THE INDUSTRIAL TRIBUNALS

CASE REF: 5506/18

CLAIMANT: **Ivan Hawthorne**

RESPONDENT: **Palmer & Harvey McLane Ltd (In Administration)**

NOTICE PARTY: **Department for the Economy**

DECISION

(A) This complaint, under Article 217 of the Employment Rights (Northern Ireland) Order 1996 ("ERO"), is well-founded.

(B) We have decided to make a protective award in respect of this claimant.

(C) It is ordered that the respondent shall pay remuneration for the protected period.

(D) The protected period began on 28 November 2017 and lasted for 90 days.

The attention of the parties is drawn to the Recoupment Statement below. The address of the respondent is:

C/O PricewaterhouseCoopers LLP
Central Square
8th Floor
29 Wellington Street
Leeds
West Yorkshire
LS1 4DL.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Buggy**

Members: **Ms M O'Kane**
Mr T Wells

APPEARANCES:

The claimant was self-represented.

The respondent was not represented.

The Department was represented by Mr J Rafferty, Barrister-at-Law.

REASONS

1. We refer to the pending proceedings which have been brought by USDAW against this respondent. The USDAW proceedings were the subject of a main hearing which was conducted at the same time as the main hearing of this complaint. In their case, USDAW, like this complainant, made a complaint of breach of Article 216 of the ERO; in those proceedings, USDAW asked us to make a protective award in favour all the Mallusk-based staff of the respondent in respect of whom USDAW was recognised by the respondent for collective bargaining purposes. A Decision in the USDAW case is being issued at the same time as the Decision in this case; the numbering of paragraphs in this Decision is generally in line with the numbering of the paragraphs in the Decision in the USDAW case.

Dempsey

2. We refer to the Decision of a tribunal in *Dempsey and Others v David Patton and Sons (NI) Ltd (In Administration)* [case reference number 947/13 and Others. Decision issued on 4 April 2014]. In the present case, we have adopted and applied the statements of legal principle which were set out in *Dempsey*, to the extent that those principles are relevant in the context of the present case.

The collective consultation legislation

3. Article 216 of the ERO imposes duties upon an employer, in some circumstances, to collectively consult with certain workforce representatives.

4. Article 217 provides for the making of a complaint, by an individual, in certain circumstances, in respect of a failure, of the part of the employer, to comply with its duties, under Article 216, to consult with the appropriate representative, or representatives, of any employee/s who may be affected by proposed redundancy dismissals.

The context

5. The respondent company went into administration on 28 November 2017. On that date, the administrators informed USDAW, and all the employees of the respondent who were employed at its Mallusk site (in Antrim), that all the employees at that site were being made redundant, or would soon be made redundant. The redundancies took place in two phases. Most of the relevant employees were made redundant on 28 November 2017. The remainder were made redundant by the end of January 2018. This claimant, who was the most senior Northern Ireland-based employee of the respondent company, and who was based at Mallusk, was dismissed with effect from 24 January 2018.

The claim

6. The effect of Article 216 of the ERO can be usefully be summarised in the following terms. Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, that employer must consult, about those dismissals, all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals. For the purposes of Article 216, the appropriate representatives, in

respect of any "affected" person who is not of a description in respect of which an independent trade union is recognised, is whichever of the following employee representative the employer chooses:

(i) employee representatives appointed or elected by the affected employee/ affected employees otherwise than for the purposes of Article 216;

(ii) employee representatives elected, by the affected employees, for the purposes of Article 216.

6A. Mr Hawthorne was not of a description of employees in respect of which any independent trade union was recognised for collective bargaining purposes. (Of all the Mallusk-based employees, he was the only one who not of such a description). On the basis of his evidence, we are sure that there were no employee representatives, appointed or elected by him, who had authority from him to be consulted about the relevant redundancy dismissals (the dismissals which were relevant within the context of this complaint). We are also sure that no relevant employee representatives were elected by Mr Hawthorne for the purposes of Article 216.

7. In these proceedings, this complainant contends that, in breach of Article 216 of ERO, no relevant collective consultation, of the type which is envisaged in Article 216, took place, with anybody, in relation to the relevant dismissals.

The course of the proceedings

8. It is not clear to us whether the administrators have granted this particular complainant permission to bring these proceedings. If that permission has not yet been granted, it should be granted speedily, and without further delay. Our understanding is that any such permission can be granted retrospectively.

9. No response was presented by the employer.

10. We are glad that the Department has participated in these proceedings.

11. In this case, as in many similar cases, it is not expected that the employer will have sufficient funds to pay any protective award. In those circumstances, an employer has no economic incentive to participate in Article 217 proceedings, and will be entirely unaffected by the outcome of those proceedings. On the other hand, the Department, in its role as the statutory guarantor in respect of certain employment debts, including protective awards, does have an economic incentive to participate in the proceedings. In this case, the Department has participated in two respects. First, it has made written enquiries, with the administrator, in respect of various relevant factual matters. Secondly, it has been represented, by Mr John Rafferty, during the course of the main hearing.

12. Mr Rafferty's involvement in this case has been very helpful in clarifying the issues.

13. [This paragraph has deliberately been left blank].

14. The main hearing of this case took place on 8 November 2018 and on 1 March 2019. On the first day of the hearing, we received sworn oral testimony from this complainant (Mr Hawthorne) and from Ms Michala Lafferty.

15. On the second day of the hearing, we received a written witness statement from Mr Mark Todd.

16. During the course of the main hearing, our attention was drawn to the contents of various documents, most of which were contained in a bundle of documents.

17. Without objection from anybody, we treated evidence given in the USDAW case as being evidence in this case as well, and we treated evidence given in this case as being evidence in the USDAW case also.

The issues, the facts and our conclusions

18. First, it is clear that this particular complaint is in time. These proceedings were begun on 23 March 2018 and this particular complainant was not dismissed until 24 January 2018. Accordingly, these proceedings were begun during the period of three months beginning with the date on which the last of the dismissals to which, to which this complaint relates, took effect. (See paragraph (5) of Article 217).

19. The next issue is whether this complainant has the standing to make this Article 217 complaint. We are satisfied that the answer to that question is "yes". We are so satisfied for the following reasons. The effect of Paragraph (1) of Article 217 is as follows: This complainant has the standing to bring this Article 217 complaint because none of the following situations applied to him:

    (1) He was not an employee of a description in respect of which an independent trade union was recognised by the employer.

    (2) There were no employee representatives appointed or elected by him otherwise than for the purposes of Article 216 who had authority from him to be consulted about the proposed dismissals on his behalf.

    (3) No employee representatives had been elected by him for the purposes of Article 216.

    Because of the foregoing, sub-paragraph (d) of Paragraph (1) of Article 217 applied within the context of this complaint.

20. The third issue is whether a relevant Article 216 duty was owed at all. There obviously was an Article 216 duty to collectively consult with appropriate representatives of this complainant, against the following background and for the following reasons. First, the claimant fell within the personal scope of the situations contemplated by sub-paragraph (b) of paragraph (3) of Article 216. Secondly, the employer did make more than 20 Mallusk-based staff redundant during the three month period beginning on 28 November 2017. (For the purpose of deciding whether the "20 or more" quantitative criterion is satisfied in this case, one does not merely take account of the number of proposed dismissals of employees who fell

within the same "description" as this complainant; instead, one takes account of all of the employees, of whatever description, which the employer proposed to dismiss as redundant, within a period of 90 days of less, who were, at the relevant time, assigned to the same establishment as the claimant. (In this context, note the wording of paragraph (1) of Article 216).

21. The next issue is whether the Article 216 duty was complied with.

22. We are sure that on 28 November 2017, the Article 216 duty was not complied with at all, either in relation to USDAW, or in relation to any representative of the claimant. (On 28 November, the administrators' interactions with USDAW were confined to the making of announcements as to what was going to happen, as distinct from consulting. On that same date, the administrator's interactions with the claimant were also confined to the making of such announcements.)

23. Having considered the oral testimony of Ms Lafferty, the oral testimony of Mr Hawthorne, and the written statement of Mr Todd, we are sure that, in respect of those employees who were not dismissed until January, there were still no interactions, between the employer and USDAW, or between the employer and anybody else, of the sort which could reasonably be regarded as "consultation" within the meaning of Article 216.

24. The next issue is whether there were "special circumstances" which rendered it not reasonably practicable for the employer to comply with any requirement of Article 216.

25. We note that the effect of paragraph (6) of Article 217 is as follows. If, on a complaint under Article 217, a question arises as to whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of Article 216, it is for the employer to show that there were.

26. On the basis of the evidence which was made available to us, we are not satisfied that there were special circumstances which rendered it not reasonably practicable for the employer to comply with any particular requirement of Article 216.

27. Because of our conclusions in relation to the "special circumstances" issue, we do not need, for the purpose of deciding whether or not there has been a breach of Article 216, to determine whether the employer "took all such steps towards compliance … as were reasonably practicable in the circumstances" (See sub-paragraph (b) of paragraph (6) of Article 217).

28. Having arrived at the foregoing conclusions, in respect of the foregoing issues, it is clear to us that this complainant's Article 217 complaint is well-founded.

29. Accordingly, pursuant to paragraph (2) of Article 217, we are under an obligation to make a declaration to that effect.

30. We hereby make that declaration.

31. The next issue, which is a remedies issue, is whether we should make a protective award pursuant to this complaint.

32. In the context of this issue, we have carefully noted the statements of principle which were set out at paragraph 75-81 of *Dempsey*, and we have applied those principles within the factual context of this case.

33. In light of those principles, and in light of the factual context of this case, we are sure that the appropriate determination is to make a protective award in this case.

34. The next issue is the following: When should the protected period begin?

35. The effect of sub-paragraph (a) of paragraph (4) of Article 217 is that the protected period must begin with the date on which the first of the dismissals, to which the complaint relates, takes effect.

36. In this case, the first of the relevant dismissals took effect on 28 November 2017. Accordingly, the protected period must begin on that date.

37. The next issue is as follows: What should be the personal scope of the protective award?

38. The effect of paragraph (3) of Article 217 is that a protective award should be an award in respect of one or more descriptions of employees to which both of the following sub-conditions apply:

    (1) Those are employees who have been dismissed as redundant.

    (2) They are employees in respect of whose dismissal the employer has failed to comply with a requirement of Article 216.

39. In arriving at our conclusions in respect of the "personal scope" we have had regard to the statements of principle which are set out at paragraphs 267-309 of *Dempsey*.

40. In arriving at conclusions in respect of this particular issue, we have also had regard to the statements of principle which were set out at paragraphs 13-21 of my own Remedies Decision in *William Glendinning* v *Mivan (No 1) Ltd (In Administration)* [case reference number 470/14, Decision issued on 10 December 2014].

41. We are sure that this particular protective award should apply to Mr Hawthorne, and only to Mr Hawthorne. (Mr Hawthorne was the only Mallusk-based employee of the employer in respect of whom USDAW was not recognised for collective bargaining purposes).

42. The remaining remedies issue is as follows: What should be the duration of the protective award?

43. Because of the particular significance, in the circumstances of this case, of the "duration" issue, we have dealt with that issue under a separate heading below.

The duration of the protective award

44. Under this heading we have set out:

(1) findings of fact which are particularly relevant to the duration issue;

(2) a statement which refers to legal principles which are particularly relevant to the duration issue and

(3) those of our conclusions which are particularly relevant to the duration issue.

45. There was no collective consultation whatsoever, whether with USDAW, or with Mr Hawthorne, or with any representative of Mr Hawthorne, in respect of the redundancies which took place on 28 November.

46. By the time each of the November dismissals took effect, no relevant consultation (no consultation of the types which are envisaged in Article 216) had taken place with USDAW or with Mr Hawthorne.

47. Between the date on which the November dismissals took effect and the date on which the January dismissals took effect, there was some discussion, and some dialogue, between the administrators and USDAW, about those dismissals which did not take effect until January. However, those discussions, and that dialogue, primarily focussed on technical matters regarding the timing and management of the details of those dismissals (as distinct from being focused on the wider consultation-subjects which are contemplated in Article 216). Similarly, between the date on which the November dismissals took effect and the date on which Mr Hawthorne's own dismissal take effect, there was no discussion or dialogue, between the employer and Mr Hawthorne, or between the employer and any representative of Mr Hawthorne, which addressed any of the wider consultations-subjects which are contemplated in Article 216.

48. In deciding on the duration of the protective award in this case, we have considered and applied the principles which were set out at paragraphs 84-87 of *Dempsey*.

49. In arriving at conclusions on this issue, we have also had regard to the statements of principle which are set out at paragraphs 1168-1202 of "Harvey on Industrial Relations and Employment Law" [Division E Redundancy/4. Collective Redundancies/P]. In particular, we note (as Mr Paul Upson pointed out in a written submission which he provided to us in the USDAW case):

(1) At paragraph 1173, Harvey points out the following:

> "In a case where there has been a complete absence of consultation then, if there are no mitigating factors, the normal consequence should be a protective award for the maximum 90 days …".

(2) At paragraph 1187, Harvey states the following:

> "Where there has been a complete failure to consult, it is clear that the burden is on the employer if it wishes to establish that anything other than the maximum period should be awarded … [Where] a tribunal has sufficient evidence placed before it, whether by the employer or employee, to conclude that there has been a breach of [the GB equivalent of Article 216], it ought to be able to form a judgement based on that material of what protective award is just and equitable".

We are sure that, in this case, there was a complete absence of meaningful consultation, with USDAW, of the types which are envisaged in Article 216.

50. Against that background, and for those reasons, we have decided that the protected period is to be a period of 90 days.

51. According to a letter dated 21 December 2018, which was sent by Ms Amanda Harte, on behalf of the administrators, the situation was as follows:

> "(4) The administrators were appointed on 28 November 2017. Given the nature of the circumstances, in that this was an administration, it was not possible to conduct a consultation process with the employees who were made redundant on the date of appointment. In terms of the retained employees, the administrators understand that those employees were advised that certain subsidiary companies may be purchased. The administrators are aware of information and consultation processes, however, the administrators must, in the majority of cases, make rapid commercial decisions in order to sell and preserve at least the viable part of the business and the jobs that go with it, to obtain the best outcome for creditors".

52. On the basis of the evidence available to us, we are sure that it would have been practicable for the administrators to organise a half day's consultation with this complainant, on the topics which are envisaged in Article 216, and in the manner which is envisaged in Article 216.

53-58 [These paragraphs have deliberately been left blank.]

59. The attention of the parties is drawn to the Recoupment Statement, which is set out below, and which constitutes part of this decision.

Recoupment Statement

[1] In the context of this Notice:

(a) "the relevant benefits" are jobseeker's allowance, income-related employment and support allowance, universal credit and income support; and

(b) any reference to "the Regulations" is a reference to the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 (as amended).

[2] Until a protective award is actually made, an employee who is out of work may legitimately claim relevant benefits because, at that time, he or she is not (yet) entitled to a protective award under an award of an industrial tribunal. However, if and when the tribunal makes a protective award, the Department for Communities ("the Department") can claim back from the employee the amount of any relevant benefit already paid to him or her; and

it can do so by requiring the employer to pay that amount to the Department out of any money which would otherwise be due to be paid, to that employee, under the protective award, for the same period.

[3] When an industrial tribunal makes a protective award, the employer must send to the Department (within 10 days) full details of any employee involved (name, address, insurance number and the date, or proposed date, of termination of employment). That is a requirement of regulation 6 of the Regulations.

[4] The employer must not pay anything at all (under the protective award) to any such employee unless and until the Department has served on the employer a recoupment notice, or unless or until the Department has told the employer that it is not going to serve any such notice.

[5] When the employer receives a recoupment notice, the employer must pay the amount of that recoupment notice to the Department; and must then pay the balance (the remainder of the money due under the protective award) to the employee.

[6] Any such notice will tell the employer how much the Department is claiming from the protective award. The notice will claim, by way of total or partial recoupment of relevant benefits, the "appropriate amount", which will be computed under paragraph (3) of regulation 8 of the Regulations

[7] In the present context, "the appropriate amount" is the lesser of the following two sums:

(a) the amount (less any tax or social security contributions which fall to be deducted from it by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Department receives from the employer the information required under regulation 6 of the Regulations, or

(b) the amount paid by way of, or paid on account of, relevant benefits to the employee for any period which coincides with any part of the protected period falling before the date described in sub-paragraph (a) above.

[8] The Department must serve a recoupment notice on the employer, or notify the employer that it does not intend to serve such a notice, within "the period applicable" or as soon as practicable thereafter. (The period applicable is the period ending 21 days after the Department has received from the employer the information required under regulation 6).

[9] A recoupment notice served on an employer has the following legal effects. First, it operates as an instruction to the employer to pay (by way of deduction out of the sum due under the award) the recoupable amount to the Department; and it is the legal duty of the employer to comply with the notice. Secondly, the employer's duty to comply with the notice does not affect the employer's obligation to pay any balance (any amount which may be due to the claimant, under the protective award, after the employer has

complied with its duties to account to the Department pursuant to the recoupment notice).

[10] Paragraph (9) of regulation 8 of the 1996 Regulations expressly provides that the duty imposed on the employer by service of the recoupment notice will not be discharged if the employer pays the recoupable amount to the employee, during the "postponement period" (see regulation 7 of the Regulations) or thereafter, if a recoupment notice is served on the employer during that postponement period.

[11] Paragraph (10) of regulation 8 of the 1996 Regulations provides that payment by the employer to the Department under Regulation 8 is to be a complete discharge, in favour of the employer as against the employee, in respect of any sum so paid, but "without prejudice to any rights of the employee under regulation 10 [of the Regulations]".

[12] Paragraph (11) of regulation 8 provides that the recoupable amount is to be recoverable by the Department from the employer as a debt.

Employment Judge:

Date and place of hearing: **8 November 2018 and 1 March 2019, Belfast.**

Date decision recorded in register and issued to parties: