Case Nos: 2405241/2020 & Others
(see attached schedule)

EMPLOYMENT TRIBUNALS

Claimants: Mr K Biggs and 38 others
(see attached schedule)

Respondents: R1: Staveley Head Limited (in Administration)
R2: The Secretary of State for Business, Energy and Industrial Strategy
R3: One Sure Insurance Limited

Heard at: Liverpool by CVP **On:** 4, 5 and 6 April 2022

Before: Employment Judge Aspinall
Mrs Radcliffe
Mr McCaughey

Representation
Claimant: Mr Rushton
Respondent: Ms Scarborough

RESERVED JUDGMENT

1. The complaints were brought under section 189 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and The Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the 2014 Regulations (TUPE).

2. **The claimant's complaint of failure to consult under Section 188 TULRCA 1992 succeeds and a protective award is made**. The Tribunal considers it just and equitable in the circumstances to make a protective award of 12 weeks or 84 days. The protected period runs from 5 February 2020 for 12 weeks. The amount awarded to each claimant is wholly attributable to loss of wages up to the final day of the period covered by the protective award. Those 39 claimants in respect of whom the award is made are listed in Schedule A to this judgment. Two claimants withdrew their complaints.

3. Recoupment provisions contained in the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to the award. Regulation 5 provides that the Secretary of State shall be notified by the Secretary of the Tribunals of the following information:

(i) The date on which this decision is sent to the parties which is as

set out below.

(ii) That this decision was made by the Liverpool Employment Tribunal.

(iii) The first respondent's name and address which is : R1: Staveley Head Limited (in Administration) care of the Administrators Messrs Duff and Phelps The Chancery, 58 Spring Gardens, Manchester M2 1EW

(iv) The employees to whom the award relates and they are set out in the Schedule.

(v) The date of the protected period which is for 12 weeks from 5 February 2020.

4. The respondent is reminded of its obligation under Regulation 6 to provide the name, address, national insurance number and date of termination of employment of each employee in the Schedule to the Secretary of State within 10 days of the date on which this decision is sent to them. Regulation 7 has the effect of postponing payment of any awards so as to allow the Secretary of State to initiate recoupment. Regulation 8 provides for the Secretary of State to initiate recoupment by serving a notice on the employer and copying it to the employees. Any recoupment notice shall operate as an instruction on the employer to pay any recoupable amount to the Secretary of State.

5. **The claimant's complaint of failure to consult under Regulation 13 TUPE fails.** The claimants were not affected employees for the purposes of TUPE consultation. The claimants were not employed immediately before the transfer and would not have been so employed but for the transfer, as the transfer was not the sole or principal reason for their dismissal. If it had been, there would have been an economic, technical or organisational reason of the transferor entailing changes in the workforce. **Liability for the failure to consult under TULRCA does not pass to the Third Respondent.**

REASONS

Background

6. The 41 claimants who commenced proceedings were former employees of Staveley Head Insurance Limited (R1). R1 was an insurance broker. In November 2019 R1 lost a major contract with Gefion (GF) that enabled it to offer insurance to clients. R1 began a redundancy exercise on 24 Janaury 2020. It went into administration on 5 February 2020. Administrators were appointed. The claimants were dismissed by the Administrator on 5 February 2020.

7. On 3 April 2020 One Sure Insurance Limited (R3) bought some of the assets of R1 in administration. R1 and R3 agreed that there was a transfer for the purposes of the TUPE Regulations on 3 April 2020.

8. By a claim form dated 4 May 2020 Mr Biggs and 40 other employees of the first respondent brought complaints seeking a protective award, outstanding wages and holiday pay. 29 of the claimants also claimed unfair dismissal. At a

case management hearing on 26 October 2021 the complaints were clarified, a list of issues set out, and the matter listed for final hearing. On 22 February 2022 the wages and holiday pay complaints and the unfair dismissal complaints were all dismissed on withdrawal, so that it was only the failure to consult under TULRCA protective award issues and failure to consult under TUPE Regulation 13 that came to final hearing.

9. Two of the claimants withdrew their complaints under TULRCA and TUPE (2405234-20 Sutherland and 2405275-20 Fletcher) so that only 39 proceeded for determination. The claimants with live claims determined at this final hearing are listed in Schedule A to this Judgment.

The hearing

Agreed list of issues

10. The parties worked together to finalise a List of Issues. A matter as to the standing of the claimants to bring their complaints was included at paragraph 3a and 3b.

11. There was discussion as to whether or not the claimants were limited to seeking an award for 13 weeks pay. Mr Rushton was not seeking more than a 90 day / 13 week award.

12. The agreed list was:

1. **Did the First Respondent dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less?**

2. **Did the First Respondent properly elect and appoint appropriate employee representatives in order to fulfil its collective consultation obligations?**

3. **Do the Claimants have standing to**
   a. **bring a claim under s189 TULRCA 1992 in accordance with the requirements of s188(1B) TULRCA.**
   b. **Bring a claim under Reg 14 TUPE Regulations 2006 in accordance with Reg 15(1) TUPE Regs.?**

4. **Did the First Respondent consult the employees who may be affected by the proposals about the dismissals for 30 days before the dismissal took effect?**

5. **Did the consultation, if any, deal with ways to avoid the dismissals, reducing the number of dismissals or how to mitigate the consequences of the dismissals.**

6. **Did the liability for the Claimants' claims against the First Respondent transfer to the Third Respondent under TUPE?**

7. **Did the First Respondent and the Third Respondent comply with their obligations under TUPE to inform and consult with the Claimants over the transfer?**

8. **If the Claimants are entitled to a protective award, then for what period is just and equitable to make such an award in the circumstances?**

Documents

13. There was an electronic bundle of 515 pages. The Tribunal also saw a Chronology and read witness statements from Mr Biggs, Mr Evans and Mr Hussain for the claimants and Mr Saunders for the First Respondent and Mr Harper for the Third Respondent.

14. Counsel for the Third Respondent, Ms Scarborough, had prepared an Opening Note. The Second Respondent had written, in the usual way in cases of this kind, to say that it intended no disrespect to the tribunal but that it would not participate in the proceedings. Both Counsel gave closing submissions, the Third Respondent spoke to a written Closing Submission document which had been shared.

Applications

15. On the first day of the hearing the Third Respondent indicated that it wished to run a special circumstances defence under Section 189(6) TULRCA and Regulation 13(9) TUPE. The claimant said this was not in the Grounds of Resistance and would require an amendment application if it were to proceed at this late stage. We agreed that the representatives would each make submissions on amendment. The Tribunal would then adjourn to interpret the Grounds of Resistance and if the special circumstances defence had not been pleaded then it would determine the amendment application.

16. The Tribunal decided that the Grounds of Resistance did not show a special circumstances defence. It considered the amendment application weighing the relative hardship and injustice to the parties and decided that the balance of prejudice lay with the claimants. The application was denied. The respondent had not set out the defence in its pleadings. It had relied on the factual matter of the loss of the contract with GF in relation to the necessity of administration. The application was made late, on the first day of the hearing and would put the claimant who had no advance notice of the defence on an unequal footing. The special circumstances defence had relatively poor prospects of success given that the only factual matters on which the third respondent accepted it could rely were the loss of the contract in November 2019 and or the appointment of the administrators on 5 February 2020. The third respondent accepted that the loss of the contract was at least two months before the dismissals and that insolvency of itself is not a special circumstance. The respondent could still defend on the bases set out in their Grounds of Resistance.

17. The broader circumstances considered included the fact that the matter related to events from January 2020 and allowing the defence would mean an adjournment to put the claimants on an equal footing and that would mean that

matter being postponed. Two years had passed since the events complained of, considerable time and cost had gone into preparation for trial. It was in the interests of justice to proceed.

Timetable

18. A timetable was agreed that accommodated the availability of Mr Biggs and Mr Saunders. The claimant went first calling Mr Hussain then Mr Evans. Mr Biggs appeared on the morning of the second day followed by Mr Saunders for the First Respondent, then Mr Harper for the Third Respondent.

Oral evidence

19. The Tribunal heard from Mr Hussain who now works for the Third Respondent.

20. The Tribunal heard from Mr Evans who had worked for the First Respondent for over 8 years when he was dismissed. He had a clear recollection of events from 24 January 2020 until 5 February 2020. He said that the operations director had chosen which members of staff were sent to the canteen to be told they were dismissed and which were sent to the boardroom to be told their employment was continuing. He had done this by picking names from a list. Some of the dismissed employees later were appointed to work for the Third Respondent including Mr Hussain and he does not pursue any award against the third respondent.

21. The Tribunal heard from Mr Biggs who gave his evidence in a straightforward and helpful way providing the Tribunal with detail of the events of 24 January - 5 February 2020 and the way in which the employee representatives were appointed and worked together to represent the employees.

22. The Tribunal heard from Mr Saunders from Duff and Phelps, administrators for the First Respondent, who appeared by witness summons and gave his evidence in a considered way. He repeated key phrases when responding to questions about the reason for dismissal, such as, *no longer economically viable and needed to reduce the expenditure, the immediate focus was to reduce overheads so as to continue to trade, take steps to optimize outcomes for creditors.*

23. The Tribunal heard from Mr Harper who was convincing as to the timing of the Third Respondent's knowledge of the administration, after the appointment of administrators and the dismissals, and its interest in acquiring assets of the First Respondent and the progress of negotiations leading to the eventual acquisition on 3 April 2020.

24. Mr Evans was recalled so as to give oral evidence as to the veracity of a document prepared by the claimants during the hearing, with no objection from the respondents, so as to assist the Tribunal in determining which claimants were represented by which employee representative. That document took the form of a table which is reproduced below. This was important because one of the representatives was not a claimant and the respondents argued that this meant that those employees represented by him did not have standing to bring complaints under TULRCA or TUPE.

The Facts

25. R1 was an insurance brokerage selling insurance polices provided largely by an insurer, GF, to customers. R1 acted as GF's agent in writing insurance business. It operated from two sites; one at Connah's Quay and one at Flint. The total number of employees employed across both sites was 111 on 28 January 2020. The First Respondent was not the only company working from those addresses. Policy Plan Limited (PPL) was another vehicle used by those controlling the First Respondent in carrying out insurance business and the claimants though employed by R1 may from time to time have undertaken work for PPL.

26. Each of the claimant's began working for the respondent on different dates, a schedule was produced in the course of the litigation and it is agreed that the 29 claimants each had more than two years continuous service at the date of dismissal.

27. In autumn 2019 R1 lost its contract with GF. The vast majority, between 85 and 95% of its insurance work, had been placed with GF. In the past R1 had lost insurers and rapidly replaced them. On this occasion the contract was not replaced.

28. On 24 January 2020 the claimants were instructed to attend a meeting with Ashley Peters the owner of R1 and an HR Consultant Sandy Windmill. The following statement was read out to them.

> *Staveley Head / Policy Plan. Proposed Restructure Announcement:*
>
> *It is with regret that I must announce that the majority of employees of Staveley Head and Policy Plan are at risk of redundancy. The reason for this is the impact that the recent early termination of the Gefion binding agreement has had. Although discussions are under way with new capacity providers we have no choice other than to review our operating structures, in particular resourcing levels. The commercial reality of this situation simply makes this untenable and not sustainable, therefore it is imperative that we react to the current situation. As a result, proposed changes to the existing roles and structures have been identified and we will shortly be entering into a period of consultation in order to discuss these proposals with affected employees. I would like to reassure you all that this decision has not been taken lightly, and we find ourselves potentially having to significantly reduce the workforce across both locations. The next step is that we will be seeking nominations for employee representative positions. Further details on how to nominate or volunteer are contained in your individual confirmation letters. We will be working closely with Careers Wales in order to support affected employees with Outreach assistance such as providing information on Welsh Government funding/grants, cv and letter writing, interview preparation and information on local vacancies if required. Once you have had a chance to reflect on today's announcement I am sure you will have questions. In the first instance please direct these to your line manager and employee representatives once they are confirmed. Sandy Windmill has*

been appointed to co-ordinate and assist us through the process in the coming weeks. Further updates will be provided as we progress through the next few weeks. In the meantime, although this is a difficult and challenging time it is business as usual therefore your continued commitment and co-operation is much appreciated.

29. The following letter was sent by email to the claimants work addresses that day:

Following today's announcement regarding the impact that the recent early termination of the Gefion binding agreement has had on the business, I am writing to confirm that your role has been identified as at risk of redundancy.

The Company has a legal obligation to enter into a period of consultation with all potentially affected employees. The consultation period will last no less than 30 days and during this time there will be a number of consultation meetings in order to inform you fully of the potential impact of the Company's proposals on job roles. At the meetings you will be given a full opportunity to ask questions and to make any representations or suggestions that you may have in connection with the proposals. Any suggestions you have will be carefully considered by the Company so I urge you to use this time to come prepared with as many questions and suggestions as you can think of.

The Company is seeking nominations or volunteers to undertake the role of Employee Representatives as follows:

PPL:- 2 Employee Representatives
SHL Sales:- 2 Employee Representatives
SHL Back Office:- 2 Employee Representatives

To register the name of the person you would like to nominate for one of these important roles (which can be yourself) please email their name and department to notifications@staveleyhead.co.uk before 12 noon on Monday 27th January 2020. Please make sure that your nominated person is happy to be included and do not add any questions or other information to your email at this stage. Once nominations have been received, we will check that the nominated employees are happy to stand and a confidential ballot will be arranged in order for votes to be cast. However, if the maximum number of nominations are received in one or more areas, nominees will automatically become Employee Representatives if they are happy to do so. Successfully elected representatives will be notified as soon as possible and will receive training as a part of this process.

The role of the Employee Representatives will be to work with the Company to help facilitate meetings, assist employees with any concerns or questions they may have and to relay important information and suggestions that arises as part of the consultation period. The Employee Representatives will serve until the end of the consultation period.

If you have any questions regarding the content of this letter or the announcement then please direct them to your line manager in the first instance. As we progress through the consultation process we will provide more detail on the situation in order to answer the most commonly raised concerns.
Yours sincerely

Ashley Peters
Managing Director

30. The claimants did not return to work at their desks but were allowed to go early if they wished. Many of the staff went with Mr Biggs and others to a local pub to discuss what was happening. The vast majority of them had no access to any of R1's systems as its practice was not to allow staff access remotely. Mr Evans was an exception to this rule and could see his work emails on his phone.

31. On the morning on Monday 27 January 2020 Mr Biggs put himself forward as an employee representative. An email was sent to all claimant's extending the deadline for casting votes for employee representatives from 12 noon until 2pm. Mr Biggs was able to vote, as were Mr Hussain and Mr Evans, for their representative of choice and did so.

32. The voting resulted in the election of the following four representatives Jamie Law, Kevin Biggs, Sean McNally and Steve Banner for the Connahs Quay location. Lisa Ward and Barrie Jones were elected for the Flint location.

33. Sandy Windmill created a document, HR1 form, dated 28 January 2020 recording their appointment. The document recited the date of first proposed dismissal as 28 February 2020. The document recited 67 employees in total and a possible 49 redundancies at Connah's Quay. The document stated that Jamie Law and Kevin Biggs represented back office staff and that Sean McNally and Steve Banner represented sales team staff. The document stated that consultation with the representatives had not yet started.

34. Those colleagues who are claimants in these proceedings were grouped loosely around their representatives as follows: (this table was prepared by the claimants to assist the Tribunal in determining issues at 3a and 3b of the List during the hearing)

Sean		**Kevin**		**Lisa**	
James	Ablett	Fryderyk	Banksi	Andrew	Connolly
Stuart	Buxton	Kevin	Biggs	Amy	Hebaiter
Abbie	Colclough	Elizabeth	Blackie	Deborah	Hughes
Nathan	Davies	Amy	Crocombe	Zoe	Hughes
Megin	Doig	Victoria	Guest	Caroline	Kirkham
Aneta	Edwards	Amanda	Jackson	Peter	Mountfort
Lee	Evans	Emily	Leighton	Liam	Roberts
Sean	Fletcher	Rhian	McGraa	Sandra	Roberts
Adam	Graham	Carl	Sillitoe	Allan	Scattergood
Jennifer	Hiles	Kristie	Williams	Lisa	Ward

Bethany	Hodson			
Sarah	Hood	Peter	Cresswell	
Jayne	Hudson	Olita	McKeon	
Tobais	Hussain			
Sarah	Kissack			
Sian	Martin			
Holly	McGlade			
Cerys	Pryce			

35. On 28 January Sandy Windmill had prepared a second HR1 document detailing 42 redundancies out of a possible 44 employees of the first respondent at the Flint premises working on PPL business. Barrie Jones and Lisa Ward were the elected representatives for groups of employees described as PPL, claims and underwriting teams. Ms Ward worked across all employees at Connah's Quay and Flint in a representative capacity.

36. Mr Biggs and Ms Ward and Mr McNally and Mr Banner all worked across the claimant group in a joint and several way to compile a list of questions to be put to management. It was a small open plan office with diminishing workload at Connah's Quay and there was time for discussion in an informal and almost constant way among the staff. Ms Ward finalized the list of questions on behalf of all the employees in the groups at both locations and it was sent to management. It had 127 questions in a table format.

37. The employees never got a reply to the list of questions. Someone, at some point, began work on a dcoument responding to some of the questions. In one of the response boxes the person completing the answers asked a question *Please confirm this includes pension contributions?* suggesting that the responses were a first draft to be consulted on with members of R1 management or legal advisers.

38. R1 was facing financial hardship and had been working for some months with a firm of insolvency practitioners called Duff and Phelps who had been tracking the business' financial performance.

39. On Tuesday 4 February 2020 two members of staff, Mr Maddox and Ms Ryan, from Duff and Phelps attended R1 premises and discussed with R1 the

urgent need to make salary savings, the insolvency situation and if it were to be appointed, the logistics of how those dismissals would be communicated to staff and managed.

