EMPLOYMENT TRIBUNALS

Claimant: **Mr Markham and others (see attached schedule)**

Respondent: **Entec Design Services Limited (in Administration)**

Rule 96 party: **Secretary of State for Business and Trade**

JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal makes a protective award in respect of the Claimants whose names are set out in the attached 'Schedule of Claimants' who were dismissed as redundant by the Respondent on **03 August 2022**.

2. The Respondent is ordered to pay remuneration to the Claimants for the protected period. The protected period begins on **03 August 2022** and is for a period of 90 days.

REASONS

1. The Respondent company appointed a liquidator, Andrew J Cordon, in a voluntary winding up on **31 August 2022**.

2. On **06 November 2022**, Mr Markham and 12 of his former colleagues presented a Claim Form (Form ET1). The claimants claimed, under section 189(1)(d) Trade Union & Labour Relations (Consolidation) Act 1991, that their former employer, Entec Design Services Ltd failed to comply with its statutory obligations to inform and consult on collective redundancies. They sought a protective award. The proceedings were served on the Respondent on **10 November 2022**, with a response date of **08 December 2022**. No response was received. On **01 February 2023**, I directed the Claimants to provide further information.

3. Those orders were that, by **28 February 2023**, the Claimants' solicitors were to the Tribunal a statement or statements in which each claimant confirms the following:

3.1 The unit, or place of work ('the establishment'), to which he or she was assigned to carry out their duties and the number of employees based at that establishment.

3.2 The number of employees made redundant at their establishment.

3.3 The date of termination of the Claimants' employment.

3.4 Whether there was any independent trade union recognised by the Respondent at the establishment.

3.5 Whether there was any elected representative and if not, whether the Respondent invited any such elections.

3.6 The first date on which the Respondent announced that there were to be redundancies

4. The Claim Form, a letter from the liquidator of **09 January 2023** and my case management orders were sent to the Secretary of State who was added as an Interested Party in accordance with rule 96 of the ET Rules. The Secretary of State sent a response (in the form of an ET3) on **13 April 2023**. He neither supported nor resisted the claims. However, he made submissions which he asked the Tribunal to consider before arriving at any decision.

5. Under rule 21 of the Tribunal Rules of Procedure 2013, where on the expiry of the time limit in rule 16 no response has been presented and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, an employment Judge shall decide whether on the available material, a determination can properly be made of the claim or part of it. If there is, the judge shall issue a judgment, otherwise a hearing must be fixed before a judge alone. As this case is not contested, it is suitable for a rule 21 judgment to be considered but only if a judge is satisfied that a determination can properly be made without a hearing.

6. There was a preliminary hearing listed by telephone on **05 April 2023**. However, the Claimant's solicitor did not attend. Judge Aspden made some further orders, which were sent to the parties on **27 April 2023**. It is clear that Judge Aspden considered that my orders of **01 February 2023** had not been fully complied with and that there remained some ambiguity.

7. Those orders have now been complied with. I have been provided with witness statements from all 13 of the claimants.

8. The issues I had to decide were:

1.1 Were the claimants dismissed by the Respondent?

1.2 Did the Respondent propose to dismiss/dismiss as redundant 20 or more employees at one establishment within a period of 90 days?

1.3 Were the employees of a description in respect of which there was an independent trade union recognised by the Respondent?

1.4 If not, were there employee representatives appointed or elected by the affected employees, who had authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf?

1.5 If not, were there employee representatives elected by the affected employees, for the purposes of section 188 Trade Union & Labour Relations (Consolidation) Act 1992, in an election satisfying the requirements of section 188A(1) of that Act?

1.6 Has the Respondent failed to comply with a requirement of section 188 or section 188A of the Act?

1.7 If so, should the Tribunal make a protective award?

1.8 If so, what award should be made?

Findings

9. On **03 August 2022**, the Claimants were told that they were to be made redundant as redundancy was unavoidable as the business was insolvent. As it happened, **03 August 2022** was the last day of employment for all of the Claimants. It was also the date of termination of all the other employees. In total there were 21 employees, which included the 13 claimants. All of them were made redundant on **03 August 2022**. All the employees worked at the Respondent's premises, Sopwith Close, Preston Farm Industrial Estate, Stockton on Tees, TS18 3TT.

10. Therefore, I find that all the employees were dismissed on **03 August 2022** and that more than 20 employees at that one establishment were dismissed within a period of 90 days.

11. I also find that there was no independent trade union recognised by the Respondent. Nor was there any employee representative elected or invited to be elected. Further, it is not in dispute as confirmed by all of the witness statements that there was no consultation or provision of information provided by the Respondent for the purposes of consultation at all prior to the announcement of redundancies.

