EMPLOYMENT TRIBUNALS

Claimants: **Ewelina Pysiewicz & Others.**

Respondents: **1. Orchard House Foods Limited (in administration)**

2. The Secretary of State for Business and Trade

Heard at: **Reading via CVP** **On:** **5 March 2024**

Before: **Employment Judge Partington**

Representation

Claimants: Alan Lewis, Pearson Solicitors, representing Katarzyna Booth and the additional claimants presented with the same claim using the multiple claim form; Ewelina Pysiewicz; Lukasz Pysiewicz; Mark Doran and the additional claimants presented with the same claim using the multiple claim form; and Milena Galwey

Mr Kennedy, Counsel for Unite

Ana Paula Teixeira, on her own behalf

Kirsty Watkins, on her own behalf

Respondent 1: Not represented and not present.

Respondent 2: Not represented and not present.

RESERVED JUDGMENT

1. The first respondent has failed to comply with a requirement of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. The claim for a protective award succeeds.

2. The Tribunal makes a protective award that the employer pay remuneration for the protected period which began on 18 January 2023 and is for a period of 90 days in respect of:

    a. the individual claimants referred to in Schedule A, who worked at the first respondent's establishment at 79 Manton Road, Earlstrees Industrial Estate, Corby NN17 4JL, and who were dismissed as redundant on or after 18 January 2023; and

    b. the claimants covered by the collective bargaining agreement between Unite and the first respondent, and who worked at the first respondent's establishment at 79 Manton Road, Earlstrees Industrial Estate, Corby NN17 4JL, and who were dismissed as redundant on or after 18 January 2023, which includes but is not limited to those employees referred to in Schedule B.

3. The Recoupment Regulations apply.

Schedule A (exhaustive list of claimants not covered by collective bargaining agreement)

First Name	Surname	Claim number
Adele	Robinson	3305417/2023
Agnieszka	Surmacz	3305418/2023
Amanda	Seja	3305490/2023
Ana Paula	Teixeira	3304142/2023
Andreaa	Andrei	3305419/2023
Andrzej	Scholtz	3305420/2023
Ann	Revell	3305448/2023
Ann-Marie	Walker	3305421/2023
Brian	Turner	3305422/2023
Carole	Fowkes	3305423/2023
Connor	Scott	3305543/2023
Craig	Cottol	3305424/2023
Dace	Treiliba	3305425/2023
Daniel	Godfree	3305426/2023
Danielle	Mitchell	3305451/2023
David	Talbot	3305427/2023
Ewelina	Pysiewicz	3302576/2023 & 3305445/2023
Frances	Hyde	3305449/2023
Gary	Minnikin	3305542/2023
James	Coles	3305429/2023
Karl	Andrews	3305450/2023
Katarzyna	Booth	3305416/2023
Kiaran	Saunders	3305430/2023
Kirsty	Watkins	3304155/2023
Krystztof	Zagorski	3305431/2023
Laszlo	Szucs	3305432/2023
Laura	Barber	3305433/2023
Lesley	Restorick	3305434/2023
Lewis	Fitzpatrick	3305443/2023
Marcis	Skellis	3305435/2023
Marta	Murawska	3305436/2023
Michael	Gardner	3305437/2023
Michael	Hall	3305438/2023
Mohammad-Yaseen	Malak	3305540/2023
Natalia	Wroblewska	3305439/2023
Nicola	Armstrong	3305447/2023
Ramunas	Dervinskas	3305539/2023
Samantha	White	3305440/2023
Sharon	McClelland	3305441/2023
Sharon	Mutch	3303871/2023
Sharon	Thompson	3305422/2023
Sheena	Coles	3305444/2023

Tomas	Hmilansky	3305452/2023
Tomasz	Salamon	3305446/2023
Wojciech	Sowa	3305544/2023

Schedule B (non-exhaustive list of claimants covered by collective bargaining agreement)

First Name	Surname	Claim number
Adrian	Dworski	3305488/2023
Andris	Pavars	3305484/2023
Angelina	Pranghadzhiyska	3305467/2023
Badria	Hassan	3304138/2023
Bhanuben	Patel	3305485/2023
Bozena	Olejniczak	3305461/2023
Carolina	Cebotari	3305465/2023
Csaba	Mile	3304202/2023
Daiva	Bitinaityte	3305471/2023
Daniela	Bitca	3305458/2023
Dawn	Kelly	3304201/2023
Ewa	Kowalska	3305455/2023
Guiseppe	Marsala	3305541/2023
Georgi	Prangadzhiyski	3305466/2023
Heidi	Redhead	3305478/2023
Ilona	Bondar	3305483/2023
Iwona	Salamon	3305474/2023
Izabela	Husar	3305428/2023
Izabela	Kanclerz	3305460/2023
Janusz	Wilczynski	3305468/2023
Janusz	Nastulak	3305482/2023
Joanna	Cwikla	3305453/2023 & 3305479/2023
Katarzyna	Naturalna	3305472/2023
Katarzyna	Treler	3305473/2023
Lilia	Vlas	3305457/2023
Lucia	Bulimar	3305489/2023
Lukasz	Pysiewicz	3302577/2023 & 3305459/2023
Magdalena	Pysiewicz	3305492/2023
Mark	Doran	3305538/2023
Marta	Swiecka	3305475/2023
Michael	Koszara	3305546/2023
Mihaela	Comanescu	3305480/2023
Mihaela Gabriela	Stoia	3305463/2023
Milena	Galway	3304203/2023
Moldovan Gheorge	Florin	3305464/2023
Monica	Galeru	3305462/2023
Monika	Michalska	3305491/2023
Nikolay	Aydarov	3305477/2023
Pawel	Koszara	3305545/2023
Paweł	Kowalski	3305454/2023
Silvia	Bitca	3305456/2023
Slawomir	Wieczorek	3305470/2023
Stoyan	kirilov	3305487/2023

Tomasz	Kempkiewicz	3305469/2023
Traian	Udrea	3305486/2023
Willy	Comanescu	3305481/2023
Yogesh	Natuarlal	3305476/2023

REASONS

Background

1. At the hearing, I had before me a 223-page bundle prepared by Alan Lewis. The day before the hearing, a related set of claims brought by Unite in Manchester Employment Tribunal (claim no. 2404532/2023) were joined to these proceedings which I heard together.

2. Alan Lewis also helpfully produced written submissions for this hearing confirming that all the claims in this action are limited to claims for a protective award pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and more particularly sections 189(1)(a) (relating to a failure to arrange an election of employee representatives or to comply with the rules on elections) and 189(1)(c) (relating to the failure to inform and consult a recognised trade union).

3. Mr Lewis confirmed that the administrator had provided written confirmation (referred to to in the bundle) that it did not object to the resumption of these proceedings.

4. Neelam Verma a Trade Union officer for Unite attended the hearing as a witness. Csab Mile also attended as a witness for Unite.

5. One of the claimants who was present at the hearing, Kirsty Ward, purported in her ET1 claim form to have brought claims on behalf of all of the employees dismissed by the first redundant. Ms Ward confirmed she was not in the collective bargaining unit, and nor was she an elected employee representative (as is explained below no elections occurred). Further, Ms Ward had not added any additional claimants to her claim form in accordance with the claim form requirements for a multiple claim. I therefore found as a preliminary matter that whilst Ms Ward's claim on her own behalf was valid, she had not made a valid tribunal claim on behalf of any other employees because she was not an employee representative and so did not meet the requirement for bringing a claim on behalf of others under s189(1)(b) TULR(C)A, nor the ET multiple claim form requirements.

6. There are two groups of claimants. The first group is made up of individual claimants who are not covered by a trade union collective bargaining agreement with the first respondent. I refer to this group as the Schedule A claimants.

7. The second group is covered by a collective bargaining agreement with the first respondent and I refer to them as the Schedule B claimants.

8. It was not entirely clear to me whether all of the consolidated claims referred to in the Tribunal Order dated 19 September 2023 had been accounted for

in the list of Schedule A claimants and Schedule B claimants provided by Mr Lewis. Mr Lewis also explained there were some errors in the lists, with some duplication and some incorrectly added names.

9. Further, the bundle of documents did not contain ACAS certificates so it was not possible for me to verify that all of the claims had been brought in time although Mr Lewis assured me they had been.

10. I therefore agreed with the representatives and directed by email dated 5 March 2024, that Mr Lewis would work with Thompsons solicitors (who represent Unite) to do the following by Friday 8 March 2024:

    1. *Mr Lewis to cross-check the Schedule A list of claimants against the tribunal list of claim numbers to ensure that all Schedule A claimants have a valid employment tribunal claim number and to add the relevant tribunal claim number next to the relevant claimant's name on Schedule A and to provide a written explanation setting out why all of the claims are in time;*

    2. *Mr Lewis and Thompsons, solicitors for Unite in these proceedings, to work together to ensure that no claimants covered by collective bargaining appear on Schedule A, and that no claimants **not** covered by collective bargaining appear on Schedule B;*

    3. *Thompsons to identify those Schedule B claimants who brought individual claims and whose individual claims should be dismissed because they have been brought as collective claims by Unite; and Thompsons to identify the collective claims which should not be dismissed and are to be determined by Employment Judge Partington;*

    4. *Mr Lewis to provide a composite Schedule A and Schedule B list updated in accordance with the above, and to identify if there are any individual claims on the tribunal list that are not accounted for on either Schedule A or Schedule B.*

11. I warned the parties that if there were any unaccounted-for claims that I may need to reconvene a further hearing to resolve any issues arising therefrom.

