



EMPLOYMENT TRIBUNALS

Claimants: **Ms S Couchman, Ms T Spooner, Ms J Dobson, Ms L Drugan, Mr R Cole, Mr R McCulloch, Mr J Featham, Mr C Winstanley, Mr C Mackie, Mr C Evans, Mr D Wildman, Mr D Brady, Mr D Bower, Mr G McLaughlin, Mr G Mountford, Mr J Kay, Mr L Heslop, Mr N Hamilton, Mr R Yare, Mr R Thomas, Mr R Dowson, Mr S Phillips, Mr D Cuskern, Mr D McEwen, Mr D Laverick, Mr J Mcloughlin, Mr P Keenon, Mr L Martin**

First Respondent: **Industrial Coating Services Limited (In Administration)**

Second Respondent: **Secretary of State for Business & Trade**

Hearing Centre: **Birmingham**

Before: **Employment Judge Kenward**

JUDGMENT

1. The complaints of the above Claimants under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) of a failure by the First Respondent to comply with the requirements of section 188 of the 1992 Act are well-founded.
2. The Tribunal orders the First Respondent by way of a protective award under section 189(3) of the 1992 Act to pay to the Claimants a payment equivalent to remuneration for the period of 90 days beginning on 20 December 2021.
3. The Employment Protection (Recoupment of Jobseeker’s Allowance and Income Support) Regulations 1996 apply to this award.

REASONS

1. The Claimants have all filed ET1 Forms of Claim claiming protective awards arising out of the circumstances in which they were made redundant with an effective date of termination of employment of 20 December 2021.

2. The notice of appointment of Joint Administrators was dated 20 December 2021. The first communication or information provided to the Claimants in relation to redundancy was an e-mailed letter from the administrators with an invitation to video meeting. The meeting was for the purposes of terminating the contracts of employment of employees as confirmed by a subsequent letter which attached a fact sheet to enable claims to be made to the Redundancy Payment Service.
3. The Claimants subsequently commenced the proceedings in the Employment Tribunal. The Tribunal wrote to the Claimants on 7 February 2022 accepting the Claims, but advising that the proceedings would be stayed pending the Joint Administrators providing their consent to the proceedings. The Joint Administrators subsequently provided their consent.
4. On 25 May 2022 the Tribunal ordered that the Claims be considered together. On 26 June 2022 the Joint Administrators wrote confirming that no Response was being submitted to the consolidated Claims.
5. On 7 June 2022, Griffin Legal LLP wrote to the Tribunal on behalf of those Claimants that it was representing, inviting the Tribunal simply to confine any Judgment to the period of the protective award and not to attempt to quantify the award, with maximum awards of 90 days being claimed. It is to be noted that this is not a case where employee representatives or trade union representatives were involved, so that any awards made would be limited to the individual Claimants rather than covering any wider description of employees.
6. On 21 September 2022 the Joint Administrators confirmed that 52 employees had been made redundant. There was no knowledge of any trade union being involved or employees being members of trade unions. Moreover, the employees were made redundant immediately upon appointment of the Joint Administrators so that there was insufficient time for employee representatives to be elected for the purposes of consultation.
7. On 31 October 2022 the proceedings were served on the Second Respondent. On 7 November 2022 the Second Respondent confirmed that it had no objection to the Claims being determined on the papers.
8. The Second Respondent filed an ET3 Form of Response on 15 November 2022. The position of the Second Respondent was stated to be that the Second Respondent does not support or resist the Claims for protective awards but has no authority to make payments in respect of protective awards unless a Judgment is made by the Tribunal. Further, under sections 184 and 189 of the 1992 Act, any protective award amounts to arrears of pay and arrears of pay (where payable by the Second Respondent) are capped at 8 weeks' pay less tax and national insurance and may be subject to recoupment. As at the effective date of termination, the maximum amount of a week's pay for these purposes was £544). The Second Respondent also requested that the Tribunal does not attempt to quantify the award that may be payable from the National Insurance Fund. It was further confirmed that the Response of the Second Respondent was

to stand as the Second Respondent's representations for the purposes of any hearing (or consideration of the case).

9. The Tribunal subsequently gave directions for there to be witness evidence as to whether the First Respondent recognised any trade union. A Statement of Evidence has been provided by Christopher Winstanley which confirmed that no employees were part of a trade union so there was no ability to be represented by a trade union (which possibly misses the point that the issue was as to whether any trade union was recognised). However, Sarah Couchman subsequently provided a Statement of Evidence confirming that the First Respondent did not recognise a trade union for any description of employee.
10. The Tribunal then listed the case to be determined on the papers.
11. The other monetary Claims of David Cuskern and John Featham (besides their Claims for a protective award) were listed to be heard separately and have will be dealt with in a separate Judgment.
12. The Claim of David Dorman has not been dealt with as part of this Judgment as the Joint Administrators have not confirmed that he was an employee at the date of Administration and made redundant by the Administrators. Accordingly, further information or evidence is needed as to whether he was an employee at the date of administration and / or made redundant by the Administrators. Any such information should be provided within 28 days of this decision being sent to the parties
13. On full consideration of the file of proceedings it was possible to issue this Judgment under rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 in respect of the claim for protective awards without a hearing.
14. On the information provided, the Tribunal makes the findings set out below.
 - (1) The First Respondent accepts that there was no consultation over redundancy dismissals, and that on 20 December 2021 52 employees were made redundant at the same time, with immediate effect, including the Claimants listed in the Schedule below.
 - (2) The First Respondent did not recognise a trade union for any description of employee. The employees were made redundant immediately upon appointment of the Joint Administrators so that there was insufficient time for employee representatives to be elected or appointed for any such consultation within section 188A of the 1992 Act.
 - (3) There was no proper warning or consultation with the Claimants.
15. In the circumstances, the First Respondent is in breach of the duty under section 188 of the 1992 Act and the Tribunal makes an award under section 189 in favour of each Claimant listed in the Schedule for the maximum protected period of 90 days commencing on 20 December 2021.

16. The First Respondent is advised of the provisions of regulation 6 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, such that, within ten days of the decision in these proceedings being promulgated, the First Respondent must comply with the provisions of regulation 6 of the 1996 Regulations and, in particular, must supply to the Secretary of State for Work and Pensions the following information in writing:
- (a) the name, address and national insurance number of each Claimant to whom the award relates; and
 - (b) the date of termination of the employment of each Claimant to whom the award relates.
17. The requirement to make any payment under the protective awards does not arise until a recoupment notice has been received or notification that it is not intended to serve a recoupment notice having regard to the provisions of regulation 7(2). The Secretary of State the Secretary of State for Work and Pensions must normally serve such recoupment notice or notification within 21 days of receipt of the required information from the First Respondent.
18. No separate Order is made against the Second Respondent, but by reason of the insolvency of the First Respondent, any sum payable by the First Respondent as a protective award may be treated as arrears of pay for the purposes of the obligations of the Second Respondent under Employment Rights Act 1996 section 184.

Employment Judge Kenward

8 August 2023

SCHEDULE

| | | |
|----|--------------|------------------------|
| 1 | 1300882/2022 | Sarah Couchman |
| 2 | 1300883/2022 | Tina Spooner |
| 3 | 1300884/2022 | Julie Dobson |
| 4 | 1300885/2022 | Lyndsay Drugan |
| 5 | 1300886/2022 | Richard Cole |
| 6 | 1300966/2022 | Robert McCulloch |
| 7 | 1301002/2022 | John Featham |
| 8 | 1301021/2022 | Christopher Winstanley |
| 9 | 1301022/2022 | Clive Mackie |
| 10 | 1301023/2022 | Colin Evans |
| 11 | 1301024/2022 | Darren Wildman |
| 12 | 1301026/2022 | David Brady |
| 13 | 1301027/2022 | David Bower |
| 14 | 1301028/2022 | Garry McLaughlin |
| 15 | 1301029/2022 | Gavin Mountford |
| 16 | 1301030/2022 | Jonathan Kay |
| 17 | 1301031/2022 | Lee Heslop |
| 18 | 1301032/2022 | Neil Hamilton |
| 19 | 1301033/2022 | Richard Yare |
| 20 | 1301034/2022 | Robert Thomas |
| 21 | 1301035/2022 | Roger Dowson |

Case No: 1300882/2022 & Others

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|----|--------------|----------------|
| 22 | 1301036/2022 | Simon Phillips |
| 23 | 1301038/2022 | David Cuskern |
| 24 | 1301245/2022 | David McEwen |
| 25 | 1301246/2022 | David Laverick |
| 26 | 1301247/2022 | Joe Mcloughlin |
| 27 | 1301248/2022 | Paul Keenon |
| 28 | 1301249/2022 | Leslie Martin |

**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 for Work and Pensions 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 for Work and Pensions 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 for Work and Pensions 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, incomerelated 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 for Work and Pensions. 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 for Work and Pensions has received from the respondent the above-mentioned information required to be given by the respondent to the Secretary of State for Work and Pensions 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 for Work and Pensions, whatever may have been paid to the employee, and regardless of any dispute between the employee and the Secretary of State for Work and Pensions as to the amount specified in the Recoupment Notice.