EMPLOYMENT TRIBUNALS

Claimant: Mr M McCall and 23 others (see schedule)

Respondent: Premier Engineering (Lincoln) Limited

Heard at: Nottingham **On:** 17, 18, 19 and 20 February 2020

Before: Employment Judge Brewer
Mrs J M Bonser
Mr M Alibhai

Representation

Claimant: Mr P Sangha, Counsel
Respondent: Mr P Clarke, Consultant

JUDGMENT

1. **The claims for unpaid annual leave succeed**
2. **The claims for a protective award succeed**
3. **The claims for failing to provide a statement of particulars succeed**

REASONS

Introduction

1. These claims have been brought by the claimants whose names appear in the schedule to this judgment. The claimants brought claims for outstanding annual leave pay, failure by the respondent to comply with its obligations in relation to collective redundancies and failure to provide a statement of particulars in accordance with their obligation under section 1, Employment Rights Act 1996. We had an agreed bundle, witness statements and heard oral evidence from Ian Chestney, Site Manager and Harry Warren, Managing Director of the respondent. Several test cases were agreed for the claimants and accordingly we heard from Stewart Sawyers, Darren Rowland and Keith Gibson.

2. In relation to the claims for holiday pay, the respondent accepted that it had miscalculated the claimants' holiday pay and agreed the figures set out in Appendix 1 to this judgment and we so award each claimant the amount set out against their name in that Appendix.

Issues

3. Given the respondent's concession in relation to the holiday pay claims, the following issues were determined by the tribunal:

    a. Does the respondent recognise one or more trade unions union?
    b. Were the claimants dismissed by reason of redundancy?
    c. If so, did the respondent comply with the information and consultation requirements of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)?
    d. If not, can the respondent show the special circumstances defence is made out?
    e. If not, are the claimants entitled to a protective award and if so, what is protected period?
    f. What period should the award cover?
    g. Did respondent fail to provide the claimants with statements of particulars pursuant to section 1, Employment Rights Act 1996 (ERA)?
    h. If so, should there be an award of compensation pursuant to section 38 and schedule 5 of the Employment Act 2002 (EA), and if so, should that be 2 weeks' pay or 4 weeks' pay?

Law

4. The relevant law is as follows.

ERA

1 Statement of initial employment particulars.

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment…

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

EA

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 or under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an employee shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

SCHEDULE 5
TRIBUNAL JURISDICTIONS TO WHICH SECTION 38 APPLIES

Section 145A of the Trade Union and Labour Relations (Consolidation) Act 1992 (inducements relating to union membership or activities)
Section 145B of that Act (inducements relating to collective bargaining)
Section 146 of that Act (detriment in relation to union membership and activities)

Section 23 of the Employment Rights Act 1996 (c. 18) (unauthorised deductions and payments)

TULRCA

188 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.

(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.

189 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.

(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

(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.

5. We note that for the purposes of the s.1 claim a weeks' pay is capped at the current statutory maximum of £525.00. For the purposes of a protective award a weeks' pay is uncapped (see s.227 ERA).

6. We refer to relevant case law below.

Findings of fact

7. The claimants were all employed by the respondent to work on a specific contract under which M & W, a main contractor to Siemens, engaged the respondent to complete what are described as 'pipe works'. Thus the respondent was engaged under a sub-contract between it and M & W.

8. The respondent employed around 96 employees on site undertaking various roles. The respondent also engaged a number of self-employed workers who are not part of this litigation. This was an unusual contract for the respondent who historically worked on contracts requiring between 6 to 10 staff.

9. The claimants are all members of either the GMB or Unite unions. The issue of whether the respondent recognised either of those unions is highly relevant because if they are recognised then as a matter of law it was for the unions to bring the protective award claims, not the individual claimants as is clear from section 189(1) TULCRA (and see **Northgate HR Ltd v Nigel Mercy [2007] EWCA Civ 1304**, Court of Appeal).

Union recognition

10. The respondent does not have a recognition or collective agreement with any trade union. However, the question arose whether given the discussions which ensued between the respondent and the representatives of two unions, the GMB and Unite, the respondent can be taken to have recognised either or both.

11. The evidence relevant to this issue was that the respondent does not have trade union representatives amongst its workforce. However, when the respondent issued a draft contract, a number of employees asked union representatives to discuss some of the terms with the respondent and there was contact on several occasions between the respondent and a representative of the GMB (Steve Clarkson) and of Unite (John McIntyre). The respondent

said that it agreed to engage with the unions on this occasion because the 'men on site' asked them to

12. Recognition is dealt with in s.178 TULRCA which we have not felt the need to set out above. However, the following cases and principles are relevant to our consideration.

13. In order to meet the S.178 definition of recognition, it is not enough that an employer is merely willing to consult or discuss with a union on one of the matters listed in that section. It must be shown that the employer is willing to negotiate with a view to actually reaching an agreement. This is a question to be decided objectively on the facts. In **Unite the Union v Sainsbury's Supermarkets Ltd and anor ET Case No.2403815/11,** for example, the union was not recognised despite a sophisticated process of regular consultation about employment issues, since there was no process of bargaining. Similarly, in **Union of Shop, Distributive and Allied Workers v Sketchley Ltd 1981 ICR 644**, EAT, the union was granted representation rights but specifically excluded from negotiation rights. The EAT held that this did not amount to an agreement recognising the union. However, the fact that the company had agreed a procedure for handling redundancies with the union might mean that the union was recognised on a S.178 matter.

14. These cases highlight the fact that there is an important difference between consultation and negotiation. In **Working Links (Employment) Ltd v Public and Commercial Services Union EAT 0305/12** there was evidence of a long history of WL Ltd consulting with PCSU over a number of matters, including redundancies, disciplinary procedures, the provision of facilities to the union and the machinery for further consultation and negotiation. Based on that evidence, an employment judge concluded that the employer engaged in collective bargaining on at least two and possibly three of the matters set out in S.178(2). Accordingly, she found that PCSU was recognised within the meaning of S.178(3). The EAT overturned this decision, holding that the employment judge had muddled the concepts of negotiation (which is about striking a bargain) and consultation. She had failed to identify clear and unequivocal evidence demonstrating that there had been negotiations over facilities, disputes resolution or the machinery for further negotiations or consultation. An employer's willingness to negotiate may be demonstrated by a formal written agreement conferring negotiating rights, or it may be inferred through a course of dealings between the parties. Written evidence, or the lack of it, is not necessarily conclusive.

15. As noted above, negotiation rights do not have to be comprehensive and may be restricted to any of the matters listed in S.178(2). Thus, in **TGWU v Asda 2004 IRLR 836, CAC**, evidence that there was a process of negotiation on union facilities and disciplinary and grievance issues meant that the union was recognised despite the fact that the agreement did not allow collective bargaining on pay or other terms and conditions of employment.

16. The general principles to be considered when deciding if a union has been recognised were summarised by the Court of Appeal in **National Union of Gold, Silver and Allied Trades v Albury Brothers Ltd 1979 ICR 84, CA**:

    a. recognition requires mutuality (i.e. the employer acknowledges the role of the union for the relevant purposes and the union assents to this)
    b. such mutuality can be express or implied,
    c. if it is implied, the acts relied upon must be clear and unequivocal and (usually)
       the result of a course of conduct over a period of time
    d. there may be partial recognition (i.e. the collective bargaining may be limited to only one of the topics listed in S.178).

17. In **Transport and General Workers Union v Courtenham Products Ltd 1977 IRLR 8, ET**, the tribunal held that an employer asking the union to represent a worker at a disciplinary hearing did not amount to recognising the union for the purposes of collective bargaining. Similarly, in **Makro Self Service Wholesalers Ltd v Union of Shop, Distributive and Allied Workers EAT 828/93** it was held that the fact that the employer had inserted a paragraph into the staff handbook encouraging employees to join the union did not necessarily mean that it had agreed to recognise the union. The fact that an employer showed faith in trade unionism or wished employees to be represented by union representatives in disciplinary matters did not amount to recognition. And in **Amalgamated Union of Engineering Workers v Sefton Engineering Co Ltd 1976 IRLR 318, ET**, the tribunal held that negotiating with two spokesmen of the workers — who happened to be union shop stewards — did not in itself constitute recognition of the union. In **National Union of Tailors and Garment Workers v Charles Ingram and Co Ltd 1977 ICR 530, EAT**, on the other hand, the union had negotiated over a long period with the employer, although there was no express agreement that the union had been recognised. The EAT said that the evidence showed that it was a recognised union notwithstanding the fact that recognition had never been formally established.

18. One isolated incident of negotiation may not always be enough to show a willingness to negotiate. In **Transport and General Workers' Union v Dyer 1977 IRLR 93, EAT**, for example, the union argued that it had been recognised by the employer and should therefore have been consulted over proposed redundancies. Shortly before the redundancies were announced, an employee was dismissed for industrial misconduct. As a result of industrial pressure, the employer met the union and agreed to reinstate him. A further meeting was held to discuss terms and conditions of employment and the employer was given the union's standard form of agreement. The employer only put up on the noticeboard the part of the agreement document dealing with wages for a 40-hour week but omitted the rest. The EAT held that the reinstatement involved recognition only to the degree necessary to solve the immediate problem and was not evidence of general recognition — the fact that the employer had put up only part of the agreement on the board showed how far it was from agreeing to recognise the union.

19. The EAT in **Cleveland County Council v Springett and ors 1985 IRLR 131, EAT**, made it clear that recognition cannot be thrust upon an employer by a third party over whom the employer has no control. In that case, the Association of Polytechnic Teachers, who only had limited representational rights with Cleveland County Council, was nominated by the Secretary of State to sit on the Burnham Committee (which set teachers' pay). The union claimed that the nomination onto the Committee accorded it automatic recognition by Cleveland County Council. The EAT, however, stated that the concept of such enforced or automatic recognition was untenable and ruled that recognition had not been achieved.

20. The phrase 'recognition … to any extent' contained in S.178 applies to the areas of recognition, not to the degree or kind of recognition. Therefore it does not include mere preliminaries to negotiations on recognition or limited and unwilling contact by the employer with the union — see **Transport and General Workers' Union v Dyer** (above).

Conclusion on recognition

21. As we have set out above, in order to meet the S.178 definition of recognition, it is not enough that an employer is merely willing to consult or discuss with a union on one of the matters listed in that section. It must be shown that the employer is willing to negotiate with a view to actually reaching an agreement. In out judgment all that happened in this case was that 2 individuals, who happened to be union organisers, were asked to speak on behalf of the employees in relation to one or two clauses in the draft contract of employment. This is not, in our view, sufficient to amount to negotiation with a view to reaching agreement, it is limited contact which was convenient for both the employees and the respondent, but no more than that and we find that neither the GMB nor Unite are expressly or impliedly recognised by the respondent. It follows from this that the claimants do have standing to bring their claims for a protective award.

Collective redundancies

22. In relation to the termination of the claimants' employment, the evidence was short.

23. On 9 July 2018, after working on site for several months, M & W called Mr Warren to an urgent meeting. He was not available, so he asked Mr Chestney to attend in his place. Mr Chestney did so, M & W said that all of the respondent's employees were required to leave the site immediately. This was around 3.30 pm.

24. Mr Chestney left the meeting, briefed his supervisors and then spoke to the entire workforce then on duty. He also waited to tell the night shift employees. In essence he told that that the respondent had been told they were no longer working on the contract, that therefore they had no work for the employees who all had to leave the site immediately.

25. We find as a fact that the employees were dismissed with immediate effect on 9 July 2018. Given that the reason was that the respondent had no work for them to do, the reason for the dismissals falls within section 139(1)(b)(i) ERA and were thus by reason of redundancy. Given that some 96 employees were so dismissed, and that there was no recognised union, we also find that sections 188, 188A and 189 TULRCA were engaged.

26. At some point in the following week Mr Warren met with two of the claimants and a union representative and agreed to pay to the dismissed employees 3 weeks' pay, described as pay in lieu of notice.

Section 1 statements

27. What the respondent described as a draft contract of employment was created and sent by Mr Chestney to 'supervisors. These documents contained standard terms of employment but in relation to pay were blank. Mr Chestney's evidence was that the claimants would go to their supervisor, agree the incomplete terms, fill in the blanks in the draft and sign the contracts. Mr Chestney said that only 3 or 4 people did this – none of the claimants except Thomas Shields did so. None of the claimants has ever received a complete s.1 statement.

Discussion and conclusions

Section 1 statements

28. The document described as a draft contract was never given to the claimants as required by s.1 ERA. At best, each claimant had an opportunity to read an incomplete contract and seek to agree it with a supervisor. Given that save in one case that did not happen, in our judgment it is clear that the respondent did not comply with its obligations under s.1 ERA. In relation to the contract which Mr Shields did complete, that does not comply with all of the requirements for a complete s.1 ERA statement of particulars in that it did not contain particulars relating to the date continuous employment began.

29. In our view this failure to provide all employees with the required s.1 ERA statement could have been avoided quite simply. The respondent said that in effect it was the fault of the employees that they did not receive the correct documentation, on time because they were seeking to renegotiate parts of it, for example the probation period. However, that is clearly not the case. It was open to the respondent to provide a completed s.1 ERA statement to all staff, within the timescale set out in s.1 ERA, and then should, by agreement or otherwise, the particulars change, the respondent could send an amended statement as allowed for in s. 4 ERA.

30. It was the respondent's decision to provide an incomplete s.1ERA statement and it was the respondent's choice to engage with the employees on changes before issuing the statement.

31. Given those circumstances and given we have made an award of unpaid holiday pay, and a protective award we must award each claimant 2 weeks' pay. We have considered whether it is just and equitable to uplift this to 4 weeks' pay and given the deliberate failings on the part of the respondent we do find that it is just and equitable to award each claimant 4 weeks' pay. The amounts are set out in Appendix 2.

Protective award

32. In this case the respondent does not contend that it took any of the steps set out in the legislation. It did not invite the employees to elect representatives and there were not other representatives to whom the required information could have been given and who it was appropriate to consult.

33. The respondent's position is that it has a special circumstances defence. That is that entirely unexpectedly M & W threw the respondent and therefore the claimants off site.

34. The legislation is clear. If a tribunal finds that an employer has acted in breach of s.188 TULRCA, it **must** make a declaration to that effect and **may** make a 'protective award' — s.189(2). A protective award is an award of pay to those employees who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and in respect of whom the employer has failed to comply with the requirements of s.188 – s.189(3). The protective award will be calculated by reference to a 'protected period', which is of whatever length the tribunal decides is 'just and equitable', up to a maximum of 90 days — s.189(4). The rate of remuneration is one week's pay for each week of the protected period — s.190(2).

35. We deal first with the purported special circumstances defence.

36. There is no definition of 'special circumstances' in TULRCA. In **Clarks of Hove Ltd v Bakers' Union 1978 ICR 1076, CA,** the Court of Appeal held that a 'special circumstance' must be something 'exceptional', 'out of the ordinary' or 'uncommon'. Indeed, since the purpose of the consultation requirements is to allow planning for, and consultation on, a redundancy situation, in order to constitute special circumstances making it not reasonably practicable to consult fully, the situation must usually be unexpected or have very specific and unusual characteristics.

37. Even where special circumstances are shown, these do not absolve the employer from complying with the consultation requirements in respect of which compliance was reasonably practicable or which were not affected by the special circumstances. The employer must still take all steps towards compliance as are reasonably practicable in the circumstances of the case. In **Shanahan Engineering Ltd v Unite the Union EAT 0411/09** SE Ltd, an engineering construction firm contracted to work on a new power station, was urgently required by its client, Alstom, to reduce the number of workers it had on site to alleviate health and safety problems caused by congestion and ground conditions. Within three days, SE Ltd had selected around 50

employees for redundancy according to agreed selection criteria and dismissed them with one week's notice. The EAT agreed with a tribunal's finding that 'special circumstances' applied to relieve the employer of the obligation to undertake the full 30-day consultation over collective redundancies, but that it should still have made some attempt at consultation. The EAT stated:

> *'The instructions given by Alstom made it inevitable that the workforce on the contract would have to be reduced; but it remained for Shanahan to decide whether employees should be dismissed for redundancy, how many employees should be dismissed, when they should be dismissed, and what if anything ought to be done to mitigate the consequences of dismissal. These were proper matters for consultation; it was the aim of the legislation that there should be consultation with a view to agreement if possible on these issues.'*

38. In **Howlett Marine Services Ltd v AEEU EAT 253/98** a tribunal found that special circumstances existed where the employer was entirely unexpectedly told by the contractor to whom it provided labour that staff cuts would be needed. The tribunal found that the decision made by the contractor was out of the ordinary, exceptional and uncommon. This was particularly so as the project on which the employees were engaged was expected to last for several months more and the amount of work involved had increased rapidly since the start of the project, to the point where overtime was being worked. However, the contractor then repeated its instruction to de-man a week later. The tribunal found that, in respect of that second instruction, special circumstances could not be said to apply — in the light of the first order from the contractor to cut staffing levels, the second order could not have been entirely unexpected. The EAT upheld this approach on appeal.

39. The position the respondent found itself in is not unlike the respondent's position in the **Howlett** case when the first decision was made. However, the issue for us is whether, notwithstanding the unexpected decision by M & W, the respondent should still have made some attempt at consultation. We note in particular the respondent's agreement to pay each of the employees some 3 weeks' pay, albeit in lieu. This means that the respondent could have continued to employ the employees for the 3-week period covered by this payment and consulted with them either directly or through elected representatives. It is entirely possible that within that 3-week period the respondent would have had some vacancies arise on its various other contracts, it may have obtained new work and so on. But this respondent decided simply to ignore its obligations under the law relating to collective redundancies.

40. For those reasons we do not consider that a special circumstances defence is made out.

41. We turn then to the protective award. The award is for a 'protected period', beginning 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 continuing for however long the tribunal decides is 'just and

equitable' — s.189(4). TULRCA gives tribunals no guidance as to how to exercise their discretion over the length of the protected period, or whether to make an award at all, except to say that they should have regard to the 'seriousness of the employer's default'. However, there is a maximum limit on the protected period of 90 days.

42. In relation to the start date of the protected period in **TGWU v Ledbury Preserves (1928) Ltd (No.2) 1986 ICR 855***,* the EAT held that the protected period should begin when the first dismissals were expected to occur in accordance with the original proposals. This view is supported by another EAT decision, **E Green and Son (Castings) Ltd and ors v ASTMS and anor 1984 ICR 352.** In this case we find that the protected period started on 9 July 2018, the date of the dismissals.

43. The next issue is the length of the protected period. There was uncertainty as to exactly what the award was meant to compensate, especially in cases where employees suffered no actual loss. That debate has been dealt with by the Court of Appeal's decision in **Susie Radin Ltd v GMB and ors 2004 ICR 893, CA**, where the Court made it clear that the protective award is designed to be punitive rather than compensatory. Given that, the Court of Appeal set out five factors that tribunals should have in mind when applying s.189:

    a. the purpose of the award is to provide a sanction, not compensation;
    b. the tribunal has a wide discretion to do what it considers just and equitable, but the focus must be on the seriousness of the employer's default;
    c. the default may vary in seriousness from the technical to a complete failure both to provide the required information and to consult;
    d. the deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under s.188; and
    e. how the tribunal assesses the length of the protected period is a matter for the tribunal, but 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 mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate.

44. In this case we find that a) there was time within which this employer could have gone a significant way to meeting its obligations under TULCRA given that if it wished it could have kept the claimants employed for at least 3 more weeks and b) therefore what the employer did was deliberate. Thus, the starting point is 90 days and we have considered whether the respondent put forward any mitigating circumstances. For the respondent all Mr Clarke said was that any consultation would have been meaningless. We found this a surprising submission given the 3 weeks' pay and what may have occurred in that 3-week period had the time been taken to engage with and consult the employees. In our view no mitigation circumstances have been advanced, and we find therefore that the protected period is 90 days. We thus make protective awards for the claimants in the sums set out in Appendix 3.

45. We note that the parties agreed that for the purposes of a weeks' pay each of the claimants earned £750.00 per week.

Expenses

46. Mr Sangha made an application for the necessary and reasonable expenses incurred by the witnesses in attending the tribunal. His application was limited to the mileage costs incurred by Mr Sawyers who drove from Hull and brought the other witnesses. Mr Clarke objected. The point, he said, was that the 'witnesses' were also claimants, they brought the claims and that is why the expenses were incurred.

47. In our view the fact that the expenses were incurred by a claimant who was also a witness is not an 'in principle' objection to that person receiving an award for those expenses. Rule 75 of the 2013 Rules used to include payment by the respondent to the claimant of the tribunal fees before their abolition. Those fees were paid in order to enable the claimants to bring claims, but that did not prevent tribunals routinely ordering losing respondents to pay the amount of the fee as part of the compensation. The incurring of the fee was a necessary and reasonable cost of bringing and pursuing the claim.

48. That is no different in our view to, as in this case, travel costs. Mr Sawyers has necessarily and reasonable incurred those costs in pursuing his claim in which he has been successful. In those circumstances we agree with the submissions of Mr Sangha and we order the respondent to pay to Mr Sawyer the sum of £196.40 for mileage costs in respect of travel from Hull to Nottingham and back.

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Employment Judge Brewer

Date: 20 February 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Schedule of claimants

	Name	Case number
1.	Mr H McCall	2602394/2018
2.	Mr S Sawyers	2602395/2018
3.	Mr M White	2602396/2018
4.	Mr S Whittingham	2602397/2018
5.	Mr N Dawson	2602669/2018
6.	Mr W Grannon	2602690/2018
7.	Mr D Rowland	2602502/2018
8.	Mr D Rothenburg	2602725/2018
9.	Mr J Cook	2600586/2018
10.	Mr T Shields	2600587/2018
11.	Mr T Adam	2602670/2018
12.	Mr J Pickering	2602888/2018
13.	Mr M Ward	2602889/2018
14.	Mr M Stott	2602891/2018
15.	Mr I Mills	2602892/2018
16.	Mr D Matthews	2602893/2018
17.	Mr J P Hutchinson	2602894/2018
18.	Mr J Hutchinson	2602895/2018
19.	Mr K Gibson	2602896/2018
20.	Mr G Fisher	2602898/2018
21.	Mr L Brindle	2602899/2018
22.	Mr P Collier	2602901/2018
23.	Mr S Freeman	2602897/2018
24.	Mr R Turner	2602890/2018

Appendix 1

Holiday pay awards

	Name	Case number	Award (£)
1.	Mr H McCall	2602394/2018	923.59
2.	Mr S Sawyers	2602395/2018	469.88
3.	Mr M White	2602396/2018	590.69
4.	Mr S Whittingham	2602397/2018	327.79
5.	Mr N Dawson	2602669/2018	261.10
6.	Mr W Grannon	2602690/2018	21.57
7.	Mr D Rowland	2602502/2018	864.28
8.	Mr D Rothenburg	2602725/2018	763.79
9.	Mr J Cook	2600586/2018	722.38
10.	Mr T Shields	2600587/2018	378.88
11.	Mr T Adam	2602670/2018	1,033.36
12.	Mr J Pickering	2602888/2018	nil
13.	Mr M Ward	2602889/2018	nil
14.	Mr M Stott	2602891/2018	640.71
15.	Mr I Mills	2602892/2018	296.14
16.	Mr D Matthews	2602893/2018	521.83
17.	Mr J P Hutchinson	2602894/2018	456.42
18.	Mr J Hutchinson	2602895/2018	99.69
19.	Mr K Gibson	2602896/2018	nil
20.	Mr G Fisher	2602898/2018	nil
21.	Mr L Brindle	2602899/2018	nil
22.	Mr P Collier	2602901/2018	824.00
23.	Mr S Freeman	2602897/2018	704.32
24.	Mr R Turner	2602890/2018	458.92

Appendix 2

Awards for failing to provide s.1 ERA statement - 4 weeks' pay @ £750.00 per week capped at £525.00 (£)

	Name	Case number	Award (£)
1.	Mr H McCall	2602394/2018	2,100.00
2.	Mr S Sawyers	2602395/2018	2,100.00
3.	Mr M White	2602396/2018	2,100.00
4.	Mr S Whittingham	2602397/2018	2,100.00
5.	Mr N Dawson	2602669/2018	2,100.00
6.	Mr W Grannon	2602690/2018	2,100.00
7.	Mr D Rowland	2602502/2018	2,100.00
8.	Mr D Rothenburg	2602725/2018	2,100.00
9.	Mr J Cook	2600586/2018	2,100.00
10.	Mr T Shields	2600587/2018	2,100.00
11.	Mr T Adam	2602670/2018	2,100.00
12.	Mr J Pickering	2602888/2018	2,100.00
13.	Mr M Ward	2602889/2018	2,100.00
14.	Mr M Stott	2602891/2018	2,100.00
15.	Mr I Mills	2602892/2018	2,100.00
16.	Mr D Matthews	2602893/2018	2,100.00
17.	Mr J P Hutchinson	2602894/2018	2,100.00
18.	Mr J Hutchinson	2602895/2018	2,100.00
19.	Mr K Gibson	2602896/2018	2,100.00
20.	Mr G Fisher	2602898/2018	2,100.00
21.	Mr L Brindle	2602899/2018	2,100.00
22.	Mr P Collier	2602901/2018	2,100.00
23.	Mr S Freeman	2602897/2018	2,100.00
24.	Mr R Turner	2602890/2018	2,100.00

Appendix 3

Protective award – protected period 90 days: 12.9 weeks @ £750.00 per week (12 weeks @ £750.00, 1 week @ £675.00 = £9,675.00)

	Name	Case number	Award (£)
1.	Mr H McCall	2602394/2018	9,675.00
2.	Mr S Sawyers	2602395/2018	9,675.00
3.	Mr M White	2602396/2018	9,675.00
4.	Mr S Whittingham	2602397/2018	9,675.00
5.	Mr N Dawson	2602669/2018	9,675.00
6.	Mr W Grannon	2602690/2018	9,675.00
7.	Mr D Rowland	2602502/2018	9,675.00
8.	Mr D Rothenburg	2602725/2018	9,675.00
9.	Mr J Cook	2600586/2018	9,675.00
10.	Mr T Shields	2600587/2018	9,675.00
11.	Mr T Adam	2602670/2018	9,675.00
12.	Mr J Pickering	2602888/2018	9,675.00
13.	Mr M Ward	2602889/2018	9,675.00
14.	Mr M Stott	2602891/2018	9,675.00
15.	Mr I Mills	2602892/2018	9,675.00
16.	Mr D Matthews	2602893/2018	9,675.00
17.	Mr J P Hutchinson	2602894/2018	9,675.00
18.	Mr J Hutchinson	2602895/2018	9,675.00
19.	Mr K Gibson	2602896/2018	9,675.00
20.	Mr G Fisher	2602898/2018	9,675.00
21.	Mr L Brindle	2602899/2018	9,675.00
22.	Mr P Collier	2602901/2018	9,675.00
23.	Mr S Freeman	2602897/2018	9,675.00
24.	Mr R Turner	2602890/2018	9,675.00