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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4107085/2020; 4107086/2020; and 4107087/2020 (V)

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(Multiple 9585)

Final Hearing held remotely in Glasgow using CVP on 14 February 2022

Employment Judge Ian McPherson

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James McDonald

**1st Claimant
Represented by:
Mr R Lawson
Solicitor**

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James McAra

**2nd Claimant
Represented by:
Mr R Lawson
Solicitor**

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Thomas Graham

**3rd Claimant
Represented by:
Mr R Lawson
Solicitor**

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J.H. Horn Limited (in liquidation)

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

- 5 (1) The claimants, who were all employed by the respondent at their establishment at 522 Crow Road, Glasgow, until their dismissals on or around 3 July 2020, are entitled to bring this claim because none of the situations in **Section 189(1)(a), (b) or (c) of the Trade Union and Labour Relations (Consolidation) Act 1992** apply and the claimants were employees dismissed as redundant.
- 10 (2) In its response the respondent per its liquidator indicated that it did not contest the claim.
- 15 (3) The respondent is in compulsory liquidation, but the relevant court granted permission for the continuation of these proceedings, by interlocutor of 22 July 2021 by Sheriff B M Cameron at Glasgow Sheriff Court.
- (4) The complaint that the respondent failed to comply with a requirement of **Section 188 and Section 188A of the Trade Union and Labour Relations (Consolidation) Act 1992** is well founded.
- 20 (5) The respondent dismissed as redundant more than 20 employees at the establishment at which the claimants worked within a period of 90 days or less. There was no independent trade union recognised by the respondent for the purposes of collective bargaining. There were no employee representatives appointed or elected, and the respondent entirely failed to inform or consult about the dismissals. No consultation
25 took place prior to the claimants' dismissals, and there was no warning whatsoever of redundancy.
- 30 (6) In these circumstances, the Tribunal makes a protective award in respect of the claimants and the respondent is ordered to pay remuneration for the protected period. The protected period begins with 3 **July 2020** and is for 90 days.

REASONS

1. These 3 cases called before the Tribunal for Final Hearing on Monday, 14 February 2022, in respect of the claim for protective awards only.
2. Following ACAS early conciliation between 1 and 7 October 2020, the 3 claimants, all members of the trade union UNITE, through their solicitor, Mr Ruaraidh Lawson, of Allan McDougall, solicitors, Edinburgh, presented an ET1 claim form on 6 November 2020, complaining of unfair dismissal by the respondent, seeking a redundancy payment, and alleging that they were owed sums in respect of notice pay, holiday pay, and arrears of pay.
3. The claims were accepted by the Tribunal on 12 November 2020, and served on the respondent per the liquidator. As the respondent was in compulsory liquidation, the claimants* representative was advised by the Tribunal, on 12 November 2020, that consent of the relevant court was required in terms of the Insolvency Act 1986.
4. On 19 November 2020, an ET3 response form was presented in the respondent's name by William Duncan (Business Recovery) Ltd stating that the respondent company was placed into provisional liquidation on 3 July 2020, when the company ceased to trade, and that Annette Menzies of William Duncan (Business Recovery) Ltd was appointed interim liquidator on 24 July 2020.
5. It was further stated in that ET3 response that all known employees of the respondent were provided with the relevant information to allow them to claim from the Insolvency Service for any monies that they may have been due as part of their contract of employment with the respondent company.
6. That ET3 response did not state that the claims were being defended. It was accepted by the Tribunal administration, on 23 November 2020, and a copy sent to the claimants' solicitor. Following initial consideration, by Employment Judge Muriel Robison, on 24 November 2020, she instructed that the respondent be asked to indicate if they intended to defend the claims.

7. By email to the Glasgow ET, on 25 November 2020, a Susan Mackrell, on behalf of William Duncan (Business Recovery) Ltd, confirmed that Annette Menzies of that firm, as provisional liquidator of the respondent company did not intend to defend the claims.
- 5 8. Thereafter, Employment Judge Lucy Wiseman instructed that the claimant's representative be asked to provide quantification of the claims to see if a **Rule 21** judgment could be issued, or whether a Hearing should be arranged. Proceedings were thereafter sisted pending consent of the Court being obtained.
- 10 9. On 23 July 2021, the claimants' representative, Mr Lawson, advised the Glasgow ET that consent had been obtained from Glasgow Sheriff Court, on 22 July 2021, for these claims to proceed and, as an ET3 had been presented by the insolvency practitioners of the respondent, and as the
- 15 claims were not being resisted, he sought a judgment of the Tribunal that the respondents had failed to comply with the requirements of **Section 188 and 188A of the Trade Union & Labour Relations (Consolidation) Act 1992**, and that in the absence of any resistance to the claims, and having regard
- to the judgment of the Court of Appeal in **Susie Radin Limited v GMB [2004] ICR 893**, the individual claimants should be awarded a protective
- 20 award in terms of **Section 189 of the 1992 Act**, and the respondents should be ordered to pay remuneration to the individual claimants for the protected period of 90 days starting on 6 July 2020.
- 25 10. As regards the other claims advanced in the ET1, namely claims for arrears of pay, holiday pay, notice pay, statutory redundancy pay and unfair dismissal, Mr Lawson advised that whether the claimants would be able to enforce a judgment in relation to those heads of claim would depend upon the extent of any residual assets of the respondent, and so he requested that
- 30 those heads of claim be sisted pending clarification being obtained of the extent to which a judgment could be satisfied by the respondent, as if it be the case that the claimants would not benefit financially from a judgment in

relation to those other heads of claim, it is unlikely that those claims would ultimately be insisted upon.

11. On 18 August 2021, Employment Judge Mark Whitcombe directed that the claimants' case in paragraphs 3 and 4 of the attachment to the ET1 is inconsistent, and a judgment could not be given on that basis. In paragraph 3, it had been stated that the claim was presented by the individual claimants in reliance upon **Section 189(1)(a) and / or (d)**, but the *esto* argument, at paragraph 4, was that the claim is presented in terms of **Section 189(1)(b)**. He asked the claimants' representative if he wished to amend their claim to remove the alternative arguments and seek a judgment under **Rule 21**, or to give availability for a one-day Hearing.
12. On instructions from Employment Judge Laura Doherty, there having been no reply from Mr Lawson, a half-day Rule 21 Hearing by CVP was assigned for 8 December 2021, and Notice of that Final Hearing issued to all parties on 10 November 2021. In the event, that Hearing did not proceed, as Mr Lawson was engaged in another ET Hearing on that date, and his application of 12 November 2021, to postpone and re-list, granted by Employment Judge Claire McManus, on 30 November 2021, there being no objection received from the respondent.
13. On 21 December 2021, the case was relisted for a 3-hour Final Hearing by CVP on Monday, 14 February 2022. On 22 December 2021, Susan Mackrell, on behalf of William Duncan (Business Recovery) Ltd, confirmed that the respondent is in liquidation, and all claimants raising proceedings had been awarded claims via the Insolvency Service, and seeking guidance on what was required of the liquidator in respect of the ongoing proceedings.
14. On 12 January 2022, Mr Lawson advised that as he understood the respondent does not resist the claims, they would presumably not be represented or in attendance at the Hearing listed for 14 February 2022. He explained that it would be necessary for the claimants to obtain a judgment from the ET in relation to the protective award claim before any payment could be made by the Insolvency Service in that regard.

15. Thereafter, on 20 January 2022, in reply to a Legal Officer's direction of 19 January 2022, asking the respondent to provide comments on whether consent is granted for the claims to proceed, Ms Mackrell advised that Annette Menzies of that firm, as liquidator of the respondent company, did not believe it was for her, as liquidator, to consent to the claimants proceeding with any claims. Consent having been granted previously by Glasgow Sheriff Court; the Legal Officer's enquiry was unnecessary.
16. On 8 February 2022, Mr Lawson, the claimants' representative, advised the Glasgow ET, with copy to Ms Mackrell, that he understood the claimants had not received payments from the residual assets of the respondent company, but they had received certain payments from the Insolvency Service, and he renewed his request of 23 July 2021 that all claims except the protective award claims are sisted, pending clarification being obtained of the extent to which a judgment could be satisfied by the respondent.
17. In terms of directions given by me, on 10 February 2022, as per letter of that date to parties from the Tribunal, it was confirmed that all claims, except the protective award claims, were sisted, that this Hearing would proceed and would determine the protective award claim only. Further, Mr Lawson was ordered, further to the CVP Notice of Final Hearing, issued on 21 December 2021, to lodge an E-Bundle, duly paginated and indexed of any documentary productions to be relied upon by the claimants giving evidence, and a skeleton written argument of legal submissions for the Judge.
18. On 10 February 2022, Susan Mackrell, on behalf of Annette Menzies of William Duncan (Business Recovery) Ltd, as liquidator of J H Horn Limited, confirmed that the liquidation will be dismissed, and the company dissolved, as of April 2022, and Ms Menzies, as liquidator, will be discharged, and that the Insolvency Service had advised that any protective award claims, as a result of a successful ET, would be received and dealt with accordingly. Finally, Ms Mackrell confirmed that no representation would be made at this Hearing by the liquidator or any member of her staff.

19. Having checked the Companies House website, just prior to the start of this Hearing, I see the respondent company is due to be dissolved on 19 April 2022, further to an interlocutor granted in the liquidation process (GLW-L80-20) by Sheriff B M Cameron at Glasgow Sheriff Court on 7 January 2022.
- 5 20. Mr Lawson's E-Bundle and skeleton argument were received by the Glasgow ET on the afternoon of Friday, 11 February 2022, and sent to me, as also to the respondents' liquidator.
21. When the case called before me, at 10:00am on Monday, 14 February 2022, on CVP, the claimant's representative, Mr Lawson was there, along with the
10 claimant, Thomas Graham, as there were connection difficulties in taking evidence from the lead claimant, James McDonald. The Hearing proceeded by way of CVP, and there were no further connection difficulties, while Mr Graham gave sworn evidence on oath, answered questions of clarification
15 Mr Graham gave evidence on behalf of all three claimants, as their circumstances are the same, as regards the matter of seeking a protective award.
22. As the E-Bundle had been prepared, with a view to evidence being given by Mr McDonald, Mr Graham emailed to Mr Lawson, who emailed it to the
20 Tribunal, a copy of the letter of 6 July 2020 received by him from the respondents' MD, David J Hunter, via an email sent to him on 7 July 2021 from an Iain Goldthorp, director /financial controller, confirming that J H Horn Limited had ceased to trade effective from 3rd July 2020, and that, regrettably, there was no alternative but to make him redundant with effect
25 from 3 July 2020. I allowed this additional letter to be added to the E-Bundle.
23. This letter to Mr Graham was similar to the letter dated 6 July 2020, sent to Mr McDonald, as produced in the claimant's E-Bundle as document 5, at page 26 of the Bundle, from Annette Menzies, provisional liquidator of the respondent, stating that she had been appointed on that date, which was the
30 date the company ceased to trade, and also the date on which he, as an

employee of the respondent, should consider his employment with the company as terminated.

24. I found Mr Graham to be a credible and reliable witness. When Mr Lawson invited me to find the claimants' complaints well founded and make a declaration to that effect, I gave an oral judgment announcing my decision, and, having regard to the Court of Appeal's judgment in **Susie Radin Limited v GMB**, at paragraph 45, per Lord Justice Peter Gibson, I made a protective award for a protected period of 90 days beginning with 3 July 2020, the date the claimants were dismissed for redundancy, the respondent company having ceased to trade.

25. There was a complete failure by the respondent company as employer, and no mitigating circumstances were put forward by, or on behalf of, the respondent, to suggest that the length of the protected period should be reduced to any extent from the maximum period.

Employment Judge: I McPherson
Date of Judgment: 14 February 2022
Entered in register: 18 February 2022
and copied to parties