40. On Wednesday 5 February Duff and Phelps (who later came to be known as Kroll) were appointed as administrators to R1 by Court Order. Mr Saunders also worked for Duff and Phelps and he made the decision, on 5 February 2020, to dismiss the claimants. That decision was to be implemented on site that day. He was concerned that as R1 had lost its main insurer, the insurance book was getting smaller each day. There were still direct debits to be collected in for current policies but as customers seeking insurance rang up to get a quote either for new business or renewal R1 had no capacity to offer insurance to them. This meant that the work load for staff was rapidly diminishing. The Administrator needed to retain enough staff to manage the running down of the existing policies and seek to preserve what repeat business it could as there might be some value in renewals business that might be placed other than with GF, to the creditors, but he did not need all of the staff. He was concerned that although there was still cash at bank that was an asset to be preserved for the creditors and not spent on salaries where there was little or no work to be done. Mr Saunders knew that R1 was losing hundreds of thousands of pounds each month.

41. Mr Saunders was aware that R1 had informed staff that they were at risk of redundancy and had started a process to consult with staff. He did not think it appropriate to wait to see that process through in line with assurances that had been given to the staff because of the immediate financial pressure and the obligation on him to preserve assets for the creditors.

42. He had not heard of One Sure Insurance at this time and had had no contact with them. Their name was not on his firm's database of parties to whom the Administrators offer businesses and assets for sale in administrations.

43. On Wednesday 5 February Mr Evans was at work at R1 and saw that the operations director had a list of names of all employees and was marking some of them with ticks and some with crosses. This turned out to be the list of people who were to be retained and who were to be made redundant. Those who were to be retained were told to go into the boardroom for a meeting. The others were told to go to the canteen for their meeting. In the canteen the claimants were told that they were being made redundant with immediate effect. They were told to go and collect their personal possessions and to leave immediately. When Mr Evans went back to his desk he had been locked out of company systems. He and others had been told, on 24 January 2020, that they would have 30 days and opportunities to ask questions and have them answered, to be consulted and to get support in finding other work. They gathered up their belongings and left. They had no further access to the company and did not do any further work for it.

44. That same day the Administrator put a press release out to 690 contacts on its database informing them that R1 was in administration. R3 was not on that database. It heard about the administration by word of mouth from other insurance industry contacts. On 5 February 2020 R3, through Mr Harper, sent an email expressing interest in acquiring assets of R1 to the Administrator. R3 also, though Mr Harper personally was not aware of this at the time, contacted the former owner

of R1 Mr Peters direct and expressed interest so that Mr Peters included R3 in a list of potentially interested parties on an email he sent to the Administrator that evening.

45. On 10 February 2020 the Administrator sent out letters to employees formally confirming their dismissals at the meeting on 5 February 2020. The letter said *as a result of the Company's insolvency it is no longer in a position to continue your contract of employment.* The Administrator also sent out that day a document inviting expressions of interest in the purchase of the business by 13 February 2020 to its database. R3 must have been added to that database or included in the distribution list as it received the invitation to express interest. R3 replied stating its intention to take on the *"full book of business, servicing those clients until renewal where they would be replaced with A rated capacity……we would be looking to retain the staff and would therefore take on any redundancy responsibilities for any of those staff that were surplus to our requirements*."

46. On 17 February 2020 R3 signed a non disclosure agreement with R1 Administrators. It provided detail as to how R3 might make an indicative offer for purchase of *"the business and / or certain assets"* of R1 in administration. Over the coming weeks the Administrator received over 30 expressions of interest. They were considered and final offers were invited for 10 March 2020

47. Offers were made by R3 by email including an offer on 10 March which set out three different valuations / bases of offer. R3's offer to purchase R1 changed considerably in scale (from buying everything to buying listed assets) and price (from £1.25 m to £ 75 000) over a period of weeks. There was an offer on 16 March 2020 at £240 000. The final agreement reached was for it to buy the following assets for a total of £ 75,000:

- The business intellectual property for £1
- The computer systems for £36,198
- The benefit of the supplier contracts and administration purchase contracts for £1
- The renewal commissions for £2
- The equipment for £24,055
- The goodwill for £1
- The stock for £14,741
- The records for £1

48. There was a schedule attached to the sale agreement itemising the furniture fixtures and fittings and computer and telecoms equipments, plant and machinery. There was a further schedule setting out the details of 22 employees whose employment would transfer to R3 who had been employed immediately before the transfer. The employee schedule recited that the managing director had been

made redundant prior to completion but the finance director's services had been retained. The sale agreement was signed by R3 on 2 April 2020.

49. The claimants received statutory redundancy payments from R2. They brought their tribunal complaints.

50. Mr Hussain took up an offer of employment from R3.

The Law

51. Section 188 and s188A Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows:

> **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–**
>
> **….**
>
> **(b) in any other case, whichever of the following employee representatives the employer chooses:–**
>
> **….**
>
> **(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.

….

(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 description 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

….

(6) 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.

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;

....

(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;

….

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

48. Section 189 TULRCA 1992 provides the remedy for breach of S188 and S188A as follow:

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.

49. TUPE brought into UK law requirements in the Acquired Rights Directive for protection of employees. That directive is no longer retained law in the UK but its recitals provided:

"Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers. It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded."

50. Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides:

> **4.— Effect of relevant transfer on contracts of employment**
>
> **(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
>
> **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.**
>
> **(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.**
>
> **7. — Dismissal of employee because of relevant transfer**
>
> **(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.**
>
> **(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the**

workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies —

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

51. Prior to 2014 the 2006 TUPE Regulations used the phrase *connected with* the transfer. Cases before 2014 on the issue of the reason for the transfer were decided using the *connected with* language whereas the current Regulation 7 requires the transfer to be the *sole or principal reason* for dismissal.

52. The principle established in Kuzel v Roche Products Limited [2008] EWCA Civ 380 that once the claimant has produced some evidence in support of his case then the burden of proof lies on the respondent to show that the reason for dismissal was not TUPE related was applied in Marshall v Game Retail Limited UK EAT /0276 /13 unreported but cited in Harvey.

53. In Kavanagh v Crystal Palace FC 2000 Ltd [2013] IRLR 291 the dismissals occurred before the transfer but were found to be *connected with* the transfer. Lord Kay said:

> *"It is common ground that the principal reason for the dismissal was not the transfer itself because at the effective date of termination no agreement had been reached in relation to the transfer*"

54. The reason for the transfer is a question of fact. The "but for" test is not applicable. The question is "what was the reason?" "what caused the employer to dismiss" Addison v Community Integrated Care 2507729/11.

55. Where the sole or principal reason for dismissal is the transfer itself Langstaff J in Osborne v Capita Business Services Ltd UK EAT/0048/16 (unreported) stated that the tribunal must then proceed by identifying whether the reason for dismissal in that individual case was one that entailed changes in the workforce. A dismissal by a transferor, a pre-transfer redundancy, must relate to the transferor's future conduct of the business and the transferor cannot rely on the transferee's, economic, technical or organisational reasons. The transferor must therefore have an intention of continuing the business.

56. **Regulation 13 – Duty to inform and consult representatives**

(1) In this regulation and regulations [13A] 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised

grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures

……..

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where —

(a) the employer has invited any of the affected employee to elect employee representatives; and

(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

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

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

Regulation 15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, 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 his employees who are affected employees;

(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 his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show —

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees [except where the question is whether or not regulation 13A applied].

[(3A) If on a complaint under paragraph (1), a question arises as to whether or not regulation 13A applied, it is for the employer to show that the conditions in sub-paragraphs (a) and (b) of regulation 13A(1) applied at the time referred to in regulation 13A(1).]

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer 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.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate

compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;

(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

Applying the law

1. Did the First Respondent dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less?

57. *20 or more employees:* 41 employees were dismissed on 5 February 2020. 39 now bring complaints.

58. *One establishment:* The respondent operated from sites at Connah's Quay and at Flint. Everyone agreed that the business of R1 across both those locations was one establishment. If that had been in doubt the Tribunal would have found, by reference to the documents prepared by Sandy Windmill at page 111 and 515 of the bundle (which recited the First Respondent as the employer and proposed redundancies at each location) and the oral evidence of Mr Saunders and the Adminstrator's Reports and communications regarding sale, that the First Respondent ran one establishment across those two sites.

59. *90 days or less:* The claimants were notified on Friday 24 January 2020 and dismissed on Friday 5 February 2020. This was 11 days, less than 90 days.

60. The Tribunal saw the notice which was read to the staff on 24 January 2020 proposing the redundancies and set out above.

61. *Dismissal by first respondent:* The Tribunal saw a letter of dismissal at page 119 of the bundle from the Administrator Sarah Bell and it heard evidence from Mr Saunders that he on behalf of the Administrator had made the decision to dismiss.

62. Mr Saunders' motivation for dismissal was to cut the wages bill so as to preserve what cash there was at bank for the creditors. The letter of dismissal said the company was insolvent. Mr Saunders told the Tribunal that R1 was losing hundreds of thousands of pounds per month so that the cash at bank would not have lasted long. He told the Tribunal that there was not enough work for the

employees to do as the insurance book was diminishing as people rang for renewals and R1 did not have an underwriter through which to offer renewals or new business. R1 had identified this and having abandoned its search for a new provider, begun a redundancy exercise before the Administrator was appointed. The Administrator acted rapidly on the first day of appointment to terminate employment and preserve assets for the creditors.

63. Mr Saunders did not at that point know of R3. It was not on its database of contacts. His firm had had no contact with R3 during the months in which his firm had been "tracking" R1.

2. Did the First Respondent properly elect and appoint appropriate employee representatives in order to fulfil its collective consultation obligations?

64. S188(1) (b) defines appropriate representatives. They are to be elected by affected employees. The Tribunal had to consider were the claimants affected employees. The Statute says *employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.* A common sense plain reading of the Statute requires that the claimants, who were employed and might lose their jobs or if retained be required to work in a different way if their colleagues lost their jobs, were clearly affected employees.

65. The requirements for proper election were set out in s188A (a) – (i).

66. The representatives were not properly elected because:

(i) there was too short a timescale in which to allow for proper representation and because

(ii) the respondent did not discharge its burden in showing the Tribunal that it had done what it could to inform all employees of the redundancy situation and of their right to vote for a representative.

67. The Tribunal accepted the evidence of Mr Evans that the respondent did not allow remote access to its emails and systems. Mr Evans had remote access but he was an exception rather than the rule. The Tribunal accepted the evidence of Mr Evans and Mr Biggs that although they could not name individuals, there were people who were not at work on Friday 24 January 2020 and Monday 27 January 2020. The respondent did not show the Tribunal what it had done, if anything, to ensure there were no such people or if there might be then to identify those people and inform those people of the redundancy situation and their rights to vote for a representative.

68. The respondent had the burden of proof and adduced no evidence of any effort that had been made to identify all employees, ensure their whereabouts or attendance at the meeting or ensure that information was provided to them in circumstances in which they could not access their work email. Even if all

employees had been informed on Friday 24 January 2020 the Tribunal accepts the oral evidence of Mr Evans and Mr Biggs that most people, in response to the news that they were at risk of redundancy and having been informed they did not need to go back to their desks, went to the pub to sit together and take in the news. There was little time for them to absorb the news let alone act on it. Then it was the weekend. By Monday at 2pm they had to have identified who might be their representatives and then have a vote and elect representatives.

69. Voting was carried out by email but there was no evidence before us as to the number of people who stood for election or the number of people who voted or the votes cast for each candidate. There was no evidence as to how those who did not have access to their work email could vote even if they had been informed of the process and wanted to vote.

70. The Tribunal considered against this short timescale the fact that the loss of the GF contract dated back to 29 November 2019. It was not suddenly urgent on 24 January 2020 that the representatives must be in place by 2pm Monday. More time could and should have been allowed for the proper notification of all employees, whether on site or not, and with access to email or not, and the proper identification of candidates for representatives and then a vote for representatives.

71. From the meeting on the afternoon of Friday 5 February until 2pm on Monday 8 February 2020 was not sufficient time to amount to a proper election process in this case. The respondent had not made such arrangements as were reasonably practical to ensure the election was fair under Section 188A (1)(a).

72. Under Section 188A(1)(f) there is an obligation upon the employer to ensure that all candidates for election are affected employees on the date of the election. The respondent submitted, on the point about standing at 3a) on the List of Issues and below, that the employees represented by Sean McNally had no standing as he was in the event retained in employment and did not bring a complaint. The Tribunal found that he was an affected employee at the time of his election. It is not with hindsight that affected employees are defined but at the time of the election.

73. Further, under Section 188A (1)(f) in the circumstances described above, where the respondent had not identified and communicated with people who may not have been at work on Friday 24 January 2020 and who had no remote access to the respondent's systems, it did not discharge the requirement of ensuring that no affected employee was unreasonably excluded from standing for election. For the same reason the respondent did not comply with Section 188A(1)(g) in that it could not in those circumstances have complied with the requirement that all affected employees on the date of the election were entitled to vote.

74. In the alternative, if they were properly elected we accept the oral evidence of Mr Biggs, and prefer it to the documentary evidence at p 111, that the representatives acted jointly together for all employees so that they were in effect four representatives for one unit of all claimants at Connahs Quay. Mr Biggs told

us there was a small open plan office. The Tribunal accepts the evidence of Mr Biggs that he Sean and Steve together worked with Lisa to consult all claimants and then collate a list of questions. Lisa Ward who was a representative elected for employees at Flint, in effect, acted as a representative for all employees across both sites as she wrote up the List of 127 Questions document.

3. Do the Claimants have standing to

a. bring a claim under s189 TULRCA 1992 in accordance with the requirements of s188(1B) TULRCA.

75. The Tribunal accepts the respondent's submission that where there are properly appointed representatives then that would preclude claims being brought by individuals.

76. A document was produced by the claimants at the request of the Tribunal that attempted to allocate staff to their representatives. This was in support of the respondent's contention that some of the claimant's had no standing to bring a complaint as their representative was not a claimant. The table is reproduced above.

77. The Tribunal finds that the representatives were not properly elected so individuals have standing under Section 189(1)(d) to bring their complaints.

78. In the alternative, if the Tribunal is wrong about the elections point, then it would have found that the representatives acted jointly so that Mr Biggs had standing for the all the Connah's Quay location staff. Ms Ward had standing for all the Flint employees and given her role in putting together the List of 127 Questions document, the Tribunal finds that Ms Ward would also have had standing for all claimants across both sites.

(b) Bring a claim under Reg 14 TUPE Regulations 2006 in accordance with Reg 15(1) TUPE Regs.?

79. Under TUPE the affected employees for the purposes of Regulations 14 and 15 are defined as

> *any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it;*

80. The claimants could not be affected employees at the time of the transfer on 3 April 2020 as they had been dismissed for a reason not connected to a transfer on 5 February 2020. At the time of their dismissal the third respondent was not in sight.

4. Did the First Respondent consult the employees who may be affected by the proposals about the dismissals for 30 days before the dismissal took effect?

81. *Consultation:* Consultation requires two way communication. There has to be an opportunity for those affected to be heard. The Tribunal finds, having regard

to the evidence of Mr Biggs and Mr Evans and the contemporaneous documentation that between 24 January and 5 February there was no consultation only the provision of information. On 24 January a script was read and a letter sent by email that was only accessible to those on site or with remote access. Assurances were given as to 30 days and processes to be followed.

82. A document was produced in the bundle that showed some questions on the List of 127 Questions document being answered, but the Tribunal attached more weight to the oral evidence of Mr Biggs than to the document in finding that there was no response communicated to the questions of the employees.

83. *30 days before dismissals:* On 28 January 2020 Sandy Windmill's form at pages 111 and 515 confirmed that consultation had not yet begun. The proposal contained in the draft response to the questions the employees submitted (completed we know not when by we know not whom) indicated a proposed consultation period from 29 January to 18 February 2020. In the event the claimants were dismissed on 5 February 2020. There was not 30 days consultation.

84. The Tribunal finds there was no consultation but if it is wrong about that then the consultation could only have lasted from the date on which it was proposed (by R1 in its draft Response to the 127 Questions document which the Tribunal finds was never shared with the employees) of 29 January 2020 until 5 February 2020. That was 3 clear working days. So, if the Tribunal is wrong about there being no consultation, then the claimants will still succeed on the failure to consult point because the consultation, if any, was not for the required 30 days.

5. Did the consultation, if any, deal with ways to avoid the dismissals, reducing the number of dismissals or how to mitigate the consequences of the dismissals.

85. No there was no meaningful consultation. R1 had said in its notification on 24 January 2020 *we will be working closely with Careers Wales in order to support affected employees with Outreach assistance such as providing information on Welsh Government funding/grants, cv and letter writing, interview preparation and information on local vacancies if required.* None of this happened. The administrators were appointed and acted immediately to terminate employment on 5 February 2020 foreshortening the periods that had been set out by the first respondent.

6. Did the liability for the Claimants' claims against the First Respondent transfer to the Third Respondent under TUPE?

86. In responding to this question on the List of Issues the Tribunal considered was the sole or principal reason for the dismissals the transfer (and if so was it for an economic, technical or organisational reason entailing changes in the workforce ? The Tribunal asked itself who was decision maker on dismissal. The answer was, by his own evidence, that Mr Saunders for the administrator made the decisions to dismiss on appointment on 5 February 2020. The reason for the decision to dismiss was as set out above, to save salaries it could not afford to pay

and to preserve the assets, such as they were including any cash at bank, of the business for the creditors. There had been discussions on 4 February and engagement in identification of people to be dismissed from a list. The administrator's staff had been working with the operations director of R1 so as to identify who would stay and who would go. This was done so as to manage the reducing business retaining a skeleton staff to service what renewals and premium collections there were.

87. The Tribunal was referred in submissions to the following cases (cited above). Space Right was fact sensitive. Similarly, Kavanagh v Crystal Palace was also fact sensitive and the Tribunal notes that both cases were decided on the pre 2014 *connected with* language in Regulation 7. The language the Tribunal had to consider was the *sole or principal reason* text.

88. When considering was the transfer the sole or principal reason for the dismissal Regulation 7 does not require a particular transfer – not *the* transfer – just a transfer. The claimant concedes that there is no evidence to support a contention in this case that the Administrator, Mr Saunders being the dismissing officer, anticipated a sale to R3 at the point of dismissal. The Tribunal accepts Mr Saunders' evidence that he had not had any contact with and had not heard of R3 at the point at which he made the decision to dismiss.

89. *A* transfer (our emphasis) was in Mr Saunders contemplation as one of a range of potential outcomes. The Tribunal accepted his evidence, and notes that he used language carefully, to say he anticipated preserving the assets for the creditors, servicing the insurance book, selling it or the business as a going concern. His intention was for the future conduct of that business at the time. Selling some, none or all of it in future was as within his contemplation on this appointment as administrator as it would properly be on any appointment. He circulated news of his appointment to a database of 690 organisations. He sent out an invitation to tender letter on 17 February 2020. This showed us that *the transferee, R3,* (our emphasis) was not in the mind of the Administrator at the time of the decision to dismiss.

90. Nor was *a* transfer *the sole or principal reason* for dismissal. Mr Saunders was not cutting staff costs to make the business saleable or more saleable, he was cutting costs because the business could not sustain the salaries in view of the diminishing returns and inability to offer renewals to the vast majority 85 – 95% of its insureds. That was the case whether the business might be sold in future or not. The immediate situation on 5 February was that R1 could not sustain those salaries and the Administrator had an obligation to preserve what assets it could, what cash at bank, for the creditors.

91. Accordingly the Tribunal finds that the sole or principal reason for the dismissals was not a transfer. The sole or principal reason for dismissal was redundancy. Therefore, the liability for the failure to inform and consult under TULRCA does not pass to R3.

92. If the transfer had been the sole or principal reason for dismissal then it would have been necessary for the Tribunal to go on and consider was there an economic, technical or organisational reason, of the transferor, relating to its future conduct of the business, that entailed changes in the workforce.

93. Mr Saunders, through his colleagues had identified with the support of the operations director, which staff would be required to maintain a service to customers so as to collect in ongoing payments of insurance premium and to preserve the asset of the insurance book going forward. He knew that the business could not afford to pay all of the salaries to do this. He intended to change the number of people employed in the workforce. He was reducing the headcount, to save salary spend and to retain the minimum number of employees to service the insurance book and customers.

94. There may have been an ancillary or peripheral benefit in doing that of making the business more attractive to a potential purchaser. Neither a sale, nor a purchaser was in sight at the point of dismissal.

95. If dismissal had been for the sole or principal reason of a transfer then the Tribunal would have gone on to find that the redundancies were for economic, technical and organisational reasons entailing changes in the workforce.

96. The Tribunal accepted R3's submission and reference to the authority Page v Lakeside Collection Ltd (t/a Lavender Hotels) [2010] 11 WLUK 509 that liability did not transfer where there was an ETO reason. In that case the EAT refused to set aside a first instance decision that employees of an insolvent company were dismissed for an ETO reason, namely that fewer managerial staff were required during administration, in the context of the claimants in that case having been made redundant on 3 February 2009 when the company entered administration, an offer for sale being made on 13 February 2009 and sale to the transferee being completed on 10 March 2009.

7. Did the First Respondent and the Third Respondent comply with their obligations under TUPE to inform and consult with the Claimants over the transfer?

97. Was there an obligation on R1 to consult the claimants about a transfer ? if so, the then the parties accepted that R1 would be jointly and severally liable with R3. Regulation 13 provides that the employer must consult with

> **"any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it".**

98. These are commonly referred to as affected employees. Were the claimant's affected employees? The Tribunal heard submissions on this point. The claimant says that the claimants were affected employees because the Administrator had a transfer in mind. The Tribunal finds, as above, that a transfer was not in sight at the date of dismissal. The transfer took place on 2 April 2020. At that point the claimant's had last been employed

just short of two months before the transfer. On 10 March 2020 R3 made its first substantive offer. Even on that date the claimants could not be said to have been affected by the transfer, or employees who may be affected by it or measures taken in connection with it, because they had been dismissed around five weeks before.

99. The Tribunal was referred to the Unison case. That case can be distinguished from this as it sought to protect employees who might have been retained employees who might have applied for promotion into the grouping that was transferred. That is different from this case where the claimants were no longer employees at the time the transfer was in sight. To go back to the language of the Regulation; *who may be affected by the transfer* they were not affected by the transfer because they had been dismissed by reason of redundancy two months before it in circumstances in which the transfer, or any transfer, was not the sole or principal reason for their dismissal and again in the Regulation they do not fall within the category of employees who *may be affected by measures taken in connection with it* because they were not employees and because their dismissals, two months before, were not measures taken in connection with this transfer. For those reasons the claimants do not fall within the scope of the duty to consult in Regulation 13 and that part of their complaints must fail.

The special measures defences

100. R3 made a late application to run a special measures defence in relation to the failure to consult under TULRCA and in relation to any failure to inform and consult under TUPE. The Tribunal rejected that application. The Tribunal did not hear evidence or submission on special measures but notes here that if it had been run there is established authority, which was accepted by R3, that insolvency itself will not amount to a special measure. There was distance in this case between the loss of the GF contract in 2019 confirmed on 26 November 2019, and distance between dismissals on 5 February 2020 and the TUPE transfer which at the highest could be said to have been in sight from 13 February 2020, more probably 10 March when an offer was made, though terms were not agreed until much later and the sale concluded on 2 April 2020. These were not events that were thrust suddenly and urgently on the respondent, neither the loss of the contract nor the appointment of the Administrator, nor the dismissals, nor the transfer such that they would have been likely to meet the requirements of a special measures defence either for TULRCA or TUPE.

8. If the Claimants are entitled to a protective award, then for what period is it just and equitable to make such an award in the circumstances?

101. Under Section 189 TULRCA a protective award is an award in respect of one or more descriptions of employees who have been dismissed as redundant and in respect of whose dismissal the employer has failed to comply with a requirement under section 188 the duty of employer to consult. A protective award orders an employer to pay remuneration for a protected period.

