



# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mrs Elin Sibbet  
(2) Miss Nichola Beacham  
(3) Mrs Claire Cale  
(4) Mr Andrew Saxton  
(5) Mrs Joanna French

**Respondent:** The Fencing Partnership Limited (in administration)

**Heard at:** Cardiff      **On:** 11<sup>th</sup> February 2019

**Before:** Employment Judge Howden-Evans (sitting alone)

**Representation**

Claimants: (1) No attendance  
(2) In Person  
(3) In Person  
(4) No attendance  
(5) No attendance

Respondent: No ET3 response form (debarred)

## JUDGMENT

1. For the purposes of Section 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA"), I find that in breach of Section 188 TULCRA, the respondent failed to comply with its duty to consult employee representatives (in the absence of a trade union being recognised by the respondent).
2. The remedies under Section 189(1)(c) TULCRA are as follows:
  - 2.1. I make a declaration that, as affected employees, the claimants' complaints are well founded;
  - 2.2. I make a protective award.
3. For the purposes of Section 189(3) TULCRA, the former employees of the respondent covered by the protective award are each of the claimants named

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in these proceedings, as each claimant is presenting their complaint as an individual affected employee (see *Independent Insurance Company Ltd v Aspinall* 2011 ICR 1234).

4. For the purposes of Section 189 (4) TULCRA, the protected period began on 29<sup>th</sup> January 2018. I consider it just and equitable, having regard to the seriousness of the respondent's failure to comply with Section 188 TULCRA, for it to last 90 days.

## **REASONS**

1. Following a period of ACAS EC conciliation, by ET1 claim forms presented on 7<sup>th</sup> February 2018, 2<sup>nd</sup> February 2018, 2 February 2018, 13<sup>th</sup> February 2018 and 12<sup>th</sup> February 2018 respectively, the claimants contended (among other matters), that contrary to Section 188 TULRCA, the respondent had failed to comply with its duty to consult and sought a protective award under Section 189 TULRCA.
2. By Order of 27<sup>th</sup> March 2018, Employment Judge S Davies, directed the cases would be heard together and notified the parties that as the respondent company was in administration, proceedings could not be continued without the consent of the Administrator.
3. By letters of 26<sup>th</sup> April and 31<sup>st</sup> May 2018, David Hill and Huw Powell, joint administrators confirmed they had no objection to the claimants' proceedings.
4. No ET3 response has been received in any of these claims. It follows that the respondent company is debarred from defending the claims for the purposes of Rule 21(3) of the tribunal's Rules of Procedure 2013. This means the tribunal has not been presented with any "special circumstances" defence.

### Evidence

5. I accept the unchallenged evidence of Miss Nichola Beacham and Mrs Claire Cale. Consequently, I find:
  - 5.1. There was no union recognised by the respondent for collective bargaining purposes.
  - 5.2. There was no attempt to arrange employee representative elections.
  - 5.3. There was no consultation with any employee representative acting on behalf of the affected individuals at any time.
  - 5.4. On 29<sup>th</sup> January 2018, without any prior warning, consultation or discussion, the claimants were told they were being made redundant with immediate effect as the respondent company had ceased trading.
  - 5.5. In total, the respondent made 23 employees redundant on 29<sup>th</sup> January 2018.

### Analysis and Conclusions

6. It is sad when a company such as the respondent, which has a long history in South Wales, can trade no longer. The respondent company's administration has been a loss to those who worked there and their families and communities. No doubt it tried hard to survive. However, a company cannot fail to engage in discussions and consultation with trade unions, or in their absence, employee representatives.
7. A protective award is punitive and not compensatory. Where there has been no consultation at all it is appropriate to start at the maximum period of 90 days; see the leading case of *Susie Radin v GMB* [2004] IRLR 400.
8. I have been mindful of the EAT's decision in *Lancaster University v UCU* [2011] IRLR 4, that I should place a serious breach of the duty to consult at the top of the protective award and then look for mitigation. In this case, with no evidence from the respondent, I have found no mitigating factors.
9. Accordingly, the appropriate period for the protective award is 90 days. The respondent must pay 90 days gross pay to each of the claimants.

## Calculations

### Mrs Elin Sibbet

1. Mrs Sibbet is owed **£1,663.70** (gross) for outstanding wages. The claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded in respect of the unpaid wages.
2. Mrs Sibbet's protective award amounts to **£5,105.70** (£56.73 gross daily wages x 90 days)
3. The total amount owed to Mrs Sibbet is **£6,769.40**. In the event of this debt not being paid in full within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award that remains unpaid. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

### Miss Nichola Beacham

4. Miss Nichola Beacham's protective award amounts to **£4,945.50** (£54.95 gross daily wages x 90 days)
5. The total amount owed to Miss Beacham is **£4,945.50**. In the event of this debt not being paid in full within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award that remains unpaid. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

**Mrs Claire Cale**

6. Mrs Claire Cale has been dismissed with insufficient notice. She is entitled to **£1,556.30** compensation for breach of contract for lack of notice (notice pay (net)).
7. Mrs Claire Cale's protective award amounts to **£9,271.80** (£103.02 gross daily wages x 90 days)
8. The total amount owed to Mrs Cale is **£10,828.10**. In the event of this debt not being paid in full within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award that remains unpaid. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

**Mr Andrew Saxton**

9. Mr Andrew Saxton is owed **£3,084.48** (gross) for outstanding wages and **£293.76** (gross) for unpaid holiday pay. The claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded in respect of the unpaid wages and unpaid holiday pay.
10. Mr Andrew Saxton's protective award amounts to **£9,441.90** (£104.91 gross daily wages x 90 days)
11. The total amount owed to Mr Saxton is **£12,820.14**. In the event of this debt not being paid in full within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award that remains unpaid. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

**Mrs Joanna French**

12. Mrs Joanna French is owed **£867.72** (gross) for outstanding wages. The claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded in respect of the unpaid wages and unpaid holiday pay.
13. Mrs Joanna French's protective award amounts to **£2,655.90** (£29.51 gross daily wages x 90 days)
14. The total amount owed to Mrs French is **£3,523.62**. In the event of this debt not being paid in full within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award that remains unpaid. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

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Employment Judge Howden-Evans

11 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE