EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101560/2022; 4101309/2022 & others as per multiple ref 4100186

Held in Glasgow on 24 May 2023

Employment Judge L Doherty

GMB Scotland	**First Claimant** **No Appearance**
Unite The Union & others	**Second Claimant** **Represented by:** **Mr S Brittenden - Counsel**
Engenda Group Limited	**Respondent** **Represented by:** **Mr D Jones - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the second claimant's application for reconsideration of the Tribunals judgment of 17 February 2023 succeeds and that judgment is varied as follows:

(1) Paragraphs 2 and 4 of the Judgment are consolidated into one paragraph in the following terms:

"The respondents are ordered to pay a protective award to the description of employees in respect of whom Unite or the GMB is the Trade Union recognised by the respondents who have been dismissed as redundant and in respect of whose dismissal the respondents have failed to comply with a requirement of Section 188

TULRCA; the protected period begins on 26 November 2021 and is for a period of 40 days."

(2) Paragraph 154 of the Reasons is deleted, and the following paragraph is substituted therefore:

'Taking into account the extent of the default in respect of the obligations to consult with a jointly recognised Trade Union, the GMB, which was part of the same bargaining unit, the Tribunal concluded that it was appropriate to make a protective award for a period of 40 days, commencing on 26 November 2026'.

REASONS

1. This was the second respondent's application for reconsideration under Rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) of a judgment dated 17 February 2023 issued by the Tribunal following a hearing to consider the Protective Award element of conjoined claims brought by the Trade Unions, Unite and a number of individuals, and the GMB.

2. The application, which was opposed, was not refused under Rule 72(1) and a hearing was fixed.

3. There was no appearance on behalf of the first claimant, the GMB. Mr Brittenden appeared for the second claimants (Unite) and Mr Jones appeared for the respondents. Both parties helpfully provided written submissions which they supplemented with oral submissions.

4. The Tribunal's judgment which is the subject of the application was issued in the following terms:

(1) the complaint presented by the Unite the Union (Unite) under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) is well founded;

(2) the respondents are ordered to pay a protective award to the group of employees in respect of whom Unite is the Trade Union recognised by

*the respondents who have been dismissed as redundant and in respect of whose dismissal the respondents have failed to comply with a requirement of Section 188 of TULCRA; the protected period begins on 26 November 2021 and is for a period of **30 days**;*

(3) the complaint presented by the GMB Scotland (the GMB) under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) is well founded;

*(4) the respondents are ordered to pay a protective award to the group of employees in respect of whom the GMB is the Trade Union recognised by the respondents who have been dismissed as redundant and in respect of whose dismissal the respondents have failed to comply with a requirement of Section 188 of TULCRA; the protected period begins on 26 November 2021 and is for a period of **40 days**.*

Second claimant's submission

5. The basis of the application was that the Tribunal had been led into error by the respondents' submissions that different protective awards should be made and by reference to whether an affected employee was a member of either Unite or GMB.

6. Mr Brittenden submitted that it is well-established that regardless of whether or not an affected employee is a member of Unite or GMB or no union at all, if they are of a description of affected employee falling within the bargaining unit in respect of which any union(s) has/have recognition rights, then they are entitled to a protective award.

7. He submitted that judgment also proceeds on a misunderstanding that Unite and GMB were recognised in respect of different *"group[s] of employees".* It is plain that Unite and GMB are jointly recognised in respect of the same bargaining unit.

8. As a consequence, Mr Brittenden submitted that it is not feasible for the parties to progress their claims for a protective award until this issue is

addressed and the "description" of employees is specified by the ET in accordance with s. 189(3) TULR(C)A 1992.

9. Mr Brittenden took the Tribunal to section188(1B) TULRCA which does not stipulate that a trade union representative can only be an *"appropriate representative"* for the purposes of redundancy consultation where the affected employees are, in fact, members of the Trade Union. He submitted that the provision makes it clear that the affected employees must be *"employees… of a description"* in respect of which the union is recognised by the employer. It is therefore the class or category of employees that the union represents that is relevant, not whether any particular employee is a member of the union.