102. The protected period begins with the date on which the first of dismissals takes effect and is of such length as the tribunal determines to be just and equitable having regard to the seriousness of the employers default in complying with any requirements under section 188 but shall not exceed 90 days.

103. The Tribunal had regard to the guidelines in Susie Radin Ltd v GMB and others [2004] EWCA Civ 180.

(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in Section 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach

(2) the ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default

(3) the default may vary in seriousness from the technical to a complete failure to provide any of the required information to consult

(4) the deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under section 188.

(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there is no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate.

104. The protective award is a collective award in respect of one or more descriptions of employees affected. Its purpose is to ensure compliance with the obligations in Section 188 by providing a sanction against failure to comply

105. The focus is not on the loss of the individual employees but the collective default of the employer and its seriousness.

106. The default of R1 included

a. that it did not consult sooner, having lost its contract in November 2019, and having failed to find a replacement at some point after that
b. that on 24 January 2020 it gave assurances that there would be a 30 days process of consultation and did not abide by that, administrators being appointed on 5 February 2020
c. that on 4 February 2020 a list was produced of people who would stay and people who would go. That list was not shared with the employee representatives perhaps because they themselves may have been on the dismissal side of the list
d. that the process for election was unreasonable for the reasons set out above
e. that it failed to respond to the 127 questions put by the representatives
f. that no individual consultation meetings had been set up
g. that ultimately the claimants were dismissed on 5 February 2020 with no meaningful consultation having taken place

107. The starting point is to award the maximum period and reduce it in respect of any mitigation. The Tribunal finds the following mitigation:

a. R1 had informed employees of potential redundancies on 24 January 2020 and had attempted to begin a consultation process. This is evidenced by the 24 January 2020 notice and letter and the HR1 forms.
b. R1 had attempted to appoint representatives.
c. The respondents had Sandy Windmill in place to run a consultation process. Until 4 February it would appear that the respondent was expecting to run that process.

d. R1 received the 127 questions and was beginning to prepare a response to them.

108. In recognition of that mitigation the Tribunal reduces the protective award by one week and considers it just and equitable in the circumstances above to make a protective award for the claimants in the Schedule of 12 weeks or 84 days.

Employment Judge Aspinall
Date: 6 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
17 May 2022

FOR EMPLOYMENT TRIBUNALS

Schedule to Judgment
The dismissed employees in respect of whom a protective award is made

Case Number	**Claimant Name**
2405233/2020	Mr Tobias Hussain

2405241/2020	Mr Kevin Biggs
2405242/2020	Lisa Ward
2405243/2020	Mr Lee Evans
2405244/2020	Ms Elizabeth Blackie
2405245/2020	Mr Peter Mountfort
2405246/2020	Mr Liam Roberts
2405247/2020	Ms Caroline Kirkham
2405248/2020	Ms Deborah Hughes
2405249/2020	Mr Stuart Buxton
2405250/2020	Ms Rhian McGraa
2405251/2020	Mr Adam Graham
2405252/2020	Mr Allan Scattergood
2405253/2020	Mrs Sandra Roberts
2405254/2020	Mr Fryderyk Banski
2405255/2020	Ms Kristie Williams
2405256/2020	Ms Amy Hebaiter
2405257/2020	Ms Victoria Guest
2405258/2020	Ms Sian Martin
2405259/2020	Ms Jennifer Hiles
2405260/2020	Ms Zoe Hughes
2405261/2020	Mr Carl Sillitoe
2405262/2020	Ms Jayne Hudson
2405263/2020	Mr Andrew Connolly
2405264/2020	Ms Sarah Hood
2405265/2020	Ms Amanda Jackson
2405266/2020	Ms Holly McGlade
2405267/2020	Ms Cerys Pryce
2405268/2020	Mr Nathan Davies
2405269/2020	Ms Sarah Kissack
2405270/2020	Ms Bethany Hodson
2405271/2020	Ms Amy Crocombe
2405272/2020	Ms Aneta Edwards
2405273/2020	Ms Olita McKeon
2405274/2020	Ms Emily Leighton
2405276/2020	Mr Peter Cresswell
2405277/2020	Mr James Ablett
2405278/2020	Ms Megin Doig
2405279/2020	Ms Abbie Colclough

ANNEX TO THE JUDGMENT
(PROTECTIVE AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The respondent is under a duty to give the Secretary of State the following information in writing: (a) the name, address and National Insurance number of every employee to whom the protective award relates; and (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the Tribunal announced its judgment at the hearing. If the Tribunal did not announce its judgment at the hearing, the information shall be given within the period of 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the respondent to do so within those times, then the information shall be given as soon as reasonably practicable thereafter.

No part of the remuneration due to an employee under the protective award is payable until either (a) the Secretary of State has served a notice (called a Recoupment Notice) on the respondent to pay the whole or part thereof to the Secretary of State or (b) the Secretary of State has notified the respondent in writing that no such notice is to be served.

This is without prejudice to the right of an employee to present a complaint to an Employment Tribunal of the employer's failure to pay remuneration under a protective award.

If the Secretary of State has served a Recoupment Notice on the respondent, the sum claimed in the Recoupment Notice in relation to each employee will be whichever is the less of:

(a) the amount (less any tax or social security contributions which fall to be deducted by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Secretary of State receives from the employer the information referred to above; OR

(b) (i) the amount paid by way of or paid as on account of jobseeker's allowance, income-related employment and support allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date described in (a) above; or

(ii) in the case of an employee entitled to an award of universal credit for any period ("the UC period") which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of universal credit for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the period to which the prescribed element is attributable.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award is then payable to the employee, subject to the deduction of any tax or social security contributions.

A Recoupment Notice must be served within the period of 21 days after the Secretary of State has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State or as soon as practicable thereafter.

After paying the balance of the remuneration (less tax and social security contributions) to the employee, the respondent will not be further liable to the employee. However, the sum claimed in a Recoupment Notice is due from the respondent as a debt to the Secretary of State, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State as to the amount specified in the Recoupment Notice.