation before then and nor was any effort made by the respondent to hold elections so that employee representatives could be  
10 appointed nor did the respondent take any steps to reduce the number of employees who were affected or to mitigate the number of dismissals.
33. The Tribunal gave careful consideration to the question of an establishment in light of the authorities referred, **Rockfon, Renfrewshire Council and Athinaiki** (see above).
- 15 34. The Tribunal noted that while none of the claimants were permanently physically based at Gardrum House they did from time to time visit there to collect supplies and so forth. All three claimants worked on various sites where the respondent had contracts to carry out works and therefore the physical base(s) from which they worked worked from would vary from day  
20 to day, week to week and even month to month. On some occasions, they could be working on a particular site for a considerable period of time.
35. The Tribunal was satisfied that the claimants did from time to time have to attend Gardrum House and so Mr Hutchison's submission that they were assigned there in the sense of it being their base to where they went to collect  
25 equipment and so forth as and when they needed to do so.
36. In these circumstances, the Tribunal concluded that the claimants are entitled to a Protective Award and that the award should be for a period of 90 days beginning on 31 May 2017 in terms of Section 189(2) of the 1992 Act. This is on the basis that there was no attempt to consult the employees, including  
30 the claimants, in advance of the mass meeting held on 31 May 2017. In

reaching this decision the Tribunal noted all that is said in **Susie Radin**,  
(again see above).

37. It therefore follows applying the law to the above findings of fact that the claim  
succeeds. Accordingly, the respondent is ordered to pay remuneration to the  
5 claimants for a protected period beginning on 31 May 2017 for a period of 90  
days being a protective award in terms of Section 189 (2) of the 1992 Act.

Employment Judge: Jane Garvie  
Date of Judgment: 23 November 2017  
Entered in register: 27 November 2017  
and copied to parties

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