**Case No. 1400290/2022, 1401153/2022 and Others**

# EMPLOYMENT TRIBUNALS

**Claimants:** Mr D Taylor and 11 Others
Mr A Smart and 28 Others

**Respondents**: (1**)** Complete Utilities Limited (In Administration)
(2) Secretary of State for Business, Enterprise and Industrial Strategy

**Heard at:** Southampton **On:** 31 August 2023 and 1 September 2023

**Before:** Employment Judge Self

**Appearances**

For the Claimants (Taylor and Others): Ms N Laing - Solicitor
(Smart and Others): Mr M Balal - Solicitor

For the Respondents: Mr N Caiden - Counsel

# RESERVED JUDGMENT

All Claims for a Protective Award are dismissed.

# WRITTEN REASONS

1. On 27 January 2022 a Claim Form was received from a group of Claimants represented by Messrs Simpson Millar (Taylor Multiple). On 28 March 2022, a second Claim was received from a group of Claimants represented by Messrs Aticus Law Solicitors (Smart Multiple). In both of those claims multiple Claimants sought a Protective Award against Complete Utilities Limited (CU) who had gone into Administration.

2. A Response to each Claim was lodged by the Administrator on behalf of the Respondent. In addition the Secretary of State for Business Energy and Industrial Strategy was joined to the proceedings and a Response was received from the Secretary of State on account of their responsibilities under section 182 of the Employment Rights Act 1996 to make certain payments out of the National Insurance Fund where it is satisfied that any employee has an entitlement. In essence the Secretary of State has put the Claimants to proof of any sum that they are due and indicated that they wished the Response to stand as therir representations in the case which is a common and proportionate course that they adopt in a case such as this.

3. The matter came before EJ Midgley by way of a Case Management Preliminary Hearing on 30 March 2023. He recorded that the claims were for a Protective Award under section 188 TULRCA 1992 arising from mass redundancies at CU's premises in Gloucester on account of the business being placed into administration on 11 November 2021.

4. The issues were identified and it was accepted by CU that it was under a duty to inform and consult and that it had failed to comply with the statutory time frames for such consultation. The issues were said to be:

    a) Whether there were special circumstances which meant that it was not reasonably practicable to carry out the statutory consultation and, if so,
    b) Whether the First Respondent took all steps as were reasonably practicable in the circumstances to consult with its workforce and, if not,
    c) The number of days protective award that should be ordered having regard to the nature of the default. It was noted that the Claimants were all seeking the maximum 90-day award.

5. This hearing took place over two days and at the end of the submissions I elected to reserve my decision rather than give an ex-tempore Judgment. I would like to thank the advocates for the assistance they provided in focussing on the issues in the case and for their helpful skeleton arguments. I considered such documents as I was directed to in the bundle. I heard evidence from Mr Benjamin Walker, Mr Jordan Price and Mr Dave Taylor for the Claimant and I heard evidence from Mr Victor Ellaby and Mr Steven Chaplin on behalf of CU. The former is a director of the Administrators and the latter is a Company Director of CU. I also considered the written and oral closing submissions from each advocate.

6. CU was placed into Administration on 11 November 2021 and more than 20 employees were made redundant by the Administrator on that day. Each employee received a letter from the Administrator in the form set out at page 193 of the bundle.

7. The relevant law is as follows:

    ***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 otherwise, at least 30 days,***
***before the first of the dismissals takes effect….***

***(2)The consultation shall include consultation about ways of***
***(a) avoiding the dismissals,***
***(b) reducing the numbers of employees to be dismissed, and***
***(c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.]***
***(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.***

8. The Administration of the business is continuing and it appears clear that there will not be funds from the Administration to satisfy any Judgment in this case as the Claimant would be deemed unsecured creditors and there is insufficient monies to even pay out secured creditors. As stated above the Secretary of State for BEIS has been joined as a co-Respondent.

9. The employer need only take such steps towards compliance with that requirement as are reasonably practicable in the circumstances. The onus is on the employer to show both that there were special circumstances and that it took all reasonably practicable steps (s.189(6)).

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

11. Even where special circumstances are shown, these do not absolve the employer from complying with the consultation requirements in respect of which compliance was reasonably practicable or which were not affected by the special circumstances. The employer must still take all steps towards compliance as are reasonably practicable in the circumstances of the case.

12. Many redundancies are the consequence of difficult financial circumstances, which may themselves lead to insolvency. In the ***Clarks*** case the Court of Appeal pointed out that insolvency is not on its own a special circumstance. Far from being 'exceptional' or 'out of the ordinary', insolvency is in fact a fairly common occurrence. In the Court's view, whether special circumstances exist will depend entirely on the cause of the insolvency. If, for example, sudden disaster strikes a company, making it necessary to close immediately, then plainly that would be capable of being a special circumstance, and that is so whether the disaster is physical or financial. But where the insolvency is due to a gradual running down of the company, a tribunal is entitled to conclude that there are no special circumstances.

13. Mr Chaplin was also a Director of Overton (Gloucester) Limited which was the Holding Company for CU. He told me that he had been in the industry for 30 years and that he had oversight of CU's day to day running and business activities and had ultimate responsibility for the finances of the Company.

14. CU was a civil engineering firm providing groundwork services for utility companies specialising largely in telecoms. In addition to the head office there was one other main site where there was a workshop where vehicles were kept and maintained. These vehicles were used by the company for projects such as digging trenches in or alongside roads to lay in and connect fibre optic cables. The company was a trading company and Overton Gloucester Limited was the holding company. Overton owned the majority of the plant and machinery and hired this out to be used by CU to carry out its work.

15. CU was the lead contractor for Gloucestershire and Herefordshire County Councils' project to lay the infrastructure for Gigaclear, a broadband provider, to use. Gigaclear was the company's largest client by a substantial margin and accordingly whilst the company had other customers it did rely upon Gigaclear paying its invoices in full, and in a timely manner. It follows therefore that Gigaclear was such a substantial contract that they would make a significant difference to cash flow.

16. CU and Gigaclear had a long-standing relationship since 2010. Initially the financial arrangements worked well for both parties and there was an understanding and flexibility on both sides. However as time went on there were changes to the management of Gigaclear at which point the levels of flexibility appeared to diminish and there was less thought of the needs of CU by Gigaclear as time went on.

17. Mr Chaplin described a cut throat business environment to us. Often CU would only be paid for work when a specific project was concluded but there were often hold-ups that meant that only small parts of a project may remain outstanding but payment would not be made. I was told that there were often financial retentions for reasons that were not always clear to CU. They would be resolved eventually by discussion /negotiation but not always in CU's favour. Mr Chaplin described a world where recourse to legal action was not the preferred course and although fully regulated by contract, breach was a regular occurrence. It was a rough and ready world where there had to be an

acceptance by CU that, from time to time, you may not get what you wanted or what was due for the work you had done. It is clear however that CU had received substantial sums from Gigaclear over a substantial period of time (£200 million) notwithstanding the quirks that I have described.

18. I am satisfied that Mr Chaplin was very experienced in this arena and was able to play his part for CU in the various discussions / negotiations that went on. He also described that on a reasonably regular basis contractors would be in essence starved out of business by larger organisations up the commercial chain. He seemed to accept that this was an occupational hazard and simply part of the business. I am quite satisfied that the risks / tricks of the trade associated with this business were well-known to Mr Chaplin as was his long relationship with Gigaclear. Similarly, however he was also very knowledgeable and experienced when dealing with Gigaclear and understood how that contract worked.

19. I have been provided with a number of Board Minutes from 5 February 2021 which shows the situation as it developed during that year:

    a) 5 February 2021 – It was agreed that the Holding Company would transfer £550,000 to support CU's cash flow.
    b) 19 February 2021 – There was further concern over cashflow and the timing of payments from the client (Gigaclear) a further £200,000 was made available to CU with the understanding that it would be paid back when Gigaclear paid their bill which was expected on 1 March.
    c) 8 March 2021 – On the basis that an AFP (application for payment) was going in to Gigaclear for NEC4 a further £200,000 would be handed over from the Holding Company to support cashflow pending that payment.
    d) 19 March 2021 - A further £300,000 was paid over on the basis that the money would be refunded upon Gigaclear's next payment.
    e) 4 May 2021 – Due to issues re payments being withheld CU would receive another £300k cash injection which would be repaid when £1 million was paid at the end of the month.
    f) 17 May 2021 - Attempts were to be made to amend the contractual terms with clients and it was suggested a Finance Director was appointed to assist with budgeting. A further £400,000 was paid over by the Holding Company.
    g) 21 June 2021 - £1 million had been paid over by Gigaclear but another £400,000 would need to be be made available to CU from the Holding Company. Future sums from the Holding Company needed to be set off from the sale of assets.
    h) 12 July 2021 – Further substantial sums were to be paid in from the Holding Company in August and meetings would be set with Gigaclear to try and get a better way of working / payment.
    i) 27 August 2021 – There had been a meeting with Gigaclear's senior executive team on 23 August at which Gigaclear had given a commitment to help. On account of this a further £300,000 was to be transferred to assist with cashflow. Some plant had also been sold to the Holding Company in lieu of this assistance.

j) 14 September 2021 – There had been a further meeting with Gigaclear on 10 September. It was foreseen that there would be further work at different levels to ensure what CU needed to continue the partnership with Gigaclear were clear. An AFP for £900,000 was to be put in and better payment terms were to be sought. Another meeting would take place on 20 October where it was envisaged a further review with Gigaclear would take place and it was thought that clear support would be needed from Gigaclear at that time.
k) 20 September - £300,000 was received from Gigaclear and they had also made a positive commitment to support CU. On that basis a further £300,000 was paid over from the Holding Company. It was proposed that a commercial consultant be engaged so as to advise on improvements that could be made.
l) On 22 October referenced the request for a £900,000 release of retention having been made to Gigaclear and a request for payment of work in progress had been made and discussions were still ongoing.
m) On 27 October there was a discussion about the outcome of various calls with Gigaclear on 25 and 26 October around the various proposals and a business case was presented to justify Gigaclear's support to enable the contract to continue. It was noted that CU's proposals for support were reviewed by Gigaclear and declined. An internal review on how CU could continue to trade from was undertaken and the deferral of various creditors and the imminent payment from Gigaclear off circa £900,000 on 29 October were considered as the basis upon which the business could continue.
n) Later that day £660,761 was received as opposed to the £893,439 that was being expected a shortfall of £232,768.
o) There were Board meetings on 29-31 October to review the business position on receipt of the latest payment from Gigaclear. That resulted in several other meetings being held over the weekend with external advisers to establish a clear picture. A decision had been made by the board of directors to use the money paid by Gigaclear to settle all monthly and PAYE wages. Following lengthy discussions a detailed review of all the emergency meetings and based on the advice given a final decision was made on Sunday 31st of October at 5:00 AM that they could no longer continue trading.

20. Mr Chaplin gave a detailed account in his witness statement about these times. He told me that a number of the payments received from Gigaclear were less than was billed or hoped. This, of itself, was not unusual but became more prevalent through 2021. Some monies received from the Holding Company was paid back but by no means all. There were the issues of the "disconnected work" to be resolved and because of that Gigaclear had delayed initiating valuable new work coming on stream although it was all there waiting to be handed out to CU and then completed.

21. I am satisfied that Mr Chaplin genuinely held the view that the issues which had arisen were, whilst more serious than before, were capable of being overcome and it was on this basis that monies were leant to the Company by the Holding Company. As it turned out much of the sums leant were lost and

the Holding Company is the main debtor to the tune of £3 million plus. The decisions of Mr Chaplin and others who were also directors of the Holding Company make no sense unless they held a genuine belief that there was a viable trading relationship possible moving forward. They held that belief on the basis of the long trading relationship and other matters which they had always managed to overcome in the past with Gigaclear. The faith held in that was dealt a grievous blow by the rejection of any re-negotiation of payment terms on 26/27 October and finally killed off by the failure to make the full payment a few days later.

22. I accept the evidence that it was Mr Harris a Trustee of the settlement which owned the Holding Company contacted Hazlewoods LLP on 26 October 2021 to discuss the potential impact of the failure by Gigaclear to accept any amendment to the terms of business. They advised about the duties not to continue trading if insolvent on a cash flow basis. I accept that even at that stage Mr Chaplin was optimistic that the full sum would come in and trading would still be possible. After the non-payment of the full sum they considered (having taken advice) that it was unlikely that they would be able to pay their employees for another month and it was the end of the line for support from the Holding Company. It was clear following further discussions that the Company would need to cease trading.

23. The duty to consult arises where the employer is 'proposing to dismiss' for redundancy. Historically, courts and tribunals have taken the view that this phrase implies that some sort of decision must have been made. For example, in *Association of Patternmakers and Allied Craftsmen v Kirvin Ltd 1978 13 ITR 446, EAT*, the Appeal Tribunal stated that, for it to be said that an employer is 'proposing to dismiss', 'the employer must have formed some view as to how many are to be dismissed, when this is to take place and how it is to be arranged'. In that case, the employer was in financial difficulties and attempts were made to sell the business. When the last prospective purchaser withdrew, a receiver was appointed who immediately gave redundancy notices to the workforce. The union argued that the duty to consult arose when the employer contemplated, or should reasonably have contemplated, the possibility of redundancies. The EAT, however, held that the employer only proposed to dismiss on the day the last potential purchaser withdrew and the receiver was appointed. Before that, redundancies were merely a contemplated possible event, so there was no breach of the consultation requirements.

24. However, while the TULR(C)A imposes the duty to consult at the point that an employer *proposes* collective redundancies, Article 2(1) of the Collective Redundancies Directive requires consultation where an employer is contemplating collective redundancies. In *MSF v Refuge Assurance plc and anor 2002 ICR 1365, EAT*, the EAT accepted that the difference in wording makes the TULR(C)A more restrictive than the Directive — *proposing to dismiss* refers to a state of mind that is much more certain and further along in the decision-making process than mere contemplation. The EAT thus

confirmed that the TULR(C)A does not comply with European law in this regard.

25. The EAT's conclusion in the MSF case is supported by the European Court of Justice (ECJ)'s decision in *Junk v Kühnel 2005 IRLR 310, ECJ*. That case focused on the timing of consultation in relation to the notice of dismissal, but the ECJ also considered the point at which the duty to consult arises. It noted that 'the case in which the employer "is contemplating" collective redundancies and has drawn up "a project" to that end corresponds to a situation in which no decision has yet been taken'. It went on to state that the wording of the Directive indicated that ***'the obligation to consult and to notify arose prior to any decision by the employer to terminate contracts of employment'***. Thus, as a matter of European law, the obligation to consult arises before the employer has set its mind on dismissal.

26. In this regard, the EAT has attempted to give the wording of S.188 some degree of 'purposive' construction. In *Scotch Premier Meat Ltd v Burns and ors 2000 IRLR 639, EAT*, for example, it held that a company considering two possible courses of action as to its future, one of which would involve effecting redundancy dismissals, the other of which would not, was 'proposing to dismiss' for S.188 purposes. According to this interpretation, it would seem that while the duty under the TULR(C)A does not arise until there is some specific proposal for dismissals, it can arise (as the Directive requires) before the employer's mind is committed to a definite course of action. In a subsequent case, however, the EAT required something more specific in order for dismissals to be 'proposed' for collective consultation purposes. In *UK Coal Mining Ltd v NUM (Northumberland Area) and anor 2008 ICR 163, EAT*, Mr Justice Elias, then President of the EAT, noted that the collective consultation duty will not arise ***'when the closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention'***. This interpretation seems to be closer to the wording of the TULR(C)A than to the ECJ's clear statement of principle in *Junk v Kühnel* (above). However, Elias P considered all of the relevant case law — including Junk — on the point, so his comments can be taken to hold some authority.

27. The European Court revisited the question of when an employer can be said to be 'contemplating' collective redundancies in ***Akavan Erityisalojen Keskusliitto (AEK) and ors v Fujitsu Siemens Computers Oy 2010 ICR 444****, ECJ*, where it held that an employer's duty to consult under Article 2(1) of the Directive is triggered once a strategic or commercial decision compelling it to contemplate or to plan for collective redundancies has been taken, not when such a decision is merely contemplated. In the ECJ's view, there were clear disadvantages to a premature triggering of the obligation; for example, restricting the flexibility available to undertakings when restructuring and causing unnecessary uncertainty for workers about their job security. The ECJ also considered that, should consultation begin when decisions that may lead to redundancies are merely contemplated, the relevant factors to be taken into account during the course of that consultation would not be known. In such circumstances, the objectives of the consultation listed in Article 2(2) of the Directive — avoiding termination of employment contracts, reducing the

number of workers affected and mitigating the consequences — could not be achieved. The ECJ also held that the obligation to start consultation was not dependent on the employer being able to supply to workers' representatives information of the type listed in Article 2(3)(b), such as the reasons for the projected redundancies, the numbers and categories of employees to be made redundant, the period over which the projected redundancies are to be effected and the selection criteria to be used. In the ECJ's view, the wording of the Directive clearly envisaged such information being provided during consultations but not necessarily at the time they start.

28. Unfortunately, the decision in Akavan is not without its problems and at certain points the ECJ appears to blur the distinction between the triggering of the obligation to consult and the obligation to start consultation. This was recognised by the Court of Appeal in *United States of America v Nolan 2011 IRLR 40, CA*, and as a result the Court decided that a reference to the ECJ was necessary to clarify when the consultation obligation under the Directive arises. While the ECJ had already addressed the issue in Akavan, the Court of Appeal considered that decision to be 'unclear'.

29. On 22 March 2012, Advocate General Mengozzi issued his opinion that the obligation to consult is triggered, within a group structure, when a body or entity that controls the employer makes a strategic or commercial decision which compels the employer to contemplate or to plan for collective redundancies.

30. The Claimant urged upon me that the obligation to collectively consult was triggered on 27 September 2021 being 45 days before the first of the dismissals took place on 11 November 2021. There was no Trade Union and there was a complete failure to elect suitable employee representatives and there was no consultation at all nor was any information provided. There was no meaningful engagement and the Claimants were left uninformed without any opportunity to voice their concerns or negotiate alternatives.

31. The Claimants did not accept that the cash flow crisis could be described as sudden and prays in aid that the cash flow issues were in place from at least July if not before according to the Board minutes detailed above. The Claimants reminded me that insolvency is not of itself a special circumstance and the situation in this case could not properly be deemed a sudden disaster.

32. In the event that there were special circumstances then the next issue is whether those circumstances rendered it not reasonably practicable for the Respondent to comply with its obligations. They suggest that it did not and they neglected to take up opportunities to comply with its obligations.

33. The Claimants averred that ***"given the length of time that CU was aware of its difficulties with its customer CU should have realised at a much earlier juncture, especially taking into account the discussions that were taking place with the customer, that redundancies were likely".*** They went on to say that given the gravity of the breach and the impact on the workforce, any Protective Award should be at the maximum level of 90 days.

34. CU's counsel reminded me that I must make sure that I do not substitute my commercial judgment for theirs. I am obliged to focus upon what a reasonable employer in the circumstances that pertained would do. It averred that there were special circumstances and that was Gigaclear paying a lesser amount than was anticipated at the end of October. It was sudden and not expected and so fell within what was said in the Clarks Hove case and was analogous **to USDAW v Leancut Bacon Limited (1981) IRLR 295 EAT** where the "sudden action of Barclays bank Ltd in stopping further credit and appointing a receiver was a special circumstance."

35. In response to the Claimants' argument that the cashflow issue was a long running affair and so the situation was more akin to a gradual decline but it was contended that I needed to focus upon insolvency in its proper context in that:
    a) Had the payment been made in full the evidence of Mr Chaplin was that if it had have been paid it would have enabled the Company to continue trading legally.
    b) Gigaclear were a longstanding client and the relationship had often been subject to brinkmanship on their part but matters had always resolved themselves in the past and Mr Chaplin held a genuine belief that the full payment would be made.
    c) The actions of Gigaclear failing to do what they had agreed to do was the trigger for ceasing trading. Had it been made then steps could and would have been taken to restructure.
    d) Once an administrator was appointed then within 14 days (11 November) the Administrator needs to make a decision as to whether the insolvent company should continue to employ members of staff.

36. It was explained to me and I accept that CU had limited credit in their bank and also that is common in this business due to the risks involved. CU were able to call upon the Holding Company for short-term financial facilities to alleviate cash flow problems much as others would utilise an overdraft. As stated Mr Chaplin was a Director and a Trustee of the Holding Company, which appears to have no liquidity issues and the capacity to pay over substantial sums in swift order when required. I am satisfied that Mr Chaplin held a genuine belief that it was expedient from a business perspective because he truly believed that there was another £35 million pounds of work from Gigaclear available and that so long as the short-term issues were overcome then as had happened so many times before issues would resolve themselves. Mr Chaplin and the trustees decision to continue to make payments to sure up the Respondent makes no business sense whatsoever unless they were convinced that Gigaclear would pay, the blockages would be sorted out and the new work would come.

37. I do not accept the Claimants' suggestion that this was blind faith. In light of the long-term relationship with Gigaclear and the nature of it which, although bumpy, had always been passable to date Mr Chaplin's approach seems a reasonable one based on his experience and knowledge at the time. He

accepts now that he may have been duped but that is with the benefit of hindsight.

38. The Respondent's obligation arises when they are proposing to dismiss. I am satisfied on the evidence provided to me that here was no proposal of dismissing any of the Claimants for redundancy until the payment was not fully made and that was a reasonable view for the Respondent to take. They were keen to keep the Company trading and were prepared to bolster it for a substantial period of time from the Holding Company but when the promised full payment was made their options were at an end and legally there was no option but to cease trading having taken advice. There was still gold at the end of the rainbow in terms of £35 million more work and I accept that it was worth the efforts to try and get to a position where that work would have benefitted both the Respondent and their staff.

39. Whilst I accept that insolvency of itself is not a special circumstance I do consider that in the particular factual nexus of this claim that the failure to pay at the eleventh hour was a disaster and unexpected in the context of previous trading and so in the circumstances it meets the criteria of a special circumstance pursuant to TULCRA and the case law. Further I accept that it rendered it not reasonably practicable to comply with their consultation and other obligations.

40. It was reasonable over 30 and 31 October to take some time to take stock and staff were notified that trading had been suspended whilst advice had been taken and staff were told that they did not need to attend work. That was followed by a letter on 5 November which indicated that consultation was being opened as all roles were at risk. It was said that any suggestions re how redundancies may be avoided were to be sent through to a general email address. On 11 November administrators were appointed.

41. There was an offer for staff to put forward any views they had. There was the start point for consultation but I am quite satisfied that any consultation with staff would or could have had any material effect on any dismissals. The financial die was cast and CU was quite simply unable to trade. I do not consider that there was any more that the Respondent could have done in the circumstances to consult with employees which would have had any material effect. What they did do was proportionate and that the letter was the only step that could realistically be taken towards compliance and so the Respondent has complied with their obligation to take all such steps towards compliance that were reasonably practicable in the specific dire circumstances that pertained.

42. All Claims are dismissed.

**9 October 2023**

Sent to the parties on:

9 October 2023

For the Tribunal Office: