



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No:4100446/2020

Hearing Held by Cloud Video Platform (CVP) on 21 September 2021

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Employment Judge: J McCluskey

Mr D Cowie & Others

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

MJ Ventilation Limited (in liquidation)

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**Respondent
Not present
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

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(1) It is found and declared that the respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992;

(2) The Tribunal makes a protective award in terms of section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992;

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(3) The claimants were made redundant on 25 October 2019. The respondent is ordered to pay remuneration to each of the claimants listed below for the protected period of 90 days, that being the period from 25 October 2019 until 22 January 2020:-

Douglas Cowie – lead claimant-4100446/2020

Sam Angus-4100447/2020

Bruce Bisset-4100448/2020

Alexander Brown-4100449/2020

James Brown-4100450/2020

Gail Brown- 4100451/2020

William Cunningham-4100452/2020

William Duncan-4100453/2020

Steven Fraser-4100454/2020

Darren Graham-4100455/2020

Kevin Kenyon-4100456/2020

James McKinney-4100457/2020

Terry McLellan-4100458/2020

Keeran McLeod-4100459/2020

Bruce Richards-4100460/2020

Stephen Robertson-4100461/2020

Andrew Smith-4100463/2020

Philip Souter-4100464/2020

James Waddell-4100465/2020

Susan Winter-4100466/2020

David Wishart-4100467/2020

REASONS

Introduction

1. A claim was presented on 24 January 2020 in which the claimants made a complaint of unfair dismissal and sought payment of a protective award, a statutory redundancy payment, notice pay, holiday pay and arrears of pay.
5 The claim form was presented by Mr D Cowie and a further twenty one individual claimants whose names and other details were listed in a schedule

to the claim form. The full list of claimants is included in the order of the Tribunal above.

2. Mr Blair Milne of Azets was appointed as provisional liquidator of the respondent on 30 October 2019, as interim liquidator on 3 December 2019
5 and as liquidator on 21 January 2020.
3. There was no ET3 response received by the Tribunal.
4. The claimants made an application to the Sheriff Court for leave to bring proceedings against the respondent in terms of section 130(2) of the Insolvency Act 1996 (as amended). That application was granted on 10 May
10 2021.
5. Notice of this final hearing was sent to the liquidator on 3 August 2021. The notice was sent for information only as no ET3 response had been received. The liquidator did not respond and was not present or represented at this final hearing.
- 15 6. The case came before the Tribunal for a final hearing to consider the protective award claims only. The Tribunal had confirmed to Mr Lawson by email dated 8 September 2021 that the other claims would remain sisted, with the respondent to confirm the position in relation to the other claims within three months.
- 20 7. Mr Bruce Bisset, one of the claimants, gave evidence. There were no other witnesses.
8. Mr Lawson confirmed that he represented all of the claimants referred to in the ET1 and accompanying schedule and that Mr Bisset was giving evidence on behalf of all of the claimants.
- 25 9. Mr Lawson provided a bundle of documents extending to 47 pages which was referred to during course of the hearing.
10. During his evidence Mr Bisset made reference to an email he had received on 25 October 2019 from the respondent. A copy of the email was provided to the Tribunal after the hearing.

Issues

11. The Tribunal considered that it had to determine the following issues:

- 5 a. Whether the respondent complied with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”)?
- b. Whether a protective award should be paid in terms of section 189 of the 1992 Act and, if so, how much?

Findings in fact

The Tribunal made the following findings in fact:

- 10 12. The claimants were employed by the respondent. The claimants were dismissed by reason of redundancy on 25 October 2019.
13. The respondent manufactured and installed ventilation systems for the construction industry.
14. Mr Bisset was a surveyor in the respondent’s business.
- 15 15. There were around eighty one employees employed by the respondent. All employees were dismissed by reason of redundancy on 25 October 2019.
16. The respondent’s main place of business was Candlehouse Lane, Coupar Angus, Blairgowrie. Manufacturing was carried out at this site and management and office staff were all based there.
- 20 17. The respondent also operated at two other smaller manufacturing sites within close proximity to Candlehouse Lane. One of these sites was across the road from Candlehouse Lane. The other was around half a mile away.
18. All management and office staff for the three sites were based at
25 Candlehouse Lane. Management decisions were made centrally at Candlehouse Lane for all three sites. There was no separate management structure for the other two manufacturing sites.

19. The other two manufacturing sites could not complete projects by themselves. They only manufactured part of what became the completed product of the respondent.
20. The factory operatives could be asked to carry out work in Candlehouse Lane and also in the other two manufacturing sites of the respondent.
21. On Friday 25 October 2019 the claimant received an email from Mr Michael Johnston, one of the directors of the respondent. The email said that Mr Johnston had taken the decision to wind up the business of the respondent and that the liquidator would be in touch to outline the process for claiming wages and other payments.
22. On Friday 25 October 2019 the employees of the respondent across all three sites were called to a meeting. At that meeting Mr Johnston told all present that he had taken the decision to wind up the business of the respondent and that the liquidator would be in touch to outline the process for claiming wages and other payments.
23. Mr Bisset was not at the meeting as he did not work on Fridays. He received an email with the information instead.
24. The respondent did not recognise an independent trade union for collective bargaining or any other purpose.
25. The claimants were not given any opportunity by the respondent to elect or appoint employee representatives prior to their dismissal by reason of redundancy.
26. There was no prior consultation by the respondent with the claimants in relation to their dismissal by reason of redundancy.