12. On 8 March 2024, Mr Lewis provided the further information requested and confirmed that there were no individual claims on the tribunal list that had not been accounted for on the updated Schedule A and Schedule B lists.

The Issues

13. Has the first respondent failed to comply with a requirement of section 188 TULR(C)A 1992?

14. Should a protective award be made in respect of each Claimant and if so, under which sub-section of section 189(1) TULR(C)A 1992?

15. What is the period of any protective award, and when did such period begin?

16. Do the recoupment regulations apply?

The Law

17. A complaint that an employer has failed to comply with S.188 of the Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) should be brought under S.189 TULR(C)A.

18. If a tribunal finds that the employer has acted in breach of S.188, it must make a declaration to that effect and may make a 'protective award' - S.189(2).

19. Under these provisions, the persons entitled to bring a complaint seeking a declaration and a protective award are:

    a. in the case of a failure relating to the election of employee representatives, any of the affected employees or any of the employees who have been made redundant - S.189(1)(a). In these circumstances, it is for the employer to show that the S.188A requirements for election have been satisfied - S.189(1B)

    b. in the case of any other failure relating to employee representatives, any of the employee representatives to whom the failure related - S.189(1)(b)

    c. in the case of failure relating to representatives of a trade union, by the trade union - S.189(1)(c), and

    d. in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant - S.189(1)(d).

20. If there is disagreement as to whether an individual was an appropriate representative for the purposes of S.188, the employer has the burden of satisfying the tribunal that the individual had the authority to represent the affected employees - S.189(1A).

21. Thus, whether or not an individual has standing to bring a claim in respect of an employer's failure to observe the requirements of S.188 depends on the type of failure at issue.

22. Where a complaint under S.189 relates to the election of an employee representative, any 'affected employee' has standing under S.189(1)(a). However, where employee representatives are appropriately in place a complaint about a failure relating to them can only be brought by them.

23. Section 189(1) is also relevant to the extent of the tribunal's power to make a protective award for breach of S.188. Such an award may only be made in favour of those who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and in respect of whom a complaint under S.189 has been proved. Since a trade union can only bring a claim in respect of those employees it represents, the protective award which results only benefits those employees — *TGWU v Brauer Coley Ltd 2007 ICR 226, EAT*.

24. Similarly, if a protective award is made in favour of an individual claimant, it cannot be extended to other employees who, although affected by the employer's failure to consult, were not party to the proceedings brought by that claimant (*Independent Insurance Co Ltd v Aspinall and anor 2011 ICR 1234, EAT*)

25. If a tribunal finds that an employer has acted in breach of S.188 TULR(C)A, it must make a declaration to that effect and may make a 'protective award' — S.189(2).

26. A protective award is an award of pay to those employees who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and in respect of whom the employer has failed to comply with the requirements of S.188 — S.189(3).

27. The protective award will be calculated by reference to a 'protected period', which is of whatever length the tribunal decides is 'just and equitable', up to a maximum of 90 days — S.189(4) The rate of remuneration is one week's pay for each week of the protected period.

28. The award is for a 'protected period', beginning 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 continuing for however long the employment tribunal decides is 'just and equitable' — S.189(4).

29. The Act gives tribunals no guidance as to how to exercise their discretion over the length of the protected period, or whether to make an award at all, except to say that they should have regard to the 'seriousness of the employer's default'. However, there is a maximum limit on the protected period of 90 days.

30. In *Susie Radin Ltd v GMB and ors* the Court of Appeal gave guidance on how tribunals should exercise their discretion under S.189. It noted that S.188 imposes an absolute obligation on employers to consult meaningfully over proposed redundancies, and that S.189 is designed to ensure that such consultation takes place by providing a sanction against a failure to comply. Nothing in the TULR(C)A links the award to any loss suffered by employees. Thus, the focus should be on the employer's default and its seriousness.

31. The Court in *Susie Radin Ltd v GMB and ors* condensed the above principles into five factors that tribunals should have in mind when applying S.189:

    a. the purpose of the award is to provide a sanction, not compensation

    b. 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

    c. the default may vary in seriousness from the technical to a complete failure, both to provide the required information and to consult

d. the deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about its obligations under S.188, and

e. 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.

The Facts

32. All the claims in this action are limited to claims for a protective award pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and more particularly sections 189(1)(a) (relating to a failure to arrange an election of employee representatives or to comply with the rules on elections) and 189(1)(c) (relating to the failure to inform and consult a recognised trade union).

33. The Respondent did have a recognised trade union, namely Unite the Union. The collective bargaining agreement confirms those covered are full time and part time production staff, process staff, warehouse, maintenance and fitters.