10. Referring to Harvey on *Industrial Relations & Employment Law* Division I (2) [1006] in support of his position, Mr Brittenden submitted that it follows that, in cases where the employer has accorded joint recognition to several unions, then if the employer consults one union it must consult all (independent) unions, and it must consult all the unions about all the proposed dismissals. The employer does not satisfy the Act by consulting the unions each in respect of its own members only.

11. Mr Brittenden referred to the Northern Ireland Court of Appeal decision in ***Governing Body of the Northern Ireland Hotel and Catering College v National Association of Teachers in Further and Higher Education*** [1995] IRLR 83 in which it was at [12] – [16]; and [32].

'As a matter of construction it is clear, in my opinion, that in the phrase 'an employee of a description in respect of which an independent trade union is recognised by him', the words 'of a description' refer to a category of employee, and that the obligation to consult a trade union relates to an employee of a description or category in respect of which the union is recognised, whether or not that employee is a member of that particular union.

I consider that to construe the words 'of a description' as referring to an employee who is a member of the trade union which is to be consulted would be to give the paragraph a meaning which it does not bear, and would

necessitate the inclusion of additional words which it does not contain. As Mr McDonald, counsel for the respondent union, submitted, if Parliament had intended to limit the requirement to consult to a case where the employee was a member of a recognised trade union, it would have been simple for the paragraph to have stated this in clear terms.

The opinion which I have formed of the construction to be given to Article 49(1) also accords with the views of textbooks on the subject. Morris and Archer on Trade Unions, Employers and the Law state at p.167:

'An employer which proposes to dismiss for redundancy an employee of a description in respect of which it recognises an independent trade union must consult representatives of that union before effecting the dismissal. The obligation arises even if only one such employee is to be dismissed, and that employee need not be a member of a recognised union or, indeed, of any union. If more than one union is recognised, there must be consultation with each union.'

12. The reasoning in ***NATFHE*** has been expressly endorsed by the EAT on one occasion by HHJ McMullen QC in ***Martello Professional Risks Ltd v Barnes and another***; ***Barnes v Martello Professional Risks Ltd and others*** UKEAT/0121/09/JOJ, UKEAT/0122/09/JOJ.

13. Mr Brittenden also referred to ***Transport and General Workers' Union v Brauer Coley Ltd*** [2007] IRLR 207, in which HHJ Burton gave the following guidance:

Thus in respect of a claim for a protective award made by a trade union in the circumstances specified in the Act, the award is obtained by the union, but it is left to the individual employee – who may or may not be a member of the trade union, but would be required to be an employee of a description in respect of which the trade union is recognised by the employer (see s.188(1B)(a)) – then to make an individual claim to the employment tribunal, effectively to cash in his entitlement pursuant to the protective award, if the employer has not paid up voluntarily.

14. Mr Brittenden submitted that ***Brauer Coley*** was followed by a different division of the EAT in ***Independent Insurance Company Ltd v Aspinall*** [2011] IRLR 716 [50]. HHJ Serota QC:

"Mr Gatt submitted that on the correct interpretation of s.189 there were four gateways to obtain relief by way of a protective award. There were routes for the elected representatives, the trade union and for the individual, and the gateway determined the remedy. By virtue of s.189(1) the remedy would bind all members of the constituency even if, as in a case of a shop represented by a trade union where not all employees were members, they would get the benefit of such an award. They were part of the constituency. If an individual is a member of a constituency then there is no room for the individual to make a claim. Such a claim could only be brought by an elected representative or a trade union. Thus, there is no complaint that can be made if, for example, it is considered by an employee that his trade union representative or elected representative has done a poor job.

We now turn to our conclusions. I do not propose to refer to all of the arguments but I will concentrate on the principal points. So far as the law is concerned, the statutory architecture of ss.188, 188A and 189 is to give representative rights to trade unions and elected representatives only. Only they may apply to enforce those rights. I am told by my lay members that as a matter of practice an employer will negotiate with a trade union representative for everybody in its constituency whether they are members of the trade union or not and similarly with employee representatives."

15. Mr Brittenden submitted that on the premise that the respondent was under an obligation to discharge its obligations to collectively consult with Unite and GMB in respect of all affected employees falling within the same bargaining unit, the "description" of affected employees requires modification to include all employees of the same description in respect of which Unite and GMB were jointly recognised. The approach of seeking to identify "the group of employees in respect of whom" either Unite or GMB "is recognised by the respondents…" is fraught with difficulty and unworkable where both have joint recognition in respect of the same bargaining unit.

16. There could be no basis to now suggests that Unite (and presumably GMB) is only recognised under the NAECI in respect of its members. This appears to amount to the respondents resiling from its concession at paragraph 91: *"There is no dispute that Unite and the GMB are recognised trade unions with whom the respondents were under a duty to consult in terms of section 188(1B)(a) of TULRCA."*

17. Mr Brittenden submitted that Trade unions are recognised in respect of defined bargaining units, not by reference to membership. Indeed, were that the case, and a pay award was not applied to non-members in the bargaining unit, that would amount to an actionable detriment for the purposes of s. 146 TULRCA.

18. Furthermore, the respondents position becomes unsustainable by reference to the fact that neither Unite nor GMB are under any obligation to name its members. The respondent does not know who all of the members are. On that basis, it cannot be said that the bargaining unit only comprises of an indeterminate and unknown class of members to the exclusion of everyone else – that would be unworkable.

19. It was clear he submitted from the provisions relied upon by respondent in response to this application that the "scope" of the recognition agreement defines the bargaining units by reference to the type of "work" undertaken.

20. The point highlighted by the respondents is that *"the use of this national collective agreement (NAECI) is restricted to the … trade unions and their respective members employed on NAECI Registered work"* is of no consequence. It simply signals that other trade unions who are not recognised, or non-members have no locus or standing to "use" the collective agreement. For example, the use of the grievance procedure or disputes resolution procedures.

21. The description of affected employees in this case includes members and non-members within the same bargaining unit. There is a consistent line of authority to the effect that it was not the intention of the legislature to have

regard to membership in determining the description of employee for the purposes of a protective award.

Respondent's submissions

22. Mr Jones confirmed that it is accepted by the respondents that Unite and the GMB were part of the one bargaining unit.

23. He also accepted that there are issues with enforcement of the judgment as it stood, as any employee who fell within the bargaining unit in respect of which a recognised Trade union has rights, regardless of whether they are a member of that recognised Trade Union, is entitled to the benefit of that protective award under Section 190 of TLUCRA. Although not accepting Mr Brittenden's proposed variation of the judgment Mr Jones did accept that it was in the interests of justice that the Tribunal vary its judgment to deal with the issue.

24. Mr Jones suggested that the judgment should be varied so that the award is made *'in respect of employees dismissed on the grounds of redundancy from PetroIINEOS Grangemoth on the 25 of November 2021'.*

25. Mr Jones argued that it was permissible to have separate protective awards to Unite and the GMB. He referred to Section 1.4 of the terms of the NAECI collective agreement under which Unite and the GMB are recognised Trade Unions, which provided:

".. the use of this national collective agreement (NAECI) is restricted to signatory employers associations, trade unions and their respective members employed on NAECI Registered work."

26. He submitted that while Section 188 of TULCRA does not require individuals to be members of a Trade Union, the NAECI limits the scope for whom each of the trade unions may seek an award under Section 189 (2) of TULCRA by virtue of the specific reference to '*their respective members employed on NAECI Registered work'*. Mr Jones submitted that it must follow, given that the level of protective award is punitive, calculated in part by reference to the level of non-compliance with Section 188 of TULCRA, that separate awards

are therefore permissible in circumstances where the level of non-compliance has been assessed in the circumstances of each claimant trade union.

27. If the Tribunal was not with him on that point, then Mr Jones opposed an increase in the protective award to 40 days for Unite. The purpose of the award is not to compensate the employee, but to punish the employer and an increase to 40 days would fail to give credit for the employer for the steps taken to consult, for the reasons assessed in the judgment.

Consideration

The Rules dealing with reconsideration are contained in Rule 70 to 73 ,which provide as follows;

> 70. *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*
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> 71 (1) *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*
>
> *Process*
>
> (2) *If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.*
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> *.....*
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> 73. *Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).*

28. Notwithstanding that none of the matters ventilated at this hearing had been raised previously, both parties agree that it is in in the interests of justice that

the Tribunal reconsider its decision under Rule 72 of and vary its judgment in order to deal with the issues of enforcement which might otherwise arise. In light of the parties submissions and the issued identified, the Tribunal was persuaded that it was in the interests of justice that it should do so.

29. The Tribunal firstly had regard to the relevant statutory provisions

30. Section 188 TULCA provides:

(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.

….

(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:

31. Section 189 (3) provides:

A protective award is an award in respect of one or more descriptions of employees—

(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

32. The parties agree that the GMB and Unite are both recognised Trade unions are part of the same bargaining unit.

33. Having regard to the terms of Section 189 (3) the Tribunal agree with Mr Brittenden's submission that the correct approach is to make an award in respect of a description of affected employees falling within the bargaining unit in respect of which the recognised Trade Unions have rights, as opposed to individual Trade Unions who are recognised, which is what the Judgment as it presently stands does. This approach is endorsed by the authorities which Mr Brittenden took the Tribunal to, as set out above. Indeed it appears that Mr Jones does not disagree with the fact that the judgment issued causing difficulty in light of the implications of enforcement.

34. The Tribunal was not persuaded that the terms of the NAECI agreement permit it to make separate Protective awards for different periods to two trade Unions. As submitted by Mr Brittenden, the extract of the NAECI agreement referred to by Mr Jones does not deal with bargaining units and only makes provision to the effect that non recognised Trade Unions or non-members have no standing to use the collective agreement.

35. Further as made clear in ***Transport and General Workers' Union v Brauer Coley Ltd [2007] IRLR 207***, and ***Independent Insurance Company Ltd v Aspinall [2011] IRLR 716***, an employee who is part of the bargaining unit, even if not a member of the recognised Trade Union, can seek to enforce the protective award. In this case that would mean that every person of description falling within the bargaining unit could make a claim in respect of the protective award in favour of the GMB.

36. The Tribunal then considered the period of the protective award, and whether, as urged by Mr Jones this should be reduced to 30 days.

37. Both parties agree that the authoritative guidance on the of the assessment of the protected period is as set out in ***Susie Radin v GMB (2004) IRLR 893***. Mr Jones placed particular emphasis on the fact that that a protective award

is to punish the employer for the breach of Section 188 and, not to compensate the employee for loss they have suffered in consequence of the breach. To increase the award to 40 days would fail to give appropriate credit to the respondents for the steps they had taken, and which were recognised in the judgment.

38. Mr Brittenden countered that to effect that as the award is intended to be punitive, and the Respondent is under an obligation in respect of each Trade Union; the correct approach is to apply the 40 days protective award to ensure parity and to penalise the respondent. Such an approach is logical. The GMB did not negotiate exclusively on behalf of its members, but in respect of the interests of everyone falling within the bargaining unit, regardless of whether or not they were members of each union. Consequently, further to consult with the GMB equally affect everyone in the bargaining unit. To adjust the award of 40 to 30 days would be to fail to have regard to punitive element of the award, and there was no error of law in the Tribunal's decision to award 40 days protective.

39. The Tribunal was persuaded that Mr Britton's approach was the correct one. The award of 40 days reflected the extent of the breach in respect of one of recognised trade unions, and therefore the extent of the breach in respect of those of the bargaining unit, and the tribunal was not satisfied that there was a basis to reduce the protective award to a period of 30 days.

40. Lastly the tribunal considered Mr Jones's position that it would be open to the tribunal to unilaterally reconsider its decision under Rule 73 of the Rules and make a finding and fact to the effect that Mr Cook said in his evidence that he did not to engage with Engenda in correspondence in circumstances where he had already noted that Unite had responded. He submitted that this would have the effect that the tribunal should adjust the award to the GMB to 30 days and align it with that made in favour of that made to Unite.

41. There was no relevant application for reconsideration at the instance of the respondents before the tribunal. The GMB were not represented at this hearing and the tribunal was not satisfied that it was in the interests of justice

to reconsider its decision under rule 73 of the Rules in the course of the hearing. Such a reconsideration would require the Tribunal to inform the parties of the reason why the decision was being reconsidered, and thereafter reconsider the decision in accordance with rule 72 (2), under which the parties have to be given the opportunity to make representations. Further, as submitted by Mr Brittenden, there was no discernible error of law in the Tribunal's decision which would warrant a reconsideration under Rule 73.

Employment Judge: **L Doherty**
Date of Judgment: **25 May 2023**
Entered in register: **26 May 2023**
and copied to parties