Observations on the evidence

27. The evidence of Mr Bisset was not challenged as the respondent in liquidation was not present at the final hearing and no ET3 form had been lodged.

28. The Tribunal accepted the evidence of Mr Bisset and found him to be a reliable and credible witness. There was no doubt as to his honesty.

Relevant Law

29. The Trade Union and Labour Relations (Consolidation) Act 1992 (“1992 Act”) contains obligations on employers where collective redundancies are contemplated. Those obligations apply where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Those obligations, broadly put, require consultation regarding avoiding the dismissals, reducing the number of dismissals and mitigating the consequences of the dismissals. The obligation is to consult with a recognised trade union or alternatively with elected employee representatives. This is in terms of section 188 of the 1992 Act.

30. The case of *Susie Radin Ltd v GMB & others* 2004 IRLR 400 remains good law. A proper approach where there has been no consultation is to start with the maximum period of 90 days and reduce it only if there are special circumstances justifying a reduction to an extent to which the Tribunal considers appropriate.

31. The case of *Clarks of Hove Ltd v Bakers’ Union* 1978 ICR 1076 confirms that a “standard” insolvency does not constitute special circumstances. There was in that case no disaster of a sudden nature or any emergency.

32. For the purposes of “one establishment” in section 188(1) of the 1992 Act, the case of *Athinaiki Chartopoiia AE v Panagiotidis & ors* [2007] IRLR 284 (paragraph 26) confirms that the European Court of Justice has determined that “establishment” should be construed broadly.

Submissions

33. Mr Lawson stated that it was only Mr Cowie and the other claimants listed in the schedule to the ET1 for whom he acted and for whom he sought a protective award.

34. He submitted that the three sites where the respondent operated should be treated as one establishment. The two smaller sites did not function as

5 separate entities. They had the same management and the same workforce and were therefore one establishment within the meaning of section 188 of the 1992 Act. He submitted that the European Court of Justice has determined that establishment should be construed broadly *Athinaiki Chartopoiia AE v Panagiotidis & ors* [2007] IRLR 284 (paragraph 26).

35. He submitted that the case of *Susie Radin Ltd v GMB & others* 2004 IRLR 400 remains good law. Where there has been no consultation the starting point for the protective award is the maximum period of 90 days. This should be reduced only if there are mitigating circumstances justifying a reduction.
- 10 He submitted that there were no such mitigating circumstances here and that the protective award should be made for the maximum period of 90 days.

Discussion and decision

36. The Tribunal was asked to make a finding that Candlehouse Lane and the other two smaller manufacturing sites were “one establishment” for the purposes of section 188(1) of the 1992 Act.
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37. Having considered the evidence, the Tribunal determined that the three sites did form “one establishment”. The Tribunal took into account that the smaller sites were within very close proximity to Candlehouse Lane; all management and office staff for the three sites were based at Candlehouse Lane; there was no separate management structure for the other two manufacturing sites; management decisions were made centrally at Candlehouse Lane for all three sites; the other two manufacturing sites could not complete projects by themselves and only manufactured part of what became the completed product of the respondent; and the factory operatives could be asked to carry out work in Candlehouse Lane and also in the other two manufacturing sites of the respondent.
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38. The Tribunal was therefore satisfied that the two smaller sites were not self-contained operating units. Rather the respondent’s three sites formed one establishment for the purposes of section 188(1) of the 1992 Act.

39. The 1992 Act contains obligations on employers where collective redundancies are contemplated. Those obligations apply where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Those obligations, broadly put, require consultation regarding avoiding the dismissals, reducing the number of dismissals and mitigating the consequences of the dismissals. The obligation is to consult with a recognised trade union or alternatively with elected employee representatives. There was no recognised trade union. No election or appointment of employee representatives took place. There was no individual consultation. The terms of section 188 of the 1992 Act were therefore not complied with.

40. All employees were made redundant on 25 October 2019. There were redundancy dismissals of 20 or more employees but less than 100 employees. In that circumstance, the obligation is for consultation to take place at least 30 days prior to the first dismissal taking place. That did not occur.

41. There was no consultation whatsoever. On the basis of the evidence the Tribunal heard, no special circumstances existed justifying departure from the provisions of the 1992 Act and the obligation of consultation imposed. The protective award is therefore made in respect of the 90 day period running from 25 October 2019 until 22 January 2020.

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30 **Employment Judge:**
Date of Judgment:
Date sent to parties:

J McCluskey
14 October 2021
15 October 2021