THE INDUSTRIAL TRIBUNALS

CASE REF: Various

CLAIMANTS:	**All the persons whose names and case reference numbers are referred to in the Schedule to this decision**
RESPONDENT:	**Williams Industrial Services Ltd (in administration)**
NOTICE PARTY:	**Department for the Economy**

DECISION

In each of the cases of the claimants referred to above ("these claimants"), our Decision is as follows:

(A) This particular 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 the descriptions of employees who are specified at paragraph 41 below.

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

(D) The protected period began on 6 February 2018 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 Stephen Cave
Joint Administrator
PricewaterhouseCoopers LLP
Waterfront Plaza
8 Laganbank Road
BELFAST
BT1 3LR

CONSTITUTION OF TRIBUNAL

Employment Judge:	**Employment Judge Buggy**
Members:	**Ms M O'Kane** **Mr T Wells**

APPEARANCES:

"The Thompsons claimants" were represented by Mr P Upson, Solicitor.

"The Worthingtons claimants" were represented Mr O Friel, Barrister-at-Law.

The respondent was not represented.

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

REASONS

1. In each of these cases, the claimant makes a complaint, pursuant to Article 217 of the Employment Rights (Northern Ireland) Order 1996 ("ERO").

2. In the present context, any reference to "the Thompsons claimants" is a reference to those claimants who are represented by Thompsons NI. The names of the claimants who are represented by Thompsons NI are as follows:

   Ronnie Johnston [CRN 565/18]
   Michael Johnston [CRN 5766/18]
   Richard Neill McCracken [CRN 5768/18]

3. In the present context, any reference to "the Worthingtons claimants" is a reference to claimants who are represented in these proceedings by Worthingtons Solicitors. All of the claimants in these proceedings, other than those who are named at paragraph 2 above, are represented by Worthingtons.

Dempsey

4. 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 these cases, 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 cases.

The collective consultation legislation

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

6. Article 217 provides for the making of a complaint, to a tribunal, in respect of a failure, on the part of the employer, to comply with it Article 216 duties.

The context

7. Each of these claimants, and other staff, were employed in Northern Ireland by the respondent company ("the Employer"). On 6 February 2018, each of these claimants, and several other employees of the Employer, were dismissed, by reason of redundancy, with effect from that date.

The claims

8. 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 proposed dismissals, "the appropriate representatives" of any of the employees who may be affected by the proposed dismissals. For the purposes of Article 216, the appropriate representatives of any affected employees, if those employees are not of a description in respect of which an independent trade union is recognised by their employer, is whichever of the following employee representatives the employer chooses:

    (i) employee representatives appointed, or elected, by the affected employees otherwise then for the purposes of Article 216 who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information, and to be consulted about the proposed dismissals, on their behalf; or

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

9. It is agreed, in the context of these cases, that none of the claimants, and none of those affected employees, was of a description in respect of which an independent trade union was recognised by the Employer. In the context of these cases, nobody contends that there were any employee representatives appointed or elected in the manner envisaged in sub-paragraph (i) above, or that there were any employee representatives who were elected by the affected employees in the manner which is contemplated at sub-paragraph (ii) above.

10. In these proceedings, each complainant contends that, in breach of Article 216 of ERO, no relevant collective consultation, of the types which are envisaged in Article 216, took place, with appropriate representatives of any of the employees who were made redundant.

The course of the proceedings

11. In each of these cases, the administrators have granted the complainant permission to bring these proceedings.

12. The Employer has not participated in these proceedings. According to a letter dated 8 June 2018, which was sent on behalf of the administrators:

> "[The] Joint Administrators will mount no defence to this claim. This is because the cost of doing so cannot be justified in the interests of the Company's creditors and is not intended to be disrespectful to the Tribunal".

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

14. 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 administrators, in respect of various relevant factual matters. Secondly, it has been represented, by Mr John Rafferty, during the course of the main hearing.

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

16. The main hearing of all of these cases took place on 29 April 2019. It was agreed by the participating parties that all of these cases should be heard together. The participating parties also agreed that evidence in any one of these cases should be treated as being evidence in all of these cases.

17. During the course of that hearing, we received sworn oral testimony from several witnesses.

18. During the course of the main hearing, our attention was drawn to the contents of various documents.

The issues, the facts and our conclusions

19. First, it is clear that all of these complaints were made in time. The relevant dismissals took place on 6 February 2018, and the proceedings in the Worthingtons cases were presented on 3 May 2018, and the proceedings in the Thompsons cases were presented on 30 April 2018.

20. The second issue is whether, in each instance, the complainant has the standing to make his Article 217 complaint. We are satisfied that each complainant does have the standing to make his Article 217 complaint, because: (1) no complainant is 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 the affected employees whose appointment/election fell within the scope of sub-paragraph (i) of paragraph 8 above. (3) No employee representatives were elected by the affected employees in an election which satisfied the requirements of Article 216A(1). Accordingly, each complainant, as an individual, has the standing to make his/her Article 217 complaint (See sub-paragraphs (a) and (d) of paragraph (1) of Article 217).

21. The next issue is whether an Article 216 duty was owed at all, in respect of the representatives of all of these claimants. We are sure that such a duty was indeed owed. The Employer did dismiss, as redundant, more than 20 employees, at least one particular establishment in Northern Ireland, in February 2018: If an Article 216 duty is triggered, in respect of redundancies of an employer's employees who were assigned to a particular establishment in respect of which 20 or more redundancies took place, there is a duty to collectively consult, with the appropriate representatives of <u>all</u> of the employees of the respondent employer who are affected by those actual or proposed redundancies, as distinct from only having a duty to consult with the representatives of employees of that employer who were assigned to the "triggering" establishment (assigned to the establishment to which of these 20 employees were assigned at the relevant time).

22. The next issue is whether the Article 216 duties were complied with.

23. We are sure that the Article 216 duties was not complied with at all. There was no collective consultation in relation to the dismissals which took place in February 2018.

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 217.

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, in each case, that the Article 217 complaint is well-founded.

29. In each of these cases, 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. In each of these cases, the next issue, which is a remedies issue, is whether we should make a protective award pursuant to the relevant complaint.

32. In the factual context of each of these cases, 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 each relevant case, we are sure that, in each of these cases, the appropriate determination is to make a protective award in that 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, each of the relevant dismissals took effect on 6 February 2018. 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" issue in this case, 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. The protective award, in these cases, applies to all of the claimants who are referred to in the Schedule below. That protective award also applies to all of the other employees of the Employer to whom all of the following conditions apply:-

    (1) The employee was dismissed by reason of redundancy in February 2018.

    (2) That employee did not present an Article 217 complaint to an industrial tribunal, which that employee subsequently withdrew.

    (3) At the time of his/her dismissal, that employee was assigned to an establishment in respect of which the employer was then dismissing, or proposing to dismiss, as redundant, 20 or more employees within a period of 90 days or less.

42. At one point, there were six Thompsons claimants in these cases; now there are only three. At the same point, there were 88 Worthingtons claimants in these proceedings, and now there are only 77.

43. At that point in the proceedings, the Department had expressed concerns that some of the complainants in these proceedings may not have been, or had not been, assigned, at the relevant time, to an establishment in respect of which the quantitative criterion was met.

44. In the present context, the "quantitative criterion" is the requirement that anybody who is within the personal scope of any protective award must have been assigned, at the relevant time, to an establishment where the Employer was proposing to dismiss as redundant 20 or more employees. (See sub-paragraph (b) of paragraph (3) of Article 217).

45. As a result of those concerns which the Department had then expressed, some of the Thompsons claimants and some of the Worthingtons claimants withdrew their cases.

46. As a result of those withdrawals, and in light of information and evidence which was provided during the course of, or within the context of, the main hearing, the Department ultimately had no "quantitative criterion" concerns in relation to any of the claimants in these pending cases, other than Mr Gary Alexander.

47. On the basis of the sworn testimony of Mr Snoddy we are satisfied that, at the relevant time, Mr Alexander was indeed assigned to an establishment in respect of which the quantitative criterion was met. (Mr Snoddy confirmed that, at the relevant time, Mr Alexander had worked at Hydebank Road as Mr Alexander was spending nearly all his time at Head Office, when he was not on site visits).

48. Accordingly, we are sure that the Employer did fail to comply with a requirement of Article 216 in respect of Mr Alexander's dismissal.

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

50. Because of the particular significance, in the circumstances of these cases, of the "duration" issue, we have dealt with that issue under a separate heading below.

The duration of the protective award

51. 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.

52. There was no consultation whatsoever in respect of the redundancies which took place on 6 February 2018.

53. 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*.

54. 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:

    (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".

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

56. On the basis of the evidence available to us, we are sure that it would have been practicable for the respondent, within the space of a single day:

(1) to set up and implement an electoral mechanism of the type which is contemplated in Article 216, and

(2) immediately afterwards, to organise a half day's consultation with whichever representatives were elected pursuant to that mechanism.

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

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

Consequential directions

59. If the Department for the Economy ("the Department") makes payments to employees pursuant to this Decision, it will be doing so because payments of remuneration under a protective award constitute a debt to which Article 227 of ERO applies. In that context, the Department will hardly need to be reminded of its power to obtain information, pursuant to Article 235 of ERO, from the employer.

60. In light of the provisions of Article 235, the Department may possibly wish to ask the administrator, pursuant to that Article, to provide the Department with a copy of the information which the administrator will in any event be providing (pursuant to regulation 6 of the Recoupment Regulations) to DfC.

61. Our current position is that we do not think that it is necessary or appropriate for us to name any specific individuals, other than the claimants whose complaints are the subject of this Decision, as individuals who are within the personal scope of this award.

62. However, we are willing to reconsider that approach if the Department asks us to do so.

Schedule

(1) Each of the three Thompsons claimants, who have pending Article 217 industrial tribunal complaints against this respondent.

(2) Each of the 77 Article 217 Worthingtons complainants, against this respondent, whose claims are still pending.

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 allowance and Income Support) Regulations (Northern Ireland) 1996 (as amended); and

(c) any reference to “the Department” is not a reference to the Department for the Economy and is a reference to the Department for Communities.

[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: 29 April 2019, Belfast.

Date decision recorded in register and issued to parties: