



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr M David and others (see Appendix 1)

**Respondents:** (1) DRB Group Limited (in creditors' voluntary liquidation)  
(2) Secretary of State for Business and Trade

**Heard at:** Cardiff, by video                      **On:** 6 October 2023

**Before:** Employment Judge S Jenkins

## Representation

**Claimants:** Mr A Windross (Counsel) – on behalf of 66 Claimants  
Mr N Ellis (in person)  
Mr P Dodd and Mr R Thompson (not present or represented)

**Respondents:** Not present or represented

# JUDGMENT

1. The Claimants' (i.e. all those listed in Appendix 1) complaints, under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("Act"), of a failure by the First Respondent to comply with the requirements of section 188 of the Act, are well-founded.
2. The First Respondent is ordered to pay to the respective Claimants listed in Appendix 1, all of whom were dismissed by reason of redundancy, a payment<sup>1</sup> equivalent to remuneration for the protected period of 90 days beginning on 30 January 2023.
3. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply.

---

<sup>1</sup> The specific sums payable to each Claimant by the First Respondent are (where capable of calculation, one was not) set out in the Appendix, although any specific sums payable to the Claimants by the Second Respondent, pursuant to Part XII of the Employment Rights Act 1996, will be less than those sums. That has been done on the basis that the Claimants wish to be in a position to pursue the balances as creditors in the First Respondent's liquidation.

# REASONS

## Background

1. The hearing was to consider the Claimants' claims for protective awards, pursuant to section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("Act"), that the First Respondent had failed to comply with its duty, under section 188 of the Act, to consult appropriate representatives of the Claimants, being employees dismissed by reason of redundancy.
2. All Claimants were employed by the First Respondent up to January or February 2023, when they were dismissed by reason of redundancy, shortly prior to the First Respondent entering into creditors' voluntary liquidation.
3. The Claimants, either individually or in groups, brought Tribunal claims against the First Respondent, joining in the Second Respondent on the basis that she would be responsible for certain payments under Part XII of the Employment Rights Act 1996.
4. The First Respondent, in liquidation, did not submit any response to the claims. The Second Respondent, the Secretary of State, provided a response on 2 June 2023, noting that the Secretary of State neither supported nor resisted the claims, but requesting that the Tribunal ensure that the Claimants were eligible to bring their claims.
5. Employment Judge Sharp, at a preliminary hearing on 14 July 2023, directed that a hearing would need to take place to consider the Claimants' claims, with evidence being provided from two witnesses. This hearing was then arranged to consider that evidence and to decide upon the Claimant's claims.

## Issues and Law

6. Section 188(1) of the Act, provides as follows:

*"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 dismissal 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."*

7. A number of constituent elements therefore arise in relation to the duties under section 188 of the Act. There must be an employer, who propose to dismiss employees as redundant, and it seemed clear that, in this case,

there was such an employer, the First Respondent, which proposed to dismiss, and indeed almost immediately thereafter did dismiss, employees as redundant.

8. In such circumstances, the employer is under a duty to consult about those dismissals with appropriate representatives. Section 188(1B) provides that, if there is a recognised trade union, then it will be the appropriate representative. If there is no recognised trade union, then the obligation is to consult with employee representatives appointed or elected for that purpose, or, if not elected or appointed for that purpose, having authority from the relevant employees to receive information and to be consulted about the proposed dismissals on their behalf. I therefore needed to consider whether there had been a recognised trade union or unions and, if not, whether any employee representatives had been appointed or elected or had the required authority.
9. The requirement set out in section 188 only arises where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. I therefore needed to be satisfied that that had been the case. There was no indication that the First Respondent operated at more than one location.
10. Where the duty to consult arises, section 188(1A) provides that the consultation shall begin "*in good time*" and, in any event, where the employer is proposing to dismiss 100 or more employees, at least 45 days, and otherwise, 30 days, before the first of the dismissals takes effect.
11. Section 188(7) of the Act allow a "special circumstances" defence to a claim of failure to consult, as it provides that, "*if, in any case, there are special circumstances which render it not reasonably practicable for the employer to comply with [any of its obligations], then the employer is to take all such steps towards compliance as are reasonably practicable in those circumstances*".
12. In Clarks of Hove Ltd v Bakers' Union [1978] ICR 1076, the Court of Appeal held that a 'special circumstance' must be something 'exceptional', 'out of the ordinary' or 'uncommon'. It also 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.
13. Finally, if I was satisfied that the First Respondent had proposed to dismiss as redundant 20 or more employees at one or more of the establishments within a period of 90 days, I needed to be satisfied as to whether there had then been a failure to comply with the consultation obligation, and, if so, as to the extent of that failure.
14. Section 189(2) of the Act provides that if the Tribunal finds a complaint of failure to consult well-founded, it shall make a declaration to that effect, and can make a protective award. Sections 189(3) and (4) then provide that a

protective award is an award ordering the employer to pay remuneration for a protected period, which 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 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. It cannot however exceed 90 days.

15. The Court of Appeal, in Susie Radin Ltd v GMB and ors [2004] ICR 893, provided guidance as to how a tribunal should approach the assessment of a protected period. It noted five factors that Tribunals should have in mind when applying section 189, as follows:

- The purpose of the award is to provide a sanction, not compensation.
- The tribunal has a wide discretion to do what it considers just and equitable, but the focus must be on the seriousness of the employer's default.
- The default may vary in seriousness from the technical to a complete failure, both to provide the required information and to consult.
- The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under S.188.
- How the tribunal assesses the length of the protected period is a matter for the tribunal, but a proper approach where there has been no consultation is to start with the maximum period of 90 days and reduce it only if there are mitigating circumstances justifying a reduction to an extent to which the tribunal considers appropriate.

## **Findings**

16. The First Respondent was an engineering company, based in Deeside, North Wales. At the time of the events giving rise to these claims, January and February 2023, it employed approximately 150 people at on location.

17. On 30 January 2023, those employees of the First Respondent who were in work were called to a meeting and informed that they were being dismissed with immediate effect due to the First Respondent's insolvent state. Those not in work became aware of the situation from their colleagues. No formal notices of termination were provided, but the first dismissals took place on 30 January 2023, with the last taking effect on 15 February 2023.

18. Liquidators were appointed on 20 February 2023.

19. I was satisfied from the witnesses' evidence, that twenty or more employees, in fact approximately 150 employees, had been dismissed at the First Respondent's premises within a 90-day period. I was also satisfied, notwithstanding that no formal notices of termination were

provided, that those dismissals were by reason of redundancy, in that the dismissals were wholly attributable to the fact that the First Respondent ceased to carry on the business for which the employees had been employed.

20. The dismissals took effect between 30 January 2023 and 15 February 2023, and it appeared to me that the earliest it could be said that the proposals to dismiss by reason of redundancy occurred was on or shortly before 30 January 2023.
21. No trade union was recognised within the First Respondent's business, and no employee representatives were appointed or elected or otherwise had authority to receive information and be consulted about any proposed dismissals.
22. In any event, no information about the proposed redundancies was provided to any representative or to the employees generally, and no consultation about the proposed redundancies took place.
23. As I have noted, the First Respondent did not submit a response to the claims, and therefore no special circumstances defence was advanced it.

## **Conclusions**

24. In light of my findings, it was clear to me that there had been proposals to dismiss 20 or more, indeed 100 or more, employees by reason of redundancy at the First Respondent's only establishment. The obligation to consult under section 188 therefore arose.
25. It was also clear to me that there had been a complete failure by the First Respondent to comply with the obligations under section 188. No employee representatives were appointed or elected, nor did any representatives have authority from the relevant employees to receive information and to be consulted about the proposed dismissals on their behalf. Furthermore, no attempts were made to provide the employees with the required information or to consult with them.
26. In the circumstances, I was satisfied that it was appropriate to make a declaration that the Claimants' claims were well founded.
27. Following the guidance provided by the Court of Appeal in Susie Radin Ltd, I then considered that it was appropriate to order that the protected period should run for 90 days. As I have noted, there was no attempt by the First Respondent to appoint or elect representatives, and no attempt to provide them with information about the proposed redundancies or to consult with them on those redundancies. I therefore saw no reason to make any reduction from the 90 day period.

**Case No: 1600759/2023 & ors  
(see Appendix 1)**

28. In conclusion, I directed that the First Respondent should be ordered to pay remuneration to the relevant Claimants for the protected period, which began on the date of the first dismissals, 30 January 2023, and ran thereafter for 90 days.
  
29. The First Respondent needs to be aware of, and comply with, the recoupment provisions set out in Appendix 2.

---

Employment Judge S Jenkins  
Date: 6 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 16 October 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

## APPENDIX 1

Case Number	Name	Protective Award
1600443/2023	Peter Dodd	£10,800.00
1600637/2023	Nathan Ellis	£6,508.92
1600759/2023	Mark David	£11,126.31
1600760/2023	Daniel Ambrose	£6,428.57
1600761/2023	Gareth Palin	£11,126.31
1600762/2023	Matthew Jones	£6,703.71
1600763/2023	Nicola Wood	£9,890.10
1600764/2023	Stephen Shone	£4,821.43
1600765/2023	David Weatherley	£5,785.71
1600767/2023	Sandra Glasson	£4,945.11
1600779/2023	Matthew Allt	£14,010.30
1600781/2023	Mark Bowles	£10,809.90
1600782/2023	Timothy Brockley	£10,800.00
1600783/2023	Ben Brown	£5,392.80
1600784/2023	Ieuan Burton	£11,635.20
1600785/2023	Gary Calland	£8,508.60
1600786/2023	Robert Capper	£8,739.00
1600787/2023	Ioan Ciordas	£18,749.70
1600788/2023	Stewart Cobden	£7,103.70
1600789/2023	Thomas Coldrick	£6,757.20
1600790/2023	Laurence Coleman	£3,075.30
1600791/2023	David Cuthill	£13,462.20
1600792/2023	Jake Davies	£12,053.70
1600793/2023	Thomas Dixon	£10,179.00
1600794/2023	Jonathan Elliott	£8,649.00
1600795/2023	Charlie Evans	£6,681.60
1600796/2023	Rhys Evans	£5,753.70
1600797/2023	Stephen Evans	£4,138.20
1600798/2023	William Fawcett	£9,878.40
1600799/2023	Joseph Gallagher	£8,658.90
1600800/2023	Neil Garbutt	£14,118.30
1600801/2023	Julie Grant	£12,321.00
1600802/2023	George Grieve	£12,974.40
1600803/2023	Steven Hill	£14,480.10
1600804/2023	Greg Hughes	£12,276.90
1600805/2023	Tom Jellicoe	£11,788.20
1600806/2023	Elliott Jones	£9,107.10
1600807/2023	Matthew Jones	£8,862.30
1600808/2023	Anthony Kennedy	£5,139.90
1600810/2023	Matthew Lea	£6,788.70
1600811/2023	George Lee	£11,505.60
1600812/2023	Marta Lorkowska	£5,356.80
1600813/2023	Alan Lunt	£9,856.80

**Case No: 1600759/2023 & ors  
(see Appendix 1)**

1600814/2023	Marzena Macias	£9,848.70
1600815/2023	Andy Mackinlay-Brown	£9,375.30
1600816/2023	Hamed Majidi Fard Vatan	£9,375.30
1600817/2023	Graham Motley	£8,949.60
1600818/2023	John Noble	£12,053.70
1600819/2023	Jordan Owen-Jones	£9,371.70
1600820/2023	Neil Parry	£5,716.80
1600821/2023	Lucy Powell	£4,619.70
1600822/2023	Frank Rimmer	£11,180.70
1600823/2023	David Rowlands	£10,089.90
1600824/2023	John Salisbury	£8,514.00
1600825/2023	Peter Scott	£13,626.00
1600826/2023	Angela Sollars	£5,979.60
1600827/2023	Hannah Stevenson	£6,160.50
1600828/2023	Kevin Swarbrick	£6,160.50
1600829/2023	Louis Taylor	£4,927.50
1600830/2023	Raymond Thompson	
1600831/2023	Clare Tierney	£8,838.90
1600832/2023	Mathew Triggs	£6,583.50
1600833/2023	Daniel Walker	£6,669.00
1600834/2023	Darren Walker	£7,033.50
1600835/2023	Gavin Walton	£10,923.30
1600836/2023	Paul Ward	£14,758.20
1600837/2023	Neville Watkins	£9,281.70
1600838/2023	Lewis Welch	£4,897.80
1600839/2023	Frans Zegers	£7,945.20



## APPENDIX 2 (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 First Respondent is under a duty to give the Secretary of State the following information in writing: (a) the name, address and National Insurance number of every employee to whom the protective award relates; and (b) the date of termination (or proposed termination) of the employment of each such employee.

That information shall be given within 10 days, commencing on the day on which the relevant judgment was sent to the parties. In any case in which it is not reasonably practicable for the First Respondent to do so within that time, then the information shall be given as soon as reasonably practicable thereafter.

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

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

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

- (a) the amount (less any tax or social security contributions which fall to be deducted by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Secretary of State receives from the employer the information referred to above; OR
- (b) (i) the amount paid by way of or paid as on account of jobseeker's allowance, income-related employment and support allowance or income support to the employee for any period which coincides with any part of the protected period falling before the date described in (a) above; or (ii) in the case of an employee entitled to an award of universal credit for any period ("the UC period") which coincides with any part of the period to which the prescribed element is attributable, any amount paid by way of or on account of universal credit for the UC period that would not have been paid if the person's earned income for that period was the same as immediately before the period to which the prescribed element is attributable.

The sum claimed in the Recoupment Notice will be payable forthwith to the Secretary of State. The balance of the remuneration under the protective award

is then payable to the employee.

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

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