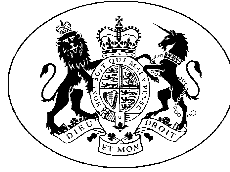

# EMPLOYMENT TRIBUNALS

| | |
|---|---|
| **Claimant:** | (1) Unite the Union<br>(2) Ms N Newman<br>(3) Mr K Mason |
| **Respondent:** | (1) Aviator Man Limited (in Creditors' Voluntary Liquidation)<br>(2) Secretary of State for Business, Energy and Industrial Strategy |

**Heard at:** Manchester Employment Tribunal **On:** 19 October 2021

**Before:** Employment Judge Dunlop (sitting alone)

**Representation**

| | |
|---|---|
| **First Claimant:** | Did not attend |
| **Second Claimant:** | In person |
| **Third Claimant:** | In person |
| **First Respondent:** | Mr M Orzeg-Wydra (solicitor) |
| **Second Respondent:** | Did not attend |

**UPON** a reconsideration of the judgment dated 22 March 2021 on the Tribunal's own initiative under rule 73 of the Employment Tribunal Rules of Procedure 2013.

# JUDGMENT

1. The Judgment of 22 March 2021, including the List of Affected Employees annexed to that Judgment, is confirmed. That means that no names will be added to the List of Affected Employees.

# REASONS

**Introduction**

1. This Judgment should be read alongside my Order of today's date in the same case.

## Background

1. This has been a reconsideration hearing during which I have reconsidered my judgment given on 22 March 2021 which made a Protective Award in the following terms:

> *It is declared that the first respondent failed in its duty to consult employee representatives under section 188 Trade Union & Labour Relations (Consolidation) Act 1992. The Tribunal makes a protective award in respect of all of those employees dismissed as redundant on or after 22 October 2019 who were of a description in respect of which Unite the Union was recognised, including the attached list of affected employees, requiring the first respondent to pay remuneration to such employees for the protected period of 90 days beginning with 22 October 2019.*

2. The Judgment included, in an annex, a Schedule of affected employees, comprising a large number of names (over 250), along with details of whether they were 'ramp' pax' or 'admin' employees and their weekly pay details. I understand that the individuals named have subsequently received payments from the Redundancy Payment Service ("RPS") in respect of the Protective Award, given the First Respondent's insolvency.

3. Following the promulgation of that judgment, the Tribunal received emails from Ms Newman and Mr Mason who considered that their names ought to have appeared in the Schedule. They stated that there were other employees who had also been missed from the list and had therefore been unsuccessful in applying to RPS for payment of the awards. A more detailed chronology of events is set out below, but for the purposes of this introduction I need only explain that the correspondence led me to convene a reconsideration hearing to hear the employees and determine whether it was appropriate to vary the Judgment by adding their names to the schedule.

## The hearing

4. I directed that Ms Mason and Mr Newman would be entitled to participate in the hearing by giving evidence, presenting documents and putting forward arguments. Rule 35 of the Employment Tribunal Rules of Procedure 2013 gives the Tribunal a wide discretion to allow non-parties to participate in proceedings where they have a legitimate interest, and I was satisfied that they had such an interest. None of the existing parties objected to this course of action.

5. Following the hearing, and in the course of writing up this Judgment, I decided it was appropriate to exercise the Tribunal's powers under Rule 34 to add the interested parties as claimants to the claim for the purposes of advancing their case in relation to reconsideration only. A separate Order to that effect will be sent to the parties. This means that, as parties, they will

have standing to appeal this Judgment to the Employment Appeal Tribunal if they wish to do so.

6. Following enquiries by the Tribunal the claimant (Unite) indicated that it did not intend to participate in the hearing. It did, however, set out its position in a letter dated 30 September 2021, referred to further below. No response was received from the second respondent (Secretary of State for BEIS) as to whether it wished to participate and it was not represented. The first respondent indicated in correspondence that it objected to the variation of the Schedule attached to the judgment and that it would be represented here today. Mr Orzeg-Wydra has represented the first respondent and provided a bundle of documents which I have had regard to. The first respondent provided no witness evidence.

7. Ms Newman and Mr Mason were also invited to provide documents and/or witness statements if they wished to do so. The only document provided (in addition to the original correspondence) was an email from Ms Newman dated 6 October 2021 setting out various matters related to the case. They also did not provide witness statements in advance.

