Case Number: 1300340/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Unite The Union	**AND**	(1) Caparo Atlas Fastenings Ltd (In Administration) (2) Secretary of State for Business Energy & Industrial Strategy

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 24 August 2017

EMPLOYMENT JUDGE HUGHES

Representation
For The claimants: Not in attendance, written submissions and bundle provided.
For the first respondent: Not in attendance, contents of bundle taken into account.
For the second respondent: Not in attendance, relied on the grounds of Response in the Response Form.

JUDGMENT

The judgment of the tribunal is that:-

1. The complaint that the first respondent failed to comply with a requirement of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well-founded.

2. The tribunal makes a protective award in respect of all employees of the first respondent who were based at its Darlaston site and were dismissed as redundant on or after 30 October 2015. The Tribunal orders the first respondent to pay to those employees remuneration for the protected period of 75 days beginning on 30 October 2015.

REASONS

Background & Issues

1 References in square brackets in these reasons are to pages in the bundle supplied by the claimant. On 7 March 2016 the claimant submitted a claim for a protective award on behalf of the employees of the first respondent's Darlaston site [37]. The claimant had complied with the Early Conciliation requirements. The claimant stated it had recognition rights with the first respondent for collective bargaining purposes, including redundancy consultation exercises. The claimant said that it was first notified of potential redundancies on 19 October 2015 and over 100 employees were made redundant on 29 October 2015. The claimant alleged the first respondent failed to comply with its legal obligations under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA").

2 On 12 February 2016 the joint Administrators for the first respondent consented to the case proceeding. The Administrators submitted a Response on behalf of the first respondent out of time. It was accepted out of time [47P]. The grounds of Response confirmed that: form HR1 was sent to the Secretary of State on 16 October 2015; Administrators were appointed on 19 October 2015; there was dialogue with the union and workforce from that point; but that there were special circumstances which meant consultation was curtailed from the required 45 days to 8 working days.

3 The special circumstances relied on were that there had been third party supplier price increases and/or duress payments for completing work, releasing product and maintaining continuity of supply which threatened the first respondent's financial viability. Having been appointed, the Administrators approached a key customer to whom 91% of the respondent's sales were made to suggest they purchase the first respondent and support trading in the interim. The customer was not interested in purchasing and informed the Administrators that it was in the process of acquiring a competitor and would be transferring its orders to that entity. The customer said it would not contribute to ongoing trade costs in the interim because it had stock reserves. Having failed to sell to that customer, or to find another buyer, the Administrators decided there was no option but to close the site.

4 In addition to raising a special circumstances defence, the first respondent said that the claimant was put to strict proof of its standing to bring a protective award claim, suggesting that one employee representative had been elected for employees not covered by the recognition agreement and/or that an employee had brought a separate claim for a protective award in this Tribunal. In addition, the first respondent queried whether the employees were based at a single establishment. The first respondent contended there should be no protective award due to special circumstances and/or it should be reduced to reflect the fact that consultation had taken place.

5 The second respondent was joined as an interested party and submitted a Response. The second respondent accepted that the first respondent was insolvent [47F]. The second respondent (understandably) was unable to comment on the extent to which consultation had taken place but did ask the Employment Tribunal to satisfy itself that the employees were based at a single establishment. The second respondent pointed out (correctly) that the maximum payable from the National Insurance Fund is 8 weeks' pay i.e. 42 days which may be subject to deductions for sums already paid and/or recoupment.

6 After case management the case was listed for a remedy hearing which came before me on 24 August 2017. The points in dispute were:

6.1 Could the first respondent rely on the special circumstances defence in section 188(7) TULCRA?

6.2 Were the employees based at a single establishment?

6.3 Was there a failure to consult?

6.4 If so, what is the appropriate protected period? This, of course, sets the level of the award, subject to the caveats raised by the second respondent in respect of the amount properly recoverable from the National Insurance Fund.

7 At the request of the parties this hearing was dealt with on paper which is why I have produced written reasons. The claimant provided written legal submissions, three witness statements, case law and a bundle. The first respondent relied on its Response Form and there was also evidence in the bundle relevant to its grounds of resistance, which I took into account. The second respondent relied on its Response Form.

8 I shall deal with the Trade Union recognition point first, since it appears to be in dispute. Witness statements from the Regional Organiser for Unite, Ms Caroline Crolley, and from Mr Stanley Hale, a Shop Steward at the Darlaston site, confirmed that the Union is recognised for collective bargaining purposes. Mr Hale confirmed he has been involved in previous redundancy consultations with the first respondent [133] and in negotiations over pay and terms and conditions. Mr Paul Wright, the Works Manager, tendered a witness statement confirming that Unite was the recognised Trade Union, and that he had negotiated with the Union over pay, terms and conditions etc. In addition, the sequence of events set out below (which is not in dispute) confirms that the Administrators were in dialogue with Unite as from 19 October 2015. It may well be that an employee representative was elected, I have no way of knowing, but given the above points it would appear that was unnecessary. It may also be the case that an individual claimant has submitted a separate Claim Form to this Tribunal, as asserted by the first respondent. However, it does not follow that the

elected representative (if such there was) or the individual claimant (if such there is) has standing to claim a protective award. In short, it was very clear to me that Unite was the recognised Trade Union and as such had standing to bring this claim.

9 I shall next deal with the single establishment point. It is quite clear that this claim relates to the closure of the first respondent's Darlaston site which plainly and obviously was a single establishment.

10 The remaining facts appear not to be in dispute. They are as follows:

10.1 Form HR1 (advance notice of redundancies) was sent to the secretary of State on 16 October 2015 [47Z]. It stated that the first proposed dismissal was "no earlier than 19 October 2015". It was not provided to the claimant until later.

10.2 On 19 October 2015 joint Administrators were appointed [74].

10.3 Ms Crolley found out that day that the first respondent was in administration from a news report.

10.5 Later that day there was a conference call between the Administrators and the Union representatives during which it was stated that the first respondent was aware that it was in financial difficulties from July 2015. Mrs Crolley pointed out that this meant there could be grounds to bring a protective award claim.

10.6 On 20 October employees were informed that the first respondent was in administration.

10.7 On 21 October employees were given an FAQ relating to potential redundancies [54 to 57].

10.8 On 22 October the Administrators met with employees in an employee consultative forum [58 to 60].

10.9 On 23 October there was an update conference call between the Administrators and the Union representatives during which the Administrators confirmed there was considerable interest from potential purchasers and they were expecting offers.

10.10 On 28 October the information required by section 188(4) was provided to the Union [63 to 67].

10.11 On 29 October there was an update conference call between the Administrators and the Union representatives during which the

Administrators informed the Union that a decision had been taken to close the site.

10.12 On 30 October employees were informed of the decision, told they were redundant and about 129 were sent home. About 20 were retained temporarily to help wind up the business.

10.13 The Administrators' report (form 2.17B) confirmed that objective (a) – maintaining the business as a going concern - was not viable; consequently objective (b) – achieving a better result for creditors' than if the business was wound up without being in administration - was pursued [83]. The report confirmed there had been no offers to purchase; that the business was loss making; that further deterioration was anticipated; and that there was no option but to cease trading. The report stated that 129 redundancies were made on 30 October 2015.

Submissions

11 A summary of the claimant's submissions is that there was a wholesale failure to consult and that the eventual outcome was apparent to the first respondent since July 2015 and therefore there was time to conduct the 45 day consultation required by statute. The claimant argued that a wholesale failure to consult should attract a 90 day award, the award being punitive not compensatory by reference to Susie Radin Ltd v GBM [2004] IRLR 400. The claimant's submissions did not address the special circumstances point, but Ms Crolley did in her witness statement, saying that consultation could have taken place earlier and that she did not accept there were special circumstances.

12 A summary of the first respondent's case is that there should be no protective award because of special circumstances or that the protected period and protective award should be less than 90 days because there was some consultation.

13 The second respondent's position is as set out in paragraph 5.

The law

14 Section 188 TULCRA (as amended) provides:

Duty of employer to consult . . representatives.

(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.]

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least [45 days] , and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(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:–

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, 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;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).]

(2) The consultation shall include consultation about ways of—

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.]

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) For the purposes of the consultation the employer shall disclose in writing to the [appropriate] representatives—

(a) the reasons for his proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed, . . .

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect. .

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.]

[(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer’s undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.]

(5) That information shall be [given to each of the appropriate representatives by being delivered to them], or sent by post to an address notified by them to the employer, or [(in the case of representatives of a trade union)] sent by post to the union at the address of its head or main office.

[(5A) The employer shall allow the appropriate representatives access to [the affected employees] and shall afford to those representatives such accommodation and other facilities as may be appropriate.]

(6). . . . .

(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. [Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.]

(7A) and (7B) are not relevant to this case.

(8) This section does not confer any rights on a trade union [, a representative] or an employee except as provided by sections 189 to 192 below.

15 Section 189 TULCRA (as amended) provides as follows:

Complaint . . and protective award.

[(1)Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground–

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.]

[(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.

[(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied.]

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) 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.

(4) The protected period—

(a) begins 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 the earlier, and

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188;

but shall not exceed 90 days . . . .

(5) An [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the [date on which the last of the dismissals to which the complaint relates] takes effect, or

(b) [during] the period of three months beginning with [that date], or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented [F8during the] period of three months, within such further period as it considers reasonable.

[Where the complaint concerns a failure to comply with a requirement of section 188 [or 188A] , section 292A (extension of time limits to facilitate

conciliation before institution of proceedings) applies for the purposes of subsection (5)(b).]

(6) If on a complaint under this section a question arises—

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,

it is for the employer to show that there were and that he did.

Conclusions

16 I have already found as a fact that the claimant has standing to bring this claim and that the claim concerns over 100 employees employed at the same establishment.

17 I shall next deal with the special circumstances argument. Section 188(7) provides that if there are special circumstances which render it not reasonably practicable for any employer to comply with a requirement to inform and/or consult, the employer shall take all steps towards compliance as are reasonably practicable in the circumstances. Section 189(6) makes it clear that the burden of proof is on the employer to show that there were special circumstances and that he took all such steps as were reasonably practicable. The statute is silent as to what might constitute special circumstances.

18 There are authorities on this question. IDS Handbook on Redundancy carries a summary of Clarks of Hove Ltd v Bakers' Union [1978] ICR 1076 CA in which it was held that a "special circumstance" must be something "exceptional", "out of the ordinary" or "uncommon". In that case the Court of Appeal said that insolvency on its own is not a special circumstance. Far from being "exceptional" or "out of the ordinary" it is a fairly common occurrence. The Court said that whether special circumstances exist will depend entirely on the cause of the insolvency. If, for example, sudden disaster strikes a company, making it necessary to close, the plainly that would be capable of being a special circumstance, whether the disaster if physical or financial. But where the insolvency is due to a gradual running down of the company, a tribunal is entitled to conclude there are no special circumstances. The facts were that the company was in financial difficulties and required about £100,000 to meet its obligations. Because of an adverse report on its affairs, a crucial loan was refused. The last hope that some shops might be sold off proved to be ill-founded and redundancy

notices were sent out. The Court of Appeal upheld the Tribunal's finding that those facts disclosed no special circumstances.

19 IDS also provides an example of what could constitute special circumstances. In Shanahan Engineering Ltd v Unite the Union EAT/0411/09 it was held that an urgent requirement by a client to reduce workers on its site for health and safety reasons did amount to a special circumstance but that nevertheless there should have been some attempt at consultation.

20 I considered that the Clarks case was, on its facts, very similar to the situation here. The first respondent had been in financial difficulties for some time and the precarious financial situation was known of since July 2015. It was not improving and was deteriorating according to the Auditors' report. It was caused by the respondent's suppliers (not the customer). It follows that the first respondent knew, or should have known, at that point that there was a likelihood of at least some redundancies in the future. If consultation had taken place then, it could have been over the full 45 day statutory period. By contrast, the information that the first respondent's main customer was intending to take its orders elsewhere came very late in the day. It must have been at some point between the update telephone conference on 23 October 2015, at which there was optimism that a buyer would be found, and 28 October 2015 which was when the statutory information was sent to the Union. It may well be that the information about the loss of that major customer triggered the decision to close the site, but it was not the cause of the insolvency situation because it had not yet happened. I concluded there were no special circumstances. If, hypothetically speaking, the first respondent had been financially viable but then lost its major customer and 91% of its orders, I would have held that there were special circumstances and would have had to consider the second limb of section 188(7) i.e. whether such consultation as there was constituted all such steps as were reasonably practicable.

21 In view of my conclusion that there were no special circumstances, the first respondent had a legal obligation to consult and did not consult for the required statutory period. Consequently the claimant is entitled to a protective award.

22 Section 189(4)(b) TULCRA provides that the protected period is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188 but shall not exceed 90 days.

23 The Susie Radin case remains the primary authority on the approach tribunals should have in mind when applying s189. There are five factors identified which are as follows: (1) the purpose of the award its to provide a sanction, not compensation; (2) the tribunal has a wide discretion to do what it considers to be just and equitable but the focus must be the seriousness of the

employer's default; (3) the default may vary in seriousness from a technical to a complete failure both to provide the required information and to consult; (4) the deliberateness of the failure might be relevant… ; and (5), it is a matter for the tribunal to assess the length of the protected period, but a proper approach where there has been no consultation is to start with the maximum period of 90 days and reduce only it if there are mitigating circumstances justifying a reduction to the extent which the tribunal considers appropriate.

24 I shall deal with the factors in Susie Radin in turn. As to the first factor, I acknowledge the protective award is a sanction. As to the second and third, the seriousness of the default is where the focus must be. In this case the claimant says it was wholesale. I disagree. The first respondent did provide the required information, albeit very late in the day; and did consult for 8 working days. I accept that this was at a point when if no buyer was found redundancies were possible. However, had it not been for the information regarding the impending loss of the customer, redundancies were not inevitable. Consequently I accepted there was genuine, albeit curtailed, consultation. As to the fourth factor, I did not find any evidence to suggest a deliberate failure to consult. As to the fifth factor, I did consider the unexpected news about the major customer was a mitigating circumstance, because the likelihood is consultation would have gone on longer but for that. Although I decided that the failure was not wholesale, I did consider the default to be serious. Consultation at a much earlier point was possible; it did not occur; and the consequence was that the effectiveness of consultation (both in terms of avoiding redundancies and ameliorating their consequences) was greatly reduced.

25 I had to consider the appropriate protected period bearing in mind my above findings. I decided that it was just and equitable for the protected period to be 75 days.

26 I have not taken steps to calculate the sums due to each claimant because I am in no position to do so for the reasons stated by the Secretary of State. A note on recoupment is attached to this judgment so that the necessary administrative steps can be taken for such sums as may be due to be calculated and paid.

Signed by ________________________ on 24 August 2017
Employment Judge Hughes

Judgment sent to Parties on
25 August 2017

NOTE: the following statement is given under Regulation 5 (2) (b) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Regulations") and advises the respondent of its duties under regulation 6, and of the effect of Regulations 7 and 8, of the Regulations.

(1) The respondent is required to give to the Benefits Agency in writing:

(a) the name, address and National Insurance number of every employee to whom the above protective award relates; and

(b) the date of termination (or proposed termination) of the employment of each such employee.

(2) The respondent is required to comply with paragraph (1) above within the period of 10 days commencing on the date on which the judgment was announced at the hearing, or, if it was not so announced, the date on which the judgment was sent to the parties.

(3) No remuneration due to an employee under the protective award shall be paid to him until the Benefits Agency has (a) served on the respondent a notice ("a recoupment notice") to pay the whole or part of the award to the Benefits Agency or (b) informed the respondent in writing that no recoupment notice is to be served.

(4) The sum due to the Benefits Agency under a recoupment notice shall be the lesser of:

(i) the amount (less any tax or social security contributions which fall to be deducted by the respondent) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Benefits Agency receives from the respondent the information mentioned at paragraph (1) above; and

(ii) the amount paid by way of, or as on account of, jobseeker's allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date mentioned at (i) above.

(5) The sum due under the recoupment notice shall be paid forthwith to the Benefits Agency. The balance of the protective award shall then (subject to deduction of any tax or social security contributions) be paid to the employee.

(6) The Benefits Agency shall serve a recoupment notice within the period of 21 days after the date mentioned at paragraph 4 (ii) above, or as soon as practicable thereafter.

(7) Payment by the respondent to the employee of the balance of the protective award (subject to deduction of any tax or social security contributions) is a complete discharge of the respondent in respect of any sum so paid.

(8) The sum claimed in a recoupment notice is due as a debt by the respondent to the Benefits Agency, whatever may have been paid to the employee and whether or not there is any dispute between the employee and the Benefits Agency as to the amount specified in the recoupment notice.