34. Management, office staff, administration staff and agency staff are excluded from the collective bargaining agreement.

35. The relevant paragraph of the collective bargaining agreement is 3.1 at page 193 of the bundle.

36. The facts in this case are not in dispute. The administrators of the first respondent have not filed a response and have confirmed they do not object to the stay being lifted and will not be issuing a defence in this matter on behalf of the Company, nor will they be attending any hearing (page 173).

37. The second respondent, the Secretary of State for Business, has filed a response confirming she:

    a. does not resist the claim (page 163);

    b. was not present at the events prior to dismissals and is unaware of the circumstances surrounding consultation with employees (paragraph 3 page 169);

    c. cannot comment on the extent to which, when proposing to make 20 or more employees redundant, the claimants' employer failed to consult representatives of the affected employees (paragraph 6 page 169-170); and

    d. holds no information about whether a trade union was recognised by the employer or whether the employees had a genuine opportunity to elect representatives (paragraph 9 page 170).

38. From the contents of the witness statement of Katarzyna Booth (pages 215 - 216) it can be seen that all of the claimants in this action, were employed at (or reported to) the first respondent's premises at 79 Manton Road, Earlstrees Industrial Estate, Corby NN17 4JL and worked across several factories at this site.

39. The first respondent was a company that manufactured fruit and vegetable juice. It employed approximately 600 employees in total.

40. On the 18 January 2023, the first respondent fell into administration and the majority of Claimants were made redundant with immediate effect on that date without prior notice or consultation, and with other Claimants being notified later of their redundancies up until 21 January 2023.

41. The nature of the first respondent's business meant that employees were spread across 5 factories at the site in Corby. Factories were split between office workers & management staff, production and maintenance staff. Various staff in production and maintenance were also allocated 'team leader' roles and would manage other employees within their teams. All employees across office, management, production and maintenance were made redundant following the first respondent entering into administration.

42. On the 18 January 2023, the majority of employees received an email (pages 218 – 219) inviting them to attend a live-stream conference call that same day. Approximately 300 employees joined this conference call, along with the administrators Grant Thornton UK LLP and some of the directors of the first respondent. It was announced that the first respondent was entering into administration and that all employees were to be made redundant with immediate effect on that date.

43. Most of the claimants received an email (pages 217 – 218) providing a website link to the Government's redundancy support service, and this email further confirmed that a letter regarding the administration would be sent by post to all employees in the next few days.

44. The claimants were therefore dismissed without notice and without any prior warning or consultation.

45. The first respondent failed to consult with Unite the Union before making the redundancies. This is confirmed by Neelam Verma, regional officer of Unite in her witness statement (pages 205-206).

46. As for those claimants who were not covered by the recognition/collective bargaining agreement, Katarzyna Booth confirms in her witness statement that there was no body of representatives appointed or elected by the any of the employees to be consulted in respect of collective redundancies (page 216). This is also confirmed by Csaba Mile in her witness statement (page 214).

Application of the law to the facts

47. The claimants were employed at the same establishment at 79 Manton Road, Earlstrees Industrial Estate, Corby NN17 4JL, and were made redundant on or after 18 January 2023.

48. There were more than 20 employees at the establishment.

49. The claimants have presented their claims for a protective award within the statutory time limit.

50. The claimants must be divided into two groups for the purpose of bringing a claim under s189 TULRCA.

51. The first group of claimants are those employees of the first respondent who were not covered by a collective bargaining agreement. No employee representatives were elected in respect of this group in breach of s188 TULRCA. They must therefore bring their claims for a protective award on an individual basis in accordance with s189(1)(a) TULRCA, which they have done. I refer to this group as the Schedule A claimants.

52. The second group of claimants are those employees who were covered by a collective bargaining agreement between Unite the Union and the first respondent, and who must bring their claims for a protective award through their union in accordance with s189(1)(c) TULRCA. I find that Unite the Union did bring a valid claim on their behalf under claim reference 2404532/2023. To the extent that individuals within this group also brought tribunal claims on an individual basis, those individual claims are not validly brought under s189(1)(c) TULRCA.

53. 20 or more employees at the establishment were made redundant or placed a risk of redundancy, on or within 90 days of 18 January 2023.

54. The claimants were dismissed during this period without any consultation having taken place in breach of s188 TULRCA.

55. The first respondent has not filed a response. The second respondent has filed a response to assist the tribunal only and has no direct knowledge of events.

56. There is no reason to depart from the principle that protective awards are punitive and should be for the maximum period unless there are circumstance making it just not to do so.

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Employment Judge **Partington**

Date: 8 March 2024

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....3 April 2024.....

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FOR EMPLOYMENT TRIBUNALS

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