EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101560/2022; 4101309/2022 & others as per multiple ref 4100186

Held in Glasgow on 17 and 18 October 2022; 24, 25 and 26 January 2023

Employment Judge L Doherty

GMB Scotland	**First Claimant** **Represented by:** **Mr M Haywood - Counsel**
Unite The Union & others	**Second Claimant** **Represented by:** **Ms S Ismail - Counsel**
Engenda Group Limited	**Respondent** **Represented by:** **Mr D Jones - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the complaint presented by the Unite the Union (Unite) under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) is well founded;

2. the respondents are ordered to pay a protective award to the group of employees in respect of whom Unite is the Trade Union recognised by the respondents who have been dismissed as redundant and in respect of whose dismissal the respondents have failed to comply with a requirement of Section 188 of TULCRA; the protected period begins on 26 November 2021 and is for a period of **30 days;**

3. the complaint presented by the GMB Scotland (the GMB) under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) is well founded;

4. the respondents are ordered to pay a protective award to the group of employees in respect of whom the GMB is the Trade Union recognised by the respondents who have been dismissed as redundant and in respect of whose dismissal the respondents have failed to comply with a requirement of Section 188 of TULCRA; the protected period begins on 26 November 2021 and is for a period of **40 days**.

REASONS

1. This was a hearing to consider the Protective Award element of conjoined claims brought by the Trade Unions, Unite and a number of individuals and the GMB. It had been agreed by the parties that the protective award element of these claims would be dealt with at a Preliminary Hearing before an Employment Judge.

2. The hearing commenced on 17 October 2022. On 18 October, the Tribunal was advised the parties were close to agreeing settlement terms, and a discharge of the hearing was sought to allow that to be completed. Unfortunately, settlement was not achieved, and the hearing was relisted for 24 to 26 January 2023.

3. All of the claimants were represented by Ms Ismail at the hearing on 17 /18 October; the respondents were represented by Ms Hallsel. At the continued hearing the GMB were separately represented by Mr Haywood, and the respondents were represented by Mr Jones, due to Ms Hallsel's unavailability. All the representatives were counsel.

4. For the respondents, evidence was given by Ms Meadows, the respondents Associate Director of Corporate Services; Mr Paul Own, Associate Director; and Mr Lee Foundation Managing Director.

5. For the first claimants, evidence was given by Mr Scott Foley, Regional Officer, and Mary Alexander, Deputy Regional Secretary, both of Unite. For

the second claimant, evidence was given by Mr Cook, Senior Organiser for the GMB.

6. Evidence in chief was given by way of witness statements which were taken as read.

7. The parties produced a joint bundle of documents.

The Issues

8. It is accepted that Unite and the GMB are recognised trade unions for consultation purposes in terms of TULCRA. It is accepted that more 20 employees were dismissed as redundant by the respondents.

9. It is not accepted that there was the requisite consultation with those Trade Unions under Section 188 (1) (A) of TULCRA.

10. The respondent's position is that they did consult.

11. Whether there was the requisite consultation is therefore the first issue for the Tribunal.

12. To the extent that there were any deficiencies in the consultation process the respondents rely on a special circumstances and reasonable steps defence under Section 188 (7) of TULCRA.

13. The special circumstances relied upon by the respondents are that they were unable to consult with the TU representatives despite attempting to do so due to their unavailability. They were descoped from the project as a result of industrial action; the descoping brought about redundancies, but they were not given a date for the descoping of the work; this caused uncertainty and they were attempting to react to that. Industrial action (5 to 9 November), which resulted in a second descoping of work by the respondent's client, meant that it was difficult to consult post-industrial action, as there was no work for any employees post 9 November and employees were sent home after that date. They also rely on the nature of their work, which comprise short term projects, and the transient nature of their workforce.

14. The respondent's position is that the issue of a HR1 form amounted to compliance with the requirements of Section 188(4) of TULCRA. The claimants do not accept this.

15. The issue of the HR1 form, the attempts to contact the TU rep's, the election of employee representatives, and consultation which took place with employee representatives are all relied upon as reasonable steps in terms of Section 188 (7).

16. The issue in considering the Section 188(7) the defence is therefore whether there were special circumstances, and if so, did they render compliance with the obligations under Section 188 (1A), (2) and (4) of TULCRA, not reasonably practicable, and if so, had the respondents taken reasonable steps to comply with their obligations under those sections.

17. In the event that defence fails, the Tribunal has to consider the issue of remedy.

Findings in Fact

18. The respondents are a company engaged in providing services to the petrochemical industry to facilitate turnarounds and shutdowns of operational Plants. These are the terms used to describe a planned or unplanned period of time which an operational Plant is off-line for essential purposes.

19. Turnarounds or shutdowns are fast paced, very active pieces of work, which last for a fixed and generally short period. Additionally, as a result of the nature of the work, it is not altogether unusual for turnarounds/shutdowns not to go to plan and for the work to be done under the pressure of time constraints.

20. On a regular basis turnarounds/shutdown, are short term, repeat events. Because of the nature of the work, the workforce is transient. Operatives are employed on short term contracts with known end dates. As a result of this, the respondents are involved not infrequently in redundancy consultation processes. They are aware that there are obligations under TULCRA with regard to consultation in certain circumstances.

21. The respondent's experience is that that Trade Union representatives almost never attend the consultation meetings which they hold, and that they only attend if a problematic issue arises. The respondents attribute the lack of engagement by the Trade Unions in consultation meetings to the short and fixed term nature of the contracts under which their operatives are employed. In order to achieve consultation with their workforce in circumstances where they are under an obligation to consult, in the absence of Trade Union representatives, the respondents generally ask the workforce to select employee representatives by a ballot or show of hands, with whom they then consult.

22. The respondents provided a Turnaround service to PetrolINEOS at their Grangemouth site in early October 2021. It was initially anticipated by the respondents that the Turnaround would be of less than four weeks duration, and they anticipated mobilising fewer than 20 newly recruited personnel. Late in the preparation phase of the Turnaround, the extent of the works was expanded resulting in the respondents significantly increasing numbers of new recruits to around 80 to meet the demands of the work required. The timeframe for the project was expanded from 4 to 8 weeks.

23. The respondent's operatives are employed subject to the Naeci Agreement. Both Unite and the GMB are trade unions recognised by the respondents

24. On 21 October 2021, the night shift workers 'cabined up' and refused to work because of queries about pay. The day shift on 22 October also refused to work as a result of this issue. Mr Foundation and Mr Own met with workers and advised them that in their view they were taking unofficial action contrary to the terms of the Naeci Agreement, but gave a commitment that any pay errors, which arose as a result of a defect in the respondents' payroll, would be resolved. The day shift workers resumed work mid-morning on 22 October.

25. The respondents sought to reassure their client that no further unofficial industrial action would be taken by their workers, however on Monday 25 October, PetrolINEOS issued a project managers instruction to inform the respondents that they were descoping them following the unofficial strike

action. The respondents did not know the full impact of the descope but did realise that it might result in redundancies earlier than they had originally anticipated.

26. Ms Meadows decided to issue an HR1 form and Section 188 (of TULCRA) letter. Both of these documents were sent by email by Ms Meadows to Unite and the GMB on Tuesday 26 October at 17.34. Ms Meadow's email to Mr Foley was copied into Mr Cook of the GMB. It stated:

".. Originally our plan was to be on and off site in under 28 days however for a host of the reasons it is not looking likely this will happen and we now have team members with more than 28 days service. As such please find attached a copy of the H R1 I will submit today and S188 letter. I will also arrange for at risk letters to be sent to the whole team including a request for employee reps.

We are still working with Petrolneos on likely end dates on the project and given that this be within the next 30 days, will be lining up work at alternative sites where required to fulfil our obligations regarding consultation.

Will it be yourself will be available to support the team through this process, or is there a site based union rep available?"

27. The Section 188 letter was emailed on the 26 of October to Mr Foley and Mr Cook in the following terms:

"Dear sirs,

Re: S188 – Proposed Redundancies

We are proposing to make redundancies at Petrolneos, Grangemouth and, under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, we must consult with appropriate representatives of the affected employees where it is proposing to make 20 or more employees redundant within a period of 90 days.

The background to this proposal is the current turnaround project is likely to last more than 28 days and it is coming to an end. I am informing you as

representatives of Unite the Union and GMB, which we recognise in respect of the potentially affected employees.

We will therefore:

- *Provide you with information about the proposed redundancies.*
- *Consult with you and your fellow representatives about ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. I will arrange a meeting with all of the representatives at which we will explain the proposals to you in more detail and consider any representations that you wish to make on the proposed measures.*
- *Provide you and your fellow representatives with reasonable resources and access to facilities to assist the effectiveness of communication with the employees that you represent, including a list of the names of those employees.*

We expect the consultation to last 30 days and expect employee representatives will:

- *Receive the information from management about the proposals, whether in writing or at meetings.*
- *Share that information with the employees that you represent, and explain the process and proposals to them.*
- *Talk to your fellow representatives about the process and proposals.*
- *Act as a point of contact on relevant issues.*
- *Attend meetings to consult on the proposed dismissals and ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals.*
- *Make representations at meetings.*

- *Ensure that the employees that you represent know how to contact you during the information and consultation period.*
- *Gather questions and views from the employees that you represent and feed them back to us.*
- *Keep the employees informed of progress and any developments during the consultation.*
- *Share the information provided to the affected employees and obtain their views on the proposals.*
- *Participate in the process in a courteous, positive and constructive matter.*

28. The HR1 form contained information to the effect that it was proposed to make a total of 94 redundancies: the date of the first and last proposed dismissals was 25 November 2021; that the reason for the redundancies was the completion of all part of the contract; that a copy of the form had been given to the appropriate representatives; and that consultation commenced on 26 October. Scott Foley of Unite and Gary Cook of the GMB were identified as the TU representatives with whom consultation would take place.

29. On the morning of 27 November Ms Meadows attempted to telephone both Mr Foley and Mr Cook. She telephoned the landline number at the bottom of Mr Foley's email. She did not receive an answer to her telephone call, and she then telephoned a number that she found on the Unite website and asked to speak to him. She was told that he was not available, but that a message would be sent to him telling him that she had called.

30. Ms Meadows did not have a direct dial number for Mr Cook. She attempted to contact him by calling a telephone number she located on GMB website. She was passed from one office to another on a number of occasions and ultimately she left a message with someone asking that Mr Cook call her back. Ms Meadows also contacted Ian Garrett, the respondents' Turnaround Manager based at Grangemouth, and asked him to speak to his client contact in order to find out if they could reach the TU representatives.

31. The respondents were concerned about fulfilling their obligations in relation to the 30-day consultation period. As a result of this notwithstanding the absence of a TU representative, on 27 October Mr Own met with the day and night shift workers in order to begin the consultation process. For the day shift he met with Steve Aitkens and Tom Buchanan who had supported resolution of the payroll dispute. He also met with the nightshift team. His notes of those meetings are produced at pages 84/85 of the bundle. Mr Own asked them to hold a ballot for the election of employee representatives ahead for the potential redundancy situation. He discussed with them that the project was coming to a stage where they would need to start thinking about demobilisation, and he advised them that the respondents had been descoped by the client and that this would likely have an impact on resource requirements. He advised them that the respondents had started a redundancy process by issuing an HR1 the written to the TU representatives. He advised that the day and night shift would need to hold a ballot to nominate employee representatives to participate in a redundancy consultation process.

32. At the conclusion of both meetings, it was agreed that the workers would arrange a vote for representatives and the said they would contact their trade union for support.

33. Mr Own held further consultation meetings with the day and nightshift on the 28 and 29 October, his notes of which are produced in the bundle. At the meeting on 28 October, the employee representatives confirmed they have been selected as representatives by a ballot. They were told about the situation on site, including the descope and tight time scales. They were given proposed selection pools, criteria, and scoring mechanisms to discuss with their teams. Attendance was removed on the request of the employee reps as a potential criterion before presenting to the teams, on the basis that the on-site clocking on system had been temperamental and may not have provided accurate information.

34. At the meetings of 29 October, the employee representatives agreed the selection pools, criteria, and scoring mechanism.

35. Later on 29 October, Ms Meadows arranged for 'at risk of redundancy' letter to be issued to teams, after which there were queries about matters such as service dates, or requests for voluntary redundancy.

36. There was no trade union representation at any of these meetings.

37. On Monday 1 November, Mr Foley responded Mr Meadows's email of 26 October as follows:

"…….

In respect of the Statutory Consultation under TULR(C)A, both Unite and the GMB are recognised for collective bargaining purposes under the NAECI for all in scope employees (Grades 1 to 6) and therefore both I and my colleague, Gary Cook from the GMB are the appropriate representatives.

I therefore be grateful if you would advise how you intend to engage in meaningful consultation with both the Trade Unions in terms of the legislation.

I enquired if any of the workforce have elected Shop Stewards from within their various trade disciplines and disappointingly I have been advised that they were dissuaded from doing so by site management.

Should this be the case, I would seek assurance that there will be reoccurrence in the future and we will work positively to ensure proactive employee engagement."

38. Ms Meadow's auto response was on when Mr Foley's email of 1 November was received; this prompted an out of office response back from Mr Foley advising he was on leave until 15 November. In the afternoon of 1 November Ms Meadows called the telephone number she had on Mr Foley's out of office email response and spoke to a call handler, asking who she could speak to in his absence. She was told that a message would be sent to someone in Mr Foley's team and someone would call back. No one called her back.

39. Mr Foley was on annual leave from Monday 1 to 15 November, although he was intermittently available during his annual leave. On 2 November he emailed a grievance about a member to the respondents.

40. Ms Meadows emailed Mr Foley on the 3 November stating:

"…… We should be off site on 17th December, but I will let you if this changes.

I'm afraid you have been given incorrect information about reps. We held stand down meetings with our teams to inform them of the start of the process and asked the workforce to nominate representatives. They have done. We have been consulting with them and so far have agreed selection criteria (disciplinary record and skills, with service date as a tiebreaker)."

41. On 3 November, consultation meetings were held with employee representatives in which they were asked for ideas to avoid redundancy. The representatives collated a list of employees who were open to transfer.

42. On 4 November Mr Own held a consultation meeting to address transfer queries, in particular about opportunities at two other sites.

43. On 5 November, a payroll query was submitted which resulted in a dispute. As a result of this the dayshift 'cabined up' and said that they had contacted their Trade Union for support. Paul Own attempted to contact the trade union representatives via PetrolINEOS, who in turn contacted Ken Kennedy of the ECIA (Engineering Construction Industry Association). Ken Kennedy spoke to Paul Own and agreed to contact the trade unions directly with a view to resolving the pay dispute.

44. On 5 November night shift workers left both sites.

45. Ken Kennedy emailed Mr Own at 22.24 on 5 November to advise that he had contacted Unite and attempted to speak to Mary Alexander as Scott Foley, who normally dealt with the Grangemouth site, was on holiday. He advised that Ms Alexander was on leave until 8 November, but she would be told about the issue on her return. Ms Alexander was also contacted by the employee rep, Mr Aitkens, who asked her to come to the site to help sort out the pay dispute.

46. The workforce remained on strike from the 6 and 9 November, which meant that work planned for the weekend was cancelled.

47. Further to this industrial action there was a second descoping of the respondents by PetrolINEOS. This meant that the work available under the contract with the respondents would run out sooner than had been previously anticipated.

48. Ms Alexander attended the site on 8 November where she met with the day shift workers, Mr Foundation, Mr Own and Ms Meadows. The dayshift and nightshift retuned to work on 9 November.

49. On 8 November, when Ms Alexander was on site Ms Meadows asked her to remain on site to support the redundancy consultation meetings, which she agreed to do. She also agreed with Ms Meadows that she would chase up Gary Cook of the GMB.

50. Ms Alexander attended site again on 9 November. A meeting took place with the Ms Alexander, the two employee representatives and the respondents project manager, Ian Garret, attending in person. Ms Meadows, Mr Own, Mr Foundation and Mr Kennedy attending via Teams. Printed copies of the selection criteria were available at the meeting. The selection criteria comprised the same three headings identified in Ms Meadows email of Mr Foley and copied to Mr Cook of 3 November.

51. Notes of the meeting are produced at page 129. The first part of the meeting was taken up with discussions about the pay dispute. Thereafter there was a discussion about the impending redundancies. Mr Own explained the descoping and potential effects of that, explaining that there were still too many unknowns and the respondents were waiting for confirmation of the position from the client. Ms Meadows indicated that the lack of contact from any Trade Union representatives meant that the respondents had no choice but to start consultation with employee representatives. She explained the potential pools and scoring criteria and asked for feedback. Mr Alexander indicated that she did not usually become involved at this stage of the process but said that she would support it. She asked if there had been any contact from the GMB representative and said she would try to contact GMB. Ms Alexander asked the employee reps if they were comfortable with the pools

and selection criteria. The employee reps said they were because the service date was a tiebreaker. They said they had not been happy that attendance had previously been proposed criteria since there have been problems with recording attendance on site.

52. Ms Alexander considered the employee reps were something akin to Shop Stewards, but that they had not completed the relevant paperwork to be Unite Shop Stewards.

53. Ms Meadows explained the effect descoping was having on the ability to achieve 30 day consultation and asked for suggestions. Ms Alexander asked whether alternative roles were available. One of the employee reps confirmed they had been given roles at other sites to ask their teams about, and Ms Meadows confirmed that any suitable vacancies would be communicated to the Teams. It was indicated at the conclusion of the meeting that the next consultation would take place later with the nightshift.

54. No Trade Union representatives the attended the night shift meeting, which was facilitated by Ian Garret.

55. Ms Alexander did telephone Mr Cook but received no response.

56. On 10 November, provisional redundancy scores were emailed to the employees.

57. On 11 November, the two employee reps notified their intention to resign and Mr Garratt emailed Ms Alexander asking if she could ask them for replacements when she spoke to them.

58. Ms Meadows also contracted Ms Alexander on 11 November, initially by phone and then by email explaining that because of the descope there was not likely to be enough to work to take them to the end of the planned 30 day consultation period. She asked Ms Alexander to call her to discuss. Ms Alexander did so, and in the course of that telephone call Ms Meadows explained the respondent's proposals to use agreed hours and holiday leave, to achieve the 30 day consultation period. Ms Alexander said that she would meet up with the employee representatives, and explain the situation to them.

59. In the course of that telephone call, Ms Alexander told Ms Meadows that she had tried to reach Mr Cook but had been unable to do so, and undertook to send her Mr Cook's mobile number, which she did.

60. Ms Alexander texted Ms Meadows later that say with feedback of her proposals re pay to achieve 30 days consultation. She said that she was happy to attend a Teams meeting the following day. She also texted Mr Cook's telephone number.

61. Ms Meadows did not phone Mr Cook.

62. A further meeting took place on 12 November which was attended by Ms Alexander, Ms Meadows, Mr Foundation, Mr Own and Mr Kennedy via Teams and by the employee representatives and two of the respondent's employees. A good deal of the meeting was taken up with discussion about how the 30 days would be achieved as work was going to run out. Ms Alexander said that she would come to the site and she asked for support from the company in taking the message about pay to achieve the 30 days consultation to the workforce. Ms Meadows agreed to write a crib sheet, which she subsequently sent to Ms Alexander later on 12 November.

63. In the course of the meeting, Ms Alexander asked if employees would be notified of other opportunities within the company, and it was confirmed that they would be.

64. On 13 November, meetings were held by Chris Thomson of Engenda with the Teams to about how payment of the 30 days would be achieved, and they where they were given an opportunity to ask questions.

65. By Monday 15 November, work started to run out and management began to release operatives from the site.

66. Ms Meadows was on leave between 15 and 18 November.

67. The 15 November was Mr Foley's first day back at work. He had a discussion with Ms Alexander on his return about the situation further to which he tried to telephone Ms Meadows, following which he emailed her at 2pm. He asked

firstly about a dismissal appeal and then the demobilisation at PetrolINEOS. He advised that he had been passed details of discussions between the respondents: *"…. Unite Shop Stewards and my colleague, Mary Alexander, and I was looking for an update on how the demobilisation is going".* He raised queries about wages and the release of operatives. Ms Meadows responded to this on 18 November. Ms Meadows also spoke to Mr Foley on the phone on 18 November to discuss matters.

68. On 19 November, the Teams were emailed redundancy outcome letters. The redundancies took effect on 26 November.

Note on evidence

69. A good deal of the evidence was not in dispute and often matters turned on the interpretation of events. There were however some specific matters of fact which were disputed which the Tribunal had to deal with.

70. In order to deal with the factual disputes the Tribunal took into account its general impression of the witnesses and the specific evidence on the relevant conflicts.

71. The Tribunal formed a generally favourable impression of all of the respondent's witnesses. They all gave their evidence in a reasonably measured manner: the events which they spoke to were supported on occasion by the existence of contemporaneous documents; and they made appropriate concessions. For example, Mr Foundation and Mr Own accepted they could not see what documents Ms Alexander had at the consultation meeting of 9 November; Mr Foundation accepted that the reason for the first pay dispute lay with issues in the respondent's payroll system.

72. The Tribunal did not form an unfavourable view of the claimants' witness and did not consider that there was any deliberate intention to mislead, however there were some instances where there was a lack of reliability which impacted the extent to which it could be relied upon, which is dealt with below.

73. One of the main challenges to Ms Meadow's evidence was in relation to the telephone calls she said that she made to the Unite and the GMB

representatives on 27 October and to Unite on 1 November. Mr Foley and Mr Cook's evidence was the had no record of these telephone calls having been received. It was put to Ms Meadows in cross examination that it lacked credibility that she did not follow up the telephone calls she made with an email and that there was no file note of her having made these telephone calls.

74. In reaching its conclusions on this the Tribunal took into account its assessment of Ms Meadows evidence generally. The Tribunal found her to be a credible witness who did not seek to exaggerate or embellish the position. An example of this is that Ms Meadows accepted without difficulty that she could not recall if she had telephoned Mr Cook after she received his telephone number from Ms Alexander, and her willingness to make what was an appropriate concession, and one which did not serve the respondents interests, enhanced her credibility in the Tribunal's view.

75. The Tribunal did not draw the inference that the lack of a follow up email or file note meant that Ms Meadows had not made the attempts to telephone the Trade Unions she spoke to in her evidence. In reaching the conclusion that Ms Meadow's evidence was to be accepted on this matter, the Tribunal took into account the detailed nature of the evidence which she gave about the telephone calls she made and the response which she had to them. Her explanation that she did not make a file note of the telephone calls she made to Unite and the GMB on 27 October because she had not managed to speak to Mr Foley or Mr Cook, and she would not normally make a note of not having spoken to someone, was plausible. Nor did the Tribunal consider a great deal turned on the fact that Ms Meadows did not advise Mr Foley that she had tried to phone him in her email response of 3 November, as the focus of that email was explaining where matters had got to by that stage. The Tribunal did not consider that anything turned on the mistake in Ms Meadows' witness statement which gave the date of the telephone calls to Unite and the GMB to be the 26th as opposed to 27 October. This was genuinely recognised to be a mistake by Ms Meadows in the Tribunal's view, and her evidence clearly

was that she tried to telephone in the morning after the HR1 and Section 188 letter were sent, which was the 27th October.

76. There was lack of agreement between the evidence of Mr Cook, and Mr Foundation and Ms Meadows as to whether the Trade Union representatives regularly attend the redundancy consultation meetings of the type which Engenda engaged in at the Grangemouth site. It was the Ms Meadows and Mr Foundation's evidence that the Trade Unions did not generally attend such meetings unless there was a significant issue which was out of the ordinary. Ms Meadows evidence in cross examination was that in her five and a half years with Engenda, she has not known the TU reps to turn up once to a redundancy consultation meeting. Mr Cook said that the trade unions attended every consultation meeting which took place at Grangemouth.

77. This did not amount to a direct conflict in the evidence, as it was not suggested that the respondents regularly operated at the Grangemouth site, and Mr Cook's evidence was about his experience at Grangemouth. His evidence or the terms of the NAECI agreement referred to by Mr Haywood in his submissions however, was not mutually exclusive with the direct evidence of the respondents witnesses as to their own experience of redundancy consultations and Trade Union representation at those.

78. The Tribunal accepted the respondent's evidence that their experience was the Trade Unions representatives did not regularly attend the redundancy consultation meetings which they held. The evidence which all the respondent's witnesses gave was convincing on this point, and it was lent credibility by the transient nature of their workforce and the fixed term nature of the contracts under which they are employed. The Tribunal considered that these were factors which rendered engagement with Trade Union representatives in the workplace less likely than it might be with a more stable workforce employed over a longer period. The credibility of the respondent's evidence on this point was also enhanced in that notwithstanding any deficiencies in inviting the Trade Union representatives to attend the consultation meetings, service of the HR1 and Section 188 letters which the Trade Unions did receive, invoked no response at all from

the GMB, and was not responded to by Unite until 1 November. Further by 9 November, Unite had been involved in the process and were aware that a consultation meeting was to take place later with the night shift, but no Unite representative attended the night shift consultation meeting.

79. Ms Alexander 's evidence was unreliable to the extent that she did not, as she frankly accepted in evidence, have a good recollection of what was discussed at the meetings which she attended, and on that basis was not prepared to accept that the notes produced by the respondents of the meetings were an accurate summary of what was discussed. There was however no effective challenge to the credibility of the respondents' witnesses as to what was discussed, and the Tribunal accepted that the minutes of the meetings were an accurate summary of what was discussed.

80. There was an issue of fact as to whether Ms Alexander had been provided with a written copy of the selection criteria at the meeting which she attended on 9 November.

81. Ms Alexander's evidence was to the effect that she could not remember if she had been given a copy of the selection criteria. It was the evidence of Mr Own, and Mr Foundation that it was likely she was be provided with a copy of the selection criteria as there was a discussion about it at the meeting on 9 November, and there were printed copies of the criteria available at the meeting. Mr Own assumed that was what she had in her hand when she asked the employee reps if they agreed with it.

82. Mr Own and Mr Foundation attended the meeting via Teams and they both accepted they could not see if Ms Alexander had been handed a copy of the selection criteria and they could not see what was in her hand.

83. Mr Brown asked the Tribunal to draw the inference that Ms Alexander had received a copy by virtue of the fact that she accepted she had made notes of the meeting, but they have not been produced by the Tribunal.

84. The Tribunal had regard to the fact that Ms Alexander did not produce her meeting notes, however in assessing this it takes into account that although

Ms Alexander's evidence lacked reliability to the extent that she could not remember good deal of what took place, the Tribunal did not form the impression that she was deliberately misleading it, and in the circumstances it was not prepared to draw the inference that her hand written notes of the meeting contained information suggesting she had been passed a copy of the selection criteria and that it was for that reason they were not disclosed.

85. The respondents notes of the meeting did not record the fact that a copy of the criteria had been passed to Ms Alexander. The Tribunal takes into account that these are summary notes, but it considered this was a factor to which it was entitled to attach some degree of weight. The Tribunal also takes into account the respondents' witnesses could not confirm that Ms Alexander had been given a copy of the selection criteria, but simply make the assumption that she had. The respondents' witnesses accepted that they could not speak to what physically took place at the meeting in terms of documents being provided to Ms Alexander, and, taking into account the absence of a reference to the document being given to her in the note of the meeting, and the fact that there was no direct evidence that she had been given the document, the Tribunal on balance was not persuaded that she had been.

86. There was an issue as to whether Ms Alexander had phoned Mr Cook, in that Mr Cook suggested in cross examination that he knew her telephone number and if she had phoned him, he would have picked this up as missed call when he checked his messages, as he always did.

87. Notwithstanding the issues of reliability in relation to Ms Alexander's evidence, the Tribunal was satisfied that she had telephoned Mr Cook. It is supported in this view in that there was a contemporaneous note recording her undertaking to do so (notes of the meeting of 9 November). Her doing so is also consistent with her texting Ms Meadows his number.

88. The Tribunal considered Mr Foley's evidence to the effect that he referred to the employee reps as shop stewards in his email to Ms Meadows of 15 November by mistake as he had not checked the position. Mr Brown submitted that this was disingenuous, however the Tribunal accepted that Mr

Foley made an error as there was no other plausible explanation as to why he referred to individuals who were clearly not shop stewards, as shop stewards in that email. His reference to these individuals as shop stewards may give an indicator as to how he viewed them at that time, however by that stage Ms Alexander was also involved.

Submissions

89. All the parties helpfully produced written submissions, which in the interests of pragmatism are not reproduced here but are dealt with where relevant below. Parties also had the opportunity to provide oral submissions.

Consideration

Merits

90. The relevant legislation is contained in section 188 and 189 of TULCRA:

Section 188:

(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.

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

(a) of avoiding the dismissals;

(b) Reducing the numbers of employees to be dismissed;

(c) mitigating the consequences of the dismissals;

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

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

…

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

i. the reasons for his proposals,

ii. the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

iii. the total number of employees of any such description employed by the employer at the establishment in question,

iv. the proposed method of selecting the employees who may be dismissed,

v. 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.

vi. 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.

vii. the number of agency workers working temporarily for and under the supervision and direction of the employer,

viii. the parts of the employer's undertaking in which those agency workers are working, and

ix. the type of work those agency workers are carrying out.

……..

(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."

Section 189

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.

…….

(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

91. There is no dispute that Unite and the GMB are recognised trade unions with whom the respondents were under a duty to consult in terms of section 188(1B) (a) of TULRCA.

Was there consultation?

92. The Tribunal firstly considered if there had been consultation with Unite and the GMB. It is for the employer to show that the requirements of Section 188 have been met.

Unite

93. Mr Brown submitted that there had been consultation with Unite. In support of this he relied on the fact that Scott Foley was notified on 26 October 2021 of the start of the collective consultation. He was notified in writing on 3 November 2021 of the proposed method of selecting employees who may be dismissed. Gemma Meadows wrote: *"We have begun consulting with them and so far agreed selection criteria (disciplinary record and skills, with service*

date as a tie breaker." Whilst Scott Foley was on annual leave from 1-15 November 2021, Mary Alexander took over the collective consultation with the respondents. Mr Brown submitted that on 9 November 2021, Ms Alexander attended a consultation meeting during which she was given a printed copy of the selection matrix. Mr Brown also relied on the note of that meeting which record the discussion which took place about the selection criteria and the availability of alternative roles.

94. Mr Brown submitted that on 11 November 2021, Gemma Meadows wrote to Ms Alexander seeking her assistance again with the ongoing collective consultation. A telephone conversation between Gemma Meadows and Mary Alexander took place at approximately 1600h later the same day .The file note records *"MA asked if we could get together tomorrow for a consultation meeting with the onsite reps to discuss. I agreed to organise".*

95. On 11 November 2021, Ms Alexander sent a SMS to Ms Meadows which read *"They are not keen on taking holidays as discussed and having looked at the agreement they should have their guaranteed hours."*

96. A further consultation then took place on 12 November 2021 with Mary Alexander in attendance by MS Teams (141-142). In the note, it is recorded:

> *"MA Asked for clarity on use of holidays…*
>
> *MA Said it was out of our hands and stated that at the point people leave the site there would be nothing to consult about. Asked whether people would still be notified of other opportunities within the company".*

97. Mary Alexander confirmed that she passed the matter back to Scott Foley upon his return from annual leave. On 15 November 2021, he emailed Gemma Meadows, and Mr Brown submitted that was notable that Scott Foley refers to: *"I have been passed over the details of current discussions held between the Company, Unite Shop Stewards and my colleague, Mary Alexander and I was looking for an update on how demobilisation is going".*

98. Ms Ismail did not accept that consultation had taken place. She submitted there was a failure to engage in meaningful consultation. She submitted that

even if the Tribunal were to find that there was partial consultation with Unite, the Tribunal should keep in mind that Ms Alexander was not invited to attend the redundancy consultation meetings but was only invited to attend on site because of the industrial action. Further, Ms Alexander was not provided with a copy of the selection matrix. She did not recall asking whether there any roles available for the claimants, but even if she did this did not amount to be consultation.

99. Ms Ismail further submitted that in principle, the specified information should be supplied at the very beginning of the statutory process, before any consultations actually take place; the information is intended to form a basis for those discussions (***E Green & Son (Castings) Ltd v Association of Scientific, Technical and Managerial Staffs [1984] IRLR 135 at 139, EAT***). The appropriate representatives can then embark on the discussions 'fully informed' (***GMB v Susie Radin Ltd [2004] EWCA Civ 180, [2004] IRLR 400, at [24]***). In this respect, Ms Ismail submitted, TULR(C)A 1992 gold-plates the CRD, which merely requires that such information should be provided 'during the course of the consultations' (***art 2(3); MSF v Refuge Assurance plc [2002] IRLR 324, EAT***).

100. The Tribunal considered that while there is no obligation to agree, there is an obligation to engage in meaningful consultation where there is an opportunity to discuss options and a reasonable amount of time to comment on information. The Tribunal did not consider the service of the HR1 form or Section 188 letter alone could constitute consultation under Section 188: both those documents however provided information to the TU representatives for the purposes of consultation.

101. The Tribunal consider that Mr Foley being advised by Ms Meadows in her email of 3 November of the selection criteria which had been agreed with the employee reps did not amount to a consultation with him about that selection criteria, but rather concluded that he was being told about what had already been agreed.

102. The Tribunal concluded that Ms Alexander was invited to take part in the consultation meetings on 9 and 12 November. It was satisfied that there the discussion about the selection criteria, but this was was confined to Ms Alexander being able to ask the employee representatives if they agreed with it, and that such a discussion did not amount to meaningful consultation on the selection criteria between the respondents and Unite.

103. There Tribunal concluded was also was a degree of consultation about ways of avoiding redundancies, in that Ms Alexander was able to ask whether alternative roles were available. The effect or purpose of that question, as Ms Alexander conceded in cross examination, was to ask about ways of avoiding redundancies. The respondents provided a response to that and she obtained input into this from the employee reps, who confirmed they had been given roles at other sites to ask their teams about, and from Ms Meadows, who advised that any suitable vacancies would be communicated to the Teams. While there had therefore been earlier discussions about this which did not involve Ms Alexander, it was open to her to provide input on this. Ms Alexander further raised this at the meeting on 12 November when she asked about operatives being still notified about further opportunities.

104. As is apparent from factual conclusions which it reached the Tribunal did not find that Ms Alexander had been provided with a written copy of the selection criteria, and therefore there was a breach of Section 188 (4) (iv).

De Facto representatives

105. Mr Brown submitted that the employee representatives were *de facto* shop stewards and he relied in part on Mr Foley's email of 15 November referring to discussions held with shop stewards. He also relied on Ms Alexander's evidence to the effect that the employee reps had just not completed the paperwork to become shop stewards in the official sense of that: and she confirmed that it was Steve Aikens who contracted her asking her to come on site.

106. The Tribunal agree that this evidence was an indicator that the employee reps were regarded as shop stewards or something akin to it by this time by Mr

Foley and Ms Alexander. That however does not advance matters for the respondents in that there is nothing to suggest that the respondents themselves considered the employee reps to be Unite Shop Stewards. Further, there is no provision for consulting with 'de facto' representatives of a Trade Union under TULCRA, and the Tribunal considered that even if Ms Alexander regarded the employee reps in this light, or Mr Foley was mistaken as to their position and thought they were shop stewards when he emailed Ms Meadows of 15 November, the employee reps were not TU Shop Stewards or representatives and any consultation with them did not go to discharge the respondents obligation to consult with Unite under section 188 of TULCRA.

Conclusion on Consultation Unite

107. The Tribunal concluded that Unite had been informed of the likelihood of impending redundancies and the reason for that, had been provided with the information in the HR1 form and section 188 letter, had been advised of the agreed selection criteria and from 9 November had been present or aware of the consultation meetings which were taking place, and that had been some consultation with Unite about means to avoid redundancy.

108. It concluded however that the respondents had not consulted about the redundancy selection criteria. It was suggested by Mr Brown that Mr Foley could have gone back to the respondents after he received Ms Meadows email of 3 November identifying the selection criteria, indicating that he disagreed with that. While that is correct, the tribunal was not persuaded Mr Foley being told what selection criteria had been agreed without being invited to comment on that, was capable of amounting to meaningful consultation with him about that criteria.

109. Albeit Unite had been advised of the headline selection criteria in the email of 3 November which had been agreed with the employee reps, he was simply being told what had been agreed and a copy of the selection matrix which set out the factors to be taken account under each criteria, and was therefore the

proposed method of selecting employees for dismissal, had not been provided to Ms Alexander, and the respondents were in breach of Section 188 (4) (d).

110. The effect of that conclusion is that the Tribunal found there had been a failure to consult with Unite as required by Section 188 (1B)(a) of TULCRA.

The GMB

111. The Tribunal concluded that there had been not been consultation as required by Section 188 with the GMB. Service of the HR1 or Section 188 letter provided information about the impending redundancies, as did Ms Meadows email of 26 October, but that did not constitute consultation. The comments above in relation to the selection criteria emailed to Mr Foley and copied to Mr Cook on 3 of November not amounting to consultation, apply equally to the GMB. Even if the intimation of the agreed selection criteria satisfied the requirement of Section 188(4) (d) to the extent that it identified the headline selection criteria, it was not a 'proposed method', but rather presented as an agreed method of selecting employees to be dismissed. The there was no consultation with GMB about this or any aspect of the redundancy process.

Section 188 (7)

112. There did not appear to be any dispute as to how the Tribunal should apply Section 188(7). The respondents have the burden of proof under Section 189 (6).

113. Mr Haywood referred to ***Shanahan Engineering Ltd v Unite the Union UKEAT/0411/09/DM***, in which the EAT set out the process the Tribunal should undertake when considering the availability of a special circumstances defence.

114. That is that it must keep in mind three stages in mind:

(1) Were there special circumstances?

(2) Did they render compliance with section 188(1A), (2) and (4) not reasonably practicable?

(3) If so, did the employer take all such steps towards compliance with these provisions as were reasonably practicable?

Special circumstances

115. The Tribunal firstly considered whether there were special circumstances.

116. Mr Brown relied upon the nature of the project itself, the transient workforce, the unofficial industrial action on two occasions which led to the descope and loss of work, the lack of engagement from either trade union despite them both being aware of the urgency of the situation, the time pressures that would apply in the circumstances, and the manner of descoping by PetrolINEOS, which he submitted all make this case extraordinary.

117. Mr Brown submitted that special circumstances must be considered by reference to what the respondents knew at the time, not with the benefit of hindsight (***E Ivor Hughes Educational Foundation v Morris [2015] I.R.L.R. 696 at para.27***). The Tribunal should not underestimate the urgency of the situation on site at the time, even Mary Alexander used that word to describe the situation on multiple occasions.

118. The Tribunal did not understand many of the factors relied upon by Mr Brown to be in issue. There was no dispute that the type of work undertaken by the respondents engaged a transient workforce employed on short-term contracts, or that Turnarounds were fast-paced and pressurised pieces of work.

119. The claimants did not accept that it was their industrial action which brought about the descope, arguing that the cause of the industrial action was a fundamental underlying issue about pay was caused by the respondents.

120. It is not a matter for this tribunal to consider the merits of the pay dispute or the legitimacy of the industrial action taken. However, given the chronology of events, the Tribunal was satisfised that further to the industrial action on both occasions the respondents were descoped by their client. The Tribunal was also satisfied that the descopes were unexpected and unusual; it had been the respondents' anticipation that they would remain on site under

contract for 8 weeks. There was no challenge to the respondents evidence that they could not tell the full impact of the first descope and that the second descope meant that work was going to run out earlier than planned.

121. There is no definition of *"special circumstances"* in TULCRA. The case of ***Clarks of Hove v Bakers Union 1978 ICR 1076*** referred to by the claimants held that a special circumstance must be something exceptional or out of the ordinary or uncommon.

122. The pressurised nature of Turnaround work or the transient nature of the workforce engaged on that type of work were not in the Tribunals view capable of amounting to special circumstances. These, on the respondents own evidence, were common features of the work which they did.

123. The Tribunal did not conclude that the Trade Unions failure to engage to the extent they did amounted to or contributed to a special circumstance. The Tribunal take into account, that as submitted by Mr Brown, that time was tight, however the respondents were able to contact the TU at the very start of the process, at which point they advised that they intended inviting them to a meeting. In the case of the GMB, that never happened. Unite did attend a consultation meeting on 9 November when invited to do so. While both unions might be criticised to varying degrees for a failure to react to information provided, this was not a case where there was a wholesale refusal to engage with the employer which was communicated to the employer. Delays in answering correspondence or failure to return telephone calls, which is what happened here, cannot be said to be out of the ordinary in industry and were not capable of amounting to a special circumstance.

124. The Tribunal did however consider that the industrial action and the descoping which followed this was capable of amounting to an exceptional circumstance. Neither descope was anticipated or on the evidence capable of being anticipated by the respondents. Regardless of the reason for the two instances of industrial action, both descopes followed as a consequence of it. The result of descopes was an unexpected loss of work. The respondents could not assess the impact of the first descope on their staffing requirements

and the second descope, which was again unforeseen, had the impact of the work running out earlier than they could have anticipated. The Tribunal was satisfied that the unforeseen loss of work following two instances of industrial action was out of the ordinary and met the test of a special circumstance.

Not reasonably practicable?

125. That then leads the Tribunal to ask whether those special circumstances had rendered compliance with section 188(1A), (2) and (4) not reasonably practicable?

126. The respondents were able to serve the HR1 letter and Section 188 notice on the Trade Union representatives at the very start of the process and had emailed them advising of the impending redundancy situation.

127. Their unexpected descoping did not render it not reasonably practicable for the respondents to consult with the Trade Unions in circumstances where they had details of the Trade unions involved and were able to give them 30 days' notice of the impending redundancy; The respondents initial correspondence indicated the TU representatives would be invited to a meeting, which did not happen. The respondents were able to put in place a mechanism for the election of employee reps; undertake a consultation exercise with them; and were able to undertake a degree of consultation with Unite notwithstanding the descopes. In these circumstances the Tribunal concluded that the special circumstances which it found did not render compliance with Sections 188(1A), (2) and (4) not reasonably practicable.

128. Having reached that conclusion, it was unnecessary for the Tribunal to go on to consider whether the respondents took all reasonable steps to comply with their obligation.

Remedy

129. The Tribunal then went in to consider the question of remedy. The relevant statutory provision is Section 189 (2), (3) and (4) of TULCRA which set out above.

130. Where the Tribunal finds that the complaint under Section 188 is well founded it must make a declaration to that effect. Making a protective award is not mandatory.

131. All the parties referred the Tribunal to the authoritative guidance on the approach to the determination of the protective period in ***Susie Radin v GMB (2004) IRLR 893*** and the judgment of L.J Peter Gibson at paragraph 45 as follows. The guidance which the Tribunal took from that was as follows:

(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 tribunal 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 and 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 tribunal assess the length of protected period is a matter for the tribunal, but a proper approach in a case where there has been 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 Tribunal consider appropriate"

132. Unite and the GMB's circumstances are to a degree different, and the Tribunal has therefore dealt with them separately. There are however some factors which are common to both claims.

133. The first is that basis of this claim is the respondent's default is specifically to comply with its obligation to consult with the recognised trade unions. The

Tribunal therefore considered the deliberateness of the failure and the availability to the respondents of legal advice about its obligations under Section 188 to consult with the recognised trade union.

134. There was no direct evidence of the respondents having taken legal advice as to their obligation in this regard under Section 188, however the Tribunal was satisfied that they were aware at least to some degree of those obligations. It was not suggested otherwise by the respondents, and the Tribunal's conclusion on this point is supported by the fact that the respondents served the trade unions with the HR1 form and Section 188 letter at the very start of the process.

135. The second point is the deliberateness of the respondents' failure to consult the trade unions. It was Unite's submission that this was a deliberate failure on the part of the respondents; they deliberately failed to consult with the trade unions and instead proceeded to consult with employee representatives, which was the practice which they normally adopted.

136. The GMB's position is that there was a conscious choice not to consult with the trade unions and that crystallised when the first consultation meeting was held on 27 October, at the very start of the process. Mr Hayward submitted that it was something akin to a company policy which run counter to Section 188, to consult with employee representatives, and he submitted it appeared the respondents proceeded on the basis of an assumption that the trade union representative would not be involved and therefore took an alternative course. This assumption, he submitted shaped the remainder of their approach to the collective redundancies and defines the nature of the default.

137. Factually, it did not appear to the Tribunal to be disputed by the respondents that they normally consulted with employee representatives. The Tribunal was satisfied that the reason for this was that their experience was that there was generally no attendance by the TU representatives at the redundancy consultation meetings the respondents conducted, unless there was an issue which was problematic.

138. The Tribunal concluded that there was a choice on the part of the respondents to proceed in the absence of TU representation on 27 October, but that their motivation for this was the tight time scales the respondents were under to meet the 30 days consultation requirements, their experience of consultation meetings was that they never attracted TU representation other than if there was a significant issue, and the fact that they had tried to reach TU reps by telephone and had not had a response.

139. The tribunal did not conclude that the respondents' approach to the consultation exercise could be categorised as deliberate attempt to exclude the trade unions. In reaching this conclusion the Tribunal take into account that the respondents were very keen to involve Unite and the pay dispute, and once they had Mr Alexander on site, they wanted her to remain on site to engage in the consultation process. Further, while as submitted by Ms Ismail, the discussions Ms Meadows had with Ms Alexander about how the respondents would achieve payment of operatives' wages for the full 30 days was not strictly consultation as defined by Section 188, they demonstrated a willingness on the part of the respondents to engage with the trade unions**.**

140. The approach the Tribunal adopted to its assessment of the protected award for both claimants was to start with the period of 90 days, and thereafter adopting the guidance ***Susie Radin*** and thereafter reduce it only if there are mitigating circumstances justifying a reduction to an extent which the Tribunal consider appropriate**.**

Unite

141. Mr Brown submitted that these proceedings involve a terminal work project which ended on 26 November 2021 for all of the respondents' staff onsite. A consultation period commenced 31 days prior, and, in the circumstances, it would not be just and equitable to make any financial award, particularly in circumstances when there has been a profound lack of engagement on the part of trade unions. He submitted that the Tribunal should exercise its discretion to make no protective award to either claimant and that a declaration would be sufficiently penal. He argued that one of the factors the

tribunal was entitled to have regard to was the length of the contract was only eight weeks, and it would be excessively penal if a protective award exceeded the length of the contract itself.

142. If the Tribunal was minded to make an award, then Mr Brown submitted that any award in favour of Unite members should not exceed 14 days representing the period from which Unite was notified of the start of the collective consultation and Mary Alexander's engagement in the process.

143. Ms Ismail submitted that the protective award should be for 90 days. The failure was deliberate, and the respondents were aware of their obligations.

144. Ms Ismail submitted that efforts to consult employee representatives ought to attract condemnation. ***Spillers French*** held that a Tribunal might properly take account of such efforts on the part of the employer when assessing the length of the protective award, but ***Susie Radin*** doubted it. Peter Gibson LJ pointed out that the employer is supposed to consult the appropriate representatives about ways of mitigating the consequences of the redundancy dismissals, so for the employer to go ahead and make unilateral arrangements is something which should attract more condemnation than commendation (***Susie Radin at [42]***).

145. The late attempts to consult with Mary Alexander were not in any sense adequate and they did not mitigate the effect of the seriousness of the breach. In any event, there is no rule of law that if there has been some minimal consultation then the tribunal must reduce the maximum award (***UK Coal Mining Ltd v National Union of Mineworkers [2008] IRLR 4, EAT***).

146. The Tribunal has a wide discretion to do what is just and equitable in all the circumstances; it's focus is on the seriousness of the respondents' default, but it also entitled to take into account all the facts and circumstances in order to make an award which is just and equitable under Section 189(4) (***GMB v Lambeth Service Team Ltd and another EAT 1027/05***, referred to by Mr Brown).

147. The complaint against the respondents is not based on a failure to consult with the workforce at large at large but is based on its failing in its obligations to consult with the recognised trade union. The respondents breach in this regard was not insignificant. Unite were not invited to take part in the consultation meetings until 9 November, and that invitation followed on the back of their involvement in a pay dispute. Although Mr Foley was given a note of the agreed selection criteria, he was not consulted about this, and Ms Alexander was not provided with the selection matrix. The respondents however did not wholly fail in their obligation to consult with Unite. While it is not of itself consultation, Unite provided them with the information in the HR1 form the Section 188 letter, together with information in Ms Meadows email of 26 October and 3 November. There was a limited degree of consultation with Ms Alexander who was involved in the process from 9 November, albeit by that stage, matters had progressed to the extent that the selection criteria and pools for redundancy selection had been agreed.