8. With the agreement of the parties in attendance, I heard sworn evidence from Ms Newman and Mr Mason. Ms Newman confirmed in evidence the matters set out in her 6 October email, and expanded her evidence in response to questions for me. Mr Mason confirmed Ms Newman's evidence and expanded on certain matters. Mr Orzeg-Wydra had the opportunity to cross-examine them both.

9. I then heard short oral submissions on the law from the first respondent and from Ms Newman and Mr Mason, before giving an oral judgment.

**Findings of Fact**

10. Prior to its insolvency, the first respondent provided services to airlines at Manchester Airport. It was part of a group of companies called Aviator Airport Alliance AB, headquartered in Sweden. The first respondent's major client was Thomas Cook, accounting for approximately 70% of its trade. The remaining 30% was accounted for by four other contracts, mainly with Noridc airlines.

11. The first respondent provided airside 'Ramp' services i.e. baggage handling, plane loading etc. It also provided landside 'Pax' services i.e. check-in services. Employees worked in one side of the business or the other. The General Manager was Julie Whittaker, beneath her, on the 'Ramp' side of the business were senior managers David Brown and Carl Breeze. Beneath them, were around six Duty Managers, of which Ms Newman and Mr Mason were two. On the 'Pax' side of the business there were two senior managers Elizabeth Baggot and Phillip Morris. Beneath them, were more junior managers and/or supervisors.

12. The vast majority of the employees in the business were therefore allocated to either the "Ramp" or "Pax" side. The names in the Schedule are each designated as "Ramp", "Pax" or "Admin", but there are only two "Admin" employees listed – Maxine Short and Joanne Castle.

13. Ms Newman and Mr Mason were both duty managers on the "ramp" side of the business. Their payslips contained the designation "ramp". I understand the other employees who Ms Newman and Mr Mason contend should be added to the Schedule are the other Duty Managerds. Whilst Ms Newman and Mr Mason were not members of Unite, I am told that at least one of the other Duty Managers was.

14. Unite the Union was recognised for the purposes of collective bargaining in respect of at least some of the employees within the business. I will return later to the issue of exactly which employees. There was no written recognition agreement. I understand from Unite's letter of 30 September 2021 that it was recognised in various predecessor companies and that some of the employees had joined the first respondent via TUPE transfers, following which the first respondent, in practice, began to engage with Unite as their representative.

15. In autumn 2019 Thomas Cook collapsed. This had a catastrophic knock-on effect on the first respondent's business. The first respondent initially hoped it may be able to continue its operations in a much-reduced form servicing its other clients. An HR1 form was submitted on 26 September 2019. That form envisaged that 170 out of 351 employees would be made redundancy between 10 November 2019 and 8 December 2019. It is also worth noting that that form stated the first respondent employed 15 "managerial and admin" staff, of whom 6 were expected to be made redundant. The remaining staff were listed as being "Manual/Ramp" (152) and "Clerical/Pax" (184). The form envisaged that around 60% from each of those groups were to be made redundant. The form noted that Unite was the recognised trade union for "Ramp + Pax + Admin" and gave no details of elected representatives.

16. Subsequently, the first respondent's directors determined that it was not viable for the first respondent to continue to run as a reduced operation. Plans were made for a 'managed wind-down' with all operations ceasing on 22 October 2019.

17. In line with this, a further HR1 form was submitted on 7 October 2019, indicating that the respondent now intended to make all 351 employees redundant on 22 October 2019. It stated that elections were underway in respect of "employees where trade unions are not recognised".

18. I have not made any findings of fact about the process followed subsequently. There is a dispute as to whether any representatives were elected to represent the management employees in consultations, but it is not necessary for me to resolve that dispute in order to determine whether Ms Newman and Mr Mason were employed in roles in respect of which Unite was recognised. The question of whether elections did, in fact, take place, may fall to be resolved in future proceedings.

19. For now, the determinative question for this reconsideration decision, is whether Ms Newman and Mr Mason were employees of a description in respect of which Unite was recognised for collective barganinging.

## Procedural history

20. On 6 February 2020, following early conciliation, Unite presented a claim for a protective award. The particulars of claim averred that: Unite was recognised "for the purposes of collective bargaining in respect of all employees"; it went on to assert that 351 employees had been made redundant and Unite sought a protective award of 90 days' pay. The clear implication is that Unite expected all 351 employees to be able to benefit from the protective award if the claim was successful.

21. The first respondent presented a response to the claim on 12 March 2020. It started in that response that it was in creditors' voluntary liquidation. Nonetheless, the claim was defended. The first point taken in the Grounds of Resistance was that the claimant was not entitled to pursue a claim for a protective award in respect of all of the respondent's employees. Specifically, the first respondent averred, "*the Claimant is precluded from pursuing a protective award claim…in respect of the employees constituting the management team of the Respondent as those employees did not form part of the bargaining unit represented for information and consultation purposes by the Claimant as defined by the collective agreement between the Claimant and the Respondent. Nor did the Claimant otherwise represent them.*"

22. By email dated 27 March 2020, the Tribunal, on its own initiative, asked Unite for its comments on paragraphs 2 and 3 of the Grounds of Resistance i.e. the paragraph dealing with the issue set out above and a paragraph raising an issue about early conciliation.

23. A response dated 17 April 2020 was submitted by Thompsons solicitors, Unite's representatives. In relation to the representation point, I set out that response in full:

> **The Claimant accepts that it was not recognised in respect of the management employees.**
>
> **The Claimant was recognised by the Respondent in respect of unskilled, clerical and industrial employees, or, "PAX", "ramp" and "admin" as stated on the HR1 form.**
>
> **The Claimant therefore asserts that it was the "appropriate representative" as per s.188 (1) of the TULR(C)A 1992 and, therefore, the appropriate claimant in respect of the categories of employees stated in the above paragraph as per s.189(1)(c).**
>
> **Given the above, we clarify that the Claimant is seeking the following by way of remedy:**
>
> **a. A declaration that the Respondent failed to comply with s.188 of the said Act; and**
> **b. A protective award of 90 days' pay, pursuant to s.189(3) TULR(C)A 1992.**
>
> **For the avoidance of any doubt, the declaration is being sought in respect of all employees contained in the category of employees referred to above, who formed part of the bargaining unit.**
>
> **The claimant respectfully requests that the above is treated as an amendment to the claim, in particular, paragraph 1 of the ET1 Grounds of Claim, which erroneously addressed its collective bargaining mandate and**

**paragraph 7, which sets out the remedy the Claimant is seeking if the claim succeeds.**

24. Unite, which is the claimant in this case, therefore made an express concession at an early point that certain employees would be excluded from the scope of any protective award secured by the union. The effect of that concession, on the face of it, would be to 'lock out' management employees from benefitting from any protective award that was secured. They are the ones who would be adversely affected by this concession.

25. Ms Newman and Mr Mason tell me that they were in touch with Unite representatives who told them (and others) that the claim was being progressed and did not inform them at any stage that a concession had been made which would affect their ability to benefit from the claim. I make no finding in relation to that evidence. It would be inappropriate to do where it is not necessary to determine whether they were part of the bargaining unit. This is particularly so as Unite were not represented at this hearing. Again, it is possible that that question may need to be determined as part of future proceedings.

26. A final hearing was due to take place on 2 July 2020. Shortly before the hearing the respondent successfully applied for a postponement on the grounds that the parties were close to settlement. By email dated 30 June 2020 from the respondent, the parties jointly applied for judgment in the terms of a consent order attached to the email. The proposed order included the list of names of employees who would be entitled to benefit from the protective award.

27. As the first respondent was in liquidation and it was envisaged that liability for payment of the protective awards would fall to the insolvency service, the Tribunal (EJ Leach) directed that the Secretary of State for BEIS should be given opportunity to comment on the proposed order. Unfortunately, the letter prepared by EJ Leach was not sent to the Secretary of State due to an administrative error and this resulted in a significant delay to the proceedings. Ultimately, however, the Secretary of State was joined as a respondent and provided a standard response to the claim by email dated 18 February 2021. The Secretary of State's response indicated that it would not be represented at any hearing and invited the Tribunal to consider the contents of the response as written submissions in any hearing which was to take place.

28. The matter was at that point referred to me and, having considered the file including the pleadings and the terms of the proposed consent order, I issued the judgment dated 22 March 2021 which is the subject of this reconsideration hearing. The judgment did not fully reflect the terms of the consent order proposed by the parties, as there were certain matters within that draft order which were not appropriately the subject of an order by the Tribunal. It did, however, fully reflect the draft order agreed between the parties in the way in which it defined those employees entitled to be paid protective awards and in the Schedule listing the names of the relevant employees.