Relevant law

12. Under section 188 Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'), an employer is required to consult 'appropriate representatives' of employees who may be affected by dismissals, or measures taken in connection with them. If the employer recognises a trade union for purposes of collective bargaining in respect of employees affected by the dismissals, they are obliged to consult the appropriate trade union official. If there is no recognised trade union, the employer is obliged to consult either an existing body of employees' representatives who have been appointed or elected for other consultation purposes but who have authority to be consulted about the proposed dismissals, or representatives who have been elected specifically for the purpose of the redundancy consultation.

13. An employee may bring a claim for a protective award on his own behalf only if there is no recognised trade union or elected employee representative, or fi the claim relates to the employer's failure to arrange the election of employee representatives.

14. Section 188 requires there to be a proposal to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. There have been a number of cases both domestic and European concerning the meaning of 'establishment' for these for these purposes. In **Martime Ltd v Nautilus International** [2019] IRLR 286, CA, Underhill LJ made clear that the focus of the authorities was on the functional and organisational characteristics of the establishment and on whether it constituted a unit. Closely related to this is whether it is located at a single 'place'. The EU authorities made clear that the term was to be defined broadly: **Rockfon A/S v Specialarbejderforbundet i Danmark** [1996] I.C.R.R 673, ECJ and **Athinaiki Chartopoiia AE v Panagiotidis and others** [2007] 284, ECJ.

15. Basically, the 'establishment' is the unit, or place of work, to which the redundant employees are assigned to carry out their duties. In some cases (where a business does not have several distinct units) the establishment and the company (or the head office from which it operates) will be one and the same thing. However, in other cases, there may be several different 'establishments' to which employees are assigned and where those establishments are all part of a larger undertaking. There must be at least 20 based at each establishment before the duty to collectively consult is triggered in relation to that establishment.

16. The remedy for a failure to comply with section 188 is set out in section 189 TULRCA. The award is for a 'protected period', beginning 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 earlier). It continues for however long the tribunal decides is just and equitable (section 189(4) TULRCA). The award is subject to a 90-day maximum.

17. The authorities make it clear that the protective award is designed to be putative rather than compensatory: **Susie Radin Ltd v GMB & Others** [2004] I.C.R. 893. In that case, the court identified five factors which tribunals should have in mind when considering section 189 TULRCA:

    17.1 The purpose of the award is to provide a sanction,
    17.2 The focus must be on the seriousness of the employer's default – albeit the tribunal has a wide discretion as to what it considers just and equitable,
    17.3 The default may vary in seriousness from the technical to a complete failure, both to provide the required information and to consult,
    17.4 The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under section 188 and
    17.5 How the tribunal assesses the length of the period is a matter for the tribunal but that a proper approach where there has been no consultation is to start with the maximum of 90 days and reduce it only if there are mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate.

Conclusions

18. As observed by the Secretary of State in these proceedings, the Tribunal has to satisfy itself, among other things, that:

    18.1 The claimants are eligible to bring the claims.

    18.2 The Respondent must have proposed to dismiss/dismissed as redundant 20 or more employees at one establishment within a period of 90 days or less. If the dismissals were of employees based at multiple establishments, where fewer

than 20 employees were affected, the duty to consult would not arise and no protective award would be available to employees at that establishment.

19. I was satisfied from the material that there was no appropriate representative and that all the employees in these proceedings worked at a 'single establishment' which consisted of 20 or more affected employees all of whom were dismissed on **03 August 2022**.

20. The claimants are seeking an award of 90 days on the basis that there was zero consultation or information given in advance of the redundancies. There does not appear to be any dispute about this. In any even, I accept the unchallenged evidence of the claimants.

21. There is no suggestion that a protective award should not be made and I conclude that it is appropriate to make one. In the absence of any challenge to the evidence of the claimants and given the decision in **Susie Radin Ltd v GMB & Others** [2004] I.C.R. 893 and in the absence of any submissions that an appropriate award would be less than 90 days, an appropriate award would, in my judgment, be 90 days, the period running from **03 August 2022**.

Employment Judge Sweeney

Date: 19 June 2023

SCHEDULE OF CLAIMANTS

1.	Mr A Markham	2502133/2022
2.	Mr A Betts	2502134/2022
3.	Mr A Nicholson	2502135/2022
4.	Mr D Russell	2502136/2022
5.	Mr G Neasham	2502137/2022
6.	Mr I Robinson	2502138/2022
7.	Mr J Sutherland	2502139/2022
8.	Mr J Sucliff	2502140/2022
9.	Mr J Lancaster	2502141/2022
10.	Ms K Unsworth	2502142/2022
11.	Ms M Matkin	2502143/2022
12.	Mr M Cinnamond	2502144/2022
13.	Mr P Heaney	2502145/2022