148. The Tribunal's conclusions as to the deliberateness of the respondent's failure to consult with Unite, are set out above. While the Tribunal was satisfied there was a conscious choice on the part of the respondents to proceed in the absence of trade union representatives at the first consultation meeting on 27 October, and to continue in this approach until 9 November, it considered that it was just and equitable to attach weight to the reasons why the respondents acted in this way.

149. Timescales were tight as a result of the unexpected descope, and the Tribunal was satisfied there was a genuine desire on the part of the respondents to comply with their obligation to consult with their workforce for a period of 30 days. Such a conclusion is supported by the steps the respondents did take in carrying out the consultation exercise which they conducted. The Respondents experience was that Trade Union did not attended straightforward redundancy consultation meetings, and the Tribunal was satisfied that this is a factor which is part of the all the circumstances which the Tribunal is entitled to have regard to in the exercise of its discretion.

150. While the respondents can be criticised for failing to invite the trade unions to a consultation meeting, it was also just and equitable to take into account that Unite could also be criticised for failing to respond to Ms Meadows email 26 October which asked for confirmation as to which Unite representative would be supporting staff and was a communication which identified what was clearly an important and urgent matter, until 1 November.

151. The Tribunal also considered it just and equitable to attach some weight to the fact that Ms Meadows did attempt to contact Unite on the morning of 27 October and on 3 November but they did not respond to that telephone contact.

152. These were all factors which the Tribunal considered were appropriate for it to have regard to as mitigating factors which justified a reduction in the 90 day period.

153. The Tribunal was not persuaded taking into account the guidance in ***Susie Radin*** which makes clear that the purpose of the award is to provide a sanction for breach by the employer of section 188, and that the proper approach is to start with 90 days and to reduce it only if there are mitigating circumstances which justify it, in light of the default which the Tribunal had found that it was the correct exercise of its discretion to make no award, regardless of the length of the contract. Nor was it not persuaded that a reduction to 15 days sought by Mr Brown was appropriate in light of this mitigation.

154. Rather, taking the extent of the default and mitigating factors identified above into account, the Tribunal concluded that it was appropriate to make a protective award for a period of 30 days, commencing on 26 November 2026.

Mr William Gair and other individuals

155. Ms Ismail made submission to the effect that Mr William Gair and 4 other individual employees should not be precluded from receiving a Protected Award. She relied in the case of Mr Gair on opinion evidence from Mr Foley as to the reasons why Mr Gair was dismissed.

156. Mr Brown did not deal with any the individuals other than Mr Gair, and he referred the Tribunal to an email exchange in the document bundle dated 22 October between Ms Meadows to Mr Foley indicating that his Mr Gair's employment had been terminated before the pay issue arose; the implication of this was that he was dismissed at some point before 22 October.

157. The Tribunal did not consider that it was appropriate within the ambit of this PH to deal with the issue of the entitlement of individual employees to a protective award. In terms of section 189 (3), a protective award is an award in respect of one or more descriptions of employees who have been dismissed as redundant, or whom it is proposed to dismiss as redundant and is respect of whose dismissal or proposed dismissal the employer had failed to comply with a requirement of Section 188.

158. The award is therefore made in favour of the group of employees represented by the trade union Unite as opposed to individual claimants. If there is an issue as to the entitlement of any of the claimants referred to by Ms Ismail to receiving payment of the protected award, then it is open to them to present a claim under Section 192 of TULCRA, and that would be an issue for the Tribunal the Tribunal would deal with when considering such a complaint.

The GMB

159. Mr Haywood submitted that, in GMB's case, there has been no consultation at all. That being so, the correct approach is to begin at 90 days in line with ***Susie Radin***.

160. He referred to the case of I the case of ***AEI Cables Ltd v (1) GMB (2) Unite UKEAT/0375/12/LA***, a case that centred on the impossibility of trading through insolvency for the purposes of consultation, the Appellant submitted that the Tribunal had erred by not considering the reasons for their failure. In contrast, this is not a case where Engenda were faced with any supervening impossibility. The pressures they faced were within the ordinary ambit of their business; this a deliberate breach, born of a conscious decision to proceed via employee representatives in default of the statutory obligation to consult the GMB. This was a decision made on 27 October 2021; that is when the

breach should crystalise. He submitted that it was plain that on some level Engenda were aware of their obligation by their HR1 and section 188 letter; it seems that there was something akin to a company policy which ran counter to section 188.

161. Engenda proceeded on the basis of an assumption that the trade union representative would not be involved and therefore took an alternate course. This assumption shaped the remainder of their approach to the collective redundancies and defines the nature of their default. They seek to rely on the nature of the project to mitigate the failure to consult. The present situation is precisely of the kind in which employees require protection. That is why it is negotiated into the NAECI Agreement and ultimately why protection is afforded to them under the statute.

162. Mr Haywood submitted that the Tribunal should incline towards making an award to achieve a penal effect. In the circumstances, the Tribunal is invited to make a protective award for the full 90 days.

163. In contrast, Mr Brown strongly urged not the Tribunal not to make any protective award in favour of GMB members given the total lack of engagement in the collective consultation process. If the Tribunal was against that, then he suggested that any award should not exceed 5 days giving what would have been a period of grace for Mr Cook to have responded to Gemma Meadows email of 3 November 2021 and mirror Unite's eventual attendance on site.

164. The Tribunal's consideration of the legal principles set out above applies equally to the consideration of the claim by the GMB and is therefore not repeated here.

165. There is however clearly a factual difference in the circumstances of the GMB and Unite in that, unlike Unite, there was no consultation with the GMB. A complete failure to consult inevitably constitutes a serious breach of that obligation, which is a factor the Tribunal took into account.

166. In considering whether there were any mitigating factors which it was just and equitable to have regard to, the Tribunal again considered that it was just and equitable to attach weight to the reason why the respondents had failed in their obligation to consult with the GMB. The reasons set out above apply equally here.

167. The Tribunal also considered it was just and equitable to attach weight to the degree to which the GMB failed to respond to information which the respondents provided them with about the proposed redundancies. They had the section 188 letter, the HR1 form and Ms Meadows emails of 26 October and 3 November. Albeit the GMB were not invited to attend a consultation meeting at any point, and Mr Cook was only copied to Mr Foley's emails as opposed to receiving direct emails, he made no effort at all to respond to this information. That was the case even though he knew the consultation meetings were taking place with employee representatives. The GMB's failure to offer any response to information which they were given by the respondents was a factor with the Tribunal considered it was just and equitable having regard to and to attach a considerable amount of weight to.

168. The Tribunal also had some regard to the fact that Mr Meadows tried to reach the GMB via telephone on 27 October and their failure to respond to this.

169. These were factors which the Tribunal considered were appropriate for it to have regard to as mitigating factors which justified a reduction in the 90 day period.

170. It was not persuaded that no award, or a reduction to 5 days sought by Mr Brown, was appropriate in light of this mitigation, taking into account the seriousness of the default. Rather, taking the extent of the default and

mitigating factors into account, the Tribunal concluded that it was appropriate to make a protective award for a period of 40 days, commencing on 26 November 2026.

Employment Judge: **L Doherty**
Date of Judgment: **17 February 2023**
Entered in register: **20 February 2023**
and copied to parties