29. On 5 May 2021, both Mr Mason and Ms Newman wrote (separately) to the Tribunal query why their names were not on the Schedule. There was a sequence of correspondence between them and the Tribunal, in the course of which it was asserted that a total of nine names had been wrongly excluded.

30. On 2 July 2021 I wrote to Unite and both respondents, setting out the names which had allegedly been wrongly excluded, and inviting them to comment on whether the Judgment should be reconsidered to enable the names to be added to the list.

31. By letter dated 9 July 2021 the first respondent objected to the addition of the individuals named in correspondence to the Judgment. The first respondent's letter drew attention to the point taken in its response as to Unite's bargaining Unite and Unite's concession on this. It gave job titles for the individuals which were all managerial job titles and asserted that each of the individuals were outside the scope of the bargaining unit (and therefore of the protective award).

32. In those circumstances, I decided to hold this reconsideration hearing to give all parties the opportunity to be heard and to determine whether it was appropriate to vary the Judgement.

33. Although Unite did not take part in this hearing, they did write to the Tribunal in the following terms on 30 September 2021:

> **Unite the Union is an independent trade union that was recognised by the Respondent for the purposes of collective bargaining in respect of unskilled, clerical and industrial employees or "PAX", "ramp" and "admin" employees.**
>
> **There was no formal recognition agreement between the Union and Respondent. The Union was recognised by Swissport and Servisair, the two companies its members had previously been employed by prior to transferring to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2013. The Respondent recognised Unite post-transfer and engaged with the Union on all matters relating to collective bargaining as defined in s.178 of the Trade Union and Labour Relations (Consolidation) Act 1992. It is accepted by the Respondent in paragraph 17 of the Grounds of Resistance that Unite was recognised in respect of the categories of employees stated above.**
>
> **Unite was not recognised to collectively bargain in relation to management employees. Therefore, assuming the employees stated in the Tribunal's letter dated 2 July 2021 were employed in management roles, they would not benefit from the declaration of a protective award made in favour of Unite the Union, given that these roles were not subject to collective bargaining.**

## The Law

34. The statutory provisions in relation to protective award claims are contained in ss188-192 TULR(C)A 1992. The parts of those sections which are relevant to this case are set out below:

> **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.**

**(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) Where—**

**(a) the employer has invited any of the affected employees to elect employee representatives, and**

**(b) the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,**

**the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.**

**(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).**

**(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.**

**188A**

**(1) The requirements for the election of employee representatives under section 188(1B)(b)(ii) are that—**

**(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;**

**(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;**

**(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;**

**(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;**

**(e) the candidates for election as employee representatives are affected employees on the date of the election;**

**(f) no affected employee is unreasonably excluded from standing for election;**

**(g) all affected employees on the date of the election are entitled to vote for employee representatives;**

**(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;**

**(i) the election is conducted so as to secure that—**

**(i) so far as is reasonably practicable, those voting do so in secret, and**

**(ii) the votes given at the election are accurately counted.**

**(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).**

**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.**

**(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 the that date, or**

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

**(5A) 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.**

**190 Entitlement under protective award**

**(1) Where an employment tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 191, to be paid remuneration by his employer for the protected period.**

**(2)-(6) [Omitted]**

35. As can be seen, those sections are lengthy and their full effect is not easy to understand. In summary, they make provision for employees facing collective redundancies to be represented by a trade union or by existing employee representatives or by employee representatives elected for that purpose. Where such representation is in place, but consultation is nevertheless incomplete, the claim for a protective award is brought by the representative but the award is made for the benefit of the employees they represent. An employee, who is not a representative can claim on their own behalf for a protective award only if there has been a failure relating to the election of representatives, or another failure which does not relate to consultation with the union or elected representatives (see s.189(1)).

36. Where a Union brings a claim, it will do so on behalf of those descriptions of employees in respect of whom it is recognised by the employer (s.188(1B)) i.e. those within its bargaining unit. Provided the union is recognised for a particular class of employee, there is no distinction drawn between employees who are members of the union and those who are not, either for the purposes of consultation, or for the purposes of the protective award. (This is in contrast to the position in, for example, individual disciplinary proceedings, where a union will normally offer representation to its members, but not to non-member employees).

37. Where a union brings a claim and obtains a protective award in relation to a particular class of employees, the award does not extend to other employees who are not of that description even if they were made redundant in the same exercise (and regardless of their union membership). That principle was made clear by the Employment Appeal Tribunal in **TGWU v Brauer Coley Ltd [2007] ICR 22**.

## Submissions

38. Ms Newman and Mr Mason made the basic submissions that they had been made redundant on the same short notice and with the same minimal information as the employees who had received the award. It would be unfair if they did not receive it. Although they accepted that they were managerial staff, they believed there was a discrepancy in that some supervisory staff on the PAX side of the business had been included. They also told me that some of the named individuals had, in fact, left the business before the 22 October. They were particularly aggrieved that one employee had received the award who, they say, was in fact dismissed for gross misconduct for reasons unrelated to the business's financial difficulties.

39. They say that they believed that Unite was representing them. They point to the fact that their payslips designed them as "ramp" employees and that their roles (which they fully accept were Duty Manager roles) were therefore roles in respect of which Unite was recognised.

40. Mr Orzeg-Wydra submitted that this was a claim brought by the union and that the union had conceded that it did not represent managerial staff, including these individuals. The proposed consent order had been reached between the parties on that basis and had been ratified by the Tribunal. There was no error in the list of names (or at least not as regards these individuals).

**Discussion and conclusions**

41. I have a great deal of sympathy with Ms Newman and Mr Mason. I appreciate that, from their perspective, the failure to consult and broader hardship of redundancy have affected them just as much as their colleagues. Having been in the same position as other employees, they have ended up being deprived of the award their colleagues received. I understand that that position is particularly galling if, as they say, other people have been erroneously included in the list who should not be there.

42. I explained to the parties at the start of the hearing that I would not be considering the removal of any name from the list. I was satisfied that it was appropriate to let Ms Newman and Mr Mason put forward their arguments as to why they *should* be on the list but I was not satisfied that they have any legitimate standing to argue that another person should be excluded.

43. The key question is whether Ms Newman and/or Mr Mason did, in fact, fall within the constituency of employees in respect of which Unite was recognised. I fully accept that they worked in the 'ramp' part of their business. But that is not enough. Having regard to the history of the case, and Unite's letter of 30 September 2021, I do not consider I have any grounds to 'go behind' Unite's concession that it represented "unskilled, clerical and industrial employees" within the Ramp and Pax functions and that this would exclude managers.

44. In support of this conclusion, I recognise that it was in the contemplation of management and the union that there would be redundant employees that fell outside that group - demonstrated by the second HR1 form. There was an intention to elect employee representatives. Whilst there is a dispute

about whether this actually took place, the fact that an election was contemplated gives further support to the position that there was a distinction between managerial and non-managerial staff.

45. As "Duty Managers" Ms Newman and Mr Mason were management employees – they were part of a relatively small management function. My conclusion that they were (and were therefore not part of Unite's constituency) is reinforced by the fact that they were excluded from the Schedule. This is evidently not a case (as I first thought it might be) were names were missed off inadvertently or through administrative error. It was the joint view of the claimant and first respondent in proposing judgment by consent that they should be excluded as management employees. The fact that other duty managers were excluded and that only two 'admin' employees are listed in the schedule is consistent with this position. In proposing the terms of the consent Judgment, both the first respondent and the union were working from an understand of how the business ran in practice, including the role of the union, and I cannot simply put that aside because Ms Newman and Mr Mason want me to.

46. For those reasons, I am satisfied that these managerial employees were not employees of a description in respect of which Unite were recognised, and therefore, in accordance with the **Brauer Coley** case, it is simply not open to me to add their names to the schedule.

47. At the end of the judgment Ms Newman raised her intention to take matters further. It is matter for her (and Mr Mason) as to whether she seeks to bring a claim in her own name. I explained that that claim would now be out of time but time can be extended where it was not reasonably practicable for the claim to be brought within time. That is a matter which would have to be determined after she had brought her claim. She may also wish to take the matter up with the union, or, as she suggested, with her Member of Parliament. I cannot offer advice on the best course of action she can take. I did however, tell her that I would provide full written reasons for this judgment on the basis that having these reasons might assist with any future course of action they wish to take.

Employment Judge Dunlop
Date: 16 November 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
18 November 2021

FOR EMPLOYMENT TRIBUNALS