JL3?

Case No. 2406885/09

EMPLOYMENT TRIBUNALS

Claimant: The University and College Union

Respondent: Lancaster University

Heard at: Manchester **On:** 8 and 9 March 2010
10 March 2010
(In Chambers)

Before: Employment Judge Brain
Mr A Nicholls
Mr G Sleight

Representation:
Claimant: Mr G Prior (Counsel)
Respondent: Mr J Bowers (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. The Claimant's complaint under Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 of a failure by the Respondent to comply with the requirements of Section 188 of the 1992 Act is well founded. The Tribunal orders the Respondent by way of protective award under Section 189(3) of the 1992 Act to pay to all academic and academic related staff employed by the Respondent and who were dismissed for redundancy (as defined by the 1992 Act) between 31 March 2009 and 30 June 2009 remuneration for the period of 60 days beginning on 31 March 2009. The Recoupment Regulations apply.

REASONS

1. The Tribunal received evidence over two days on 8 and 9 March 2010. Judgement was reserved. The Tribunal deliberated in Chambers on 10 March 2010. The unanimous judgment of the Tribunal is that the Claimant's claims are well founded and that the Respondent shall pay a protective award to all academic and academic related staff dismissed by the Respondent by reason of redundancy between 31 March 2009 and 30 June 2009 for the period of 60 days beginning on 31 March 2009. The Tribunal now sets out its reasons for its judgment.

2. The Claimant called evidence from Marie Monaghan who is employed by the Claimant as a Regional Support Officer, a position that she has held since 1 September 2008. The Respondent called evidence from: Valerie Walshe, the former Director of Human Resources at the Respondent, a position that she held between 1993 and September 2009; David Owen, Head of Human Resources Business Support at the Respondent, a position that he has held for the past two years; and Fiona Aiken, who is employed by the Respondent as University Secretary. Helpful written submissions (supplemented by oral argument) were received from both Counsel and for which the Tribunal is grateful.

3. The Claimant presented its claim on 29 June 2009. The Claimant's claim is that the Respondent breached its statutory duty contained in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA), to inform and consult the workforce about proposed redundancies.

4. Section 188 of TULRA provides as follows:-

> *(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 sub section (1), at least 90 days, and*
>
> *(b) otherwise, at least 30 days*
>
> *before the first of the dismissals takes effect.*

5. Section 188 (1B) provides who are the appropriate representatives of any affected employees. If the employees are of a description in respect of which an independent trade union is recognised by their employer, those representatives are representatives of the trade union. In any other case, the appropriate representatives are employee representatives as specified in sub-paragraph (b) of Section 188 (1B). There is no dispute that in this case the Claimant trade union was

recognised by the Respondent and is, accordingly, the appropriate representative of the affected employees.

6. Continuing with the legislative scheme, by Section 188 (2):-

The consultation shall include consultation about ways of –

(i) avoiding the dismissals

(ii) reducing the numbers of employees to be dismissed, and

(iii) mitigating the consequences of the dismissals

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

7. Section 188(4) provides:

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 of which the dismissals are to take effect, and

(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.

8. Section 188 (7) provides a defence of reasonable practicability for an employer. It provides:-

"If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of sub section (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

9. Section 189 provides that where an employer has failed to comply with the requirement of Section 188, a complaint may be presented to an Employment

Tribunal on that ground and, if relevant to this case, by sub-section (1) (c), the complaint shall be presented by the trade union where the failure relates to representatives of a trade union. Section 189 (2) goes on to provide that if the complaint is well founded a tribunal shall make a declaration to that effect and may make a protective award. Accordingly, it is mandatory to make a declaration should the complaint of failure to comply with Section 188 be well founded as against an employer and the Tribunal has a discretion to make a protective award.

10. Section 189 (3) provides:-

> 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 the requirement of Section 188,*
>
> *ordering the employer to pay remuneration for the protected period.*

11. Section 189 (4) provides that 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 the requirement of Section 188;*
>
> *but shall not exceed 90 days.*

12. By Section 190, the employer is obliged to pay remuneration for the protected period to every employee of a description to which the protective award relates. The definition of redundancies for the purposes of the relevant Chapter of TULRA is set out in Section 195 which provides:-

> *(1) In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related.*
>
> *(2) For the purposes of any proceedings under this Chapter, where an employee is or is proposed to be dismissed it shall be presumed unless the contrary is proved, that he is or is proposed to be dismissed as redundant.*

13. Harvey on Industrial Relations and Employment Law has this to say about the definition of redundancy set out in Section 195 of the TULRA (at paragraph 2524 of Division E):-

> *"Redundancy for this purpose is very widely defined. A redundancy dismissal is a dismissal for any reason not related to the individual employee concerned ... there can thus be a duty to consult about dismissals arising from all sorts of management initiatives to improve organisational efficiency, whether or not the programme involves redundancy in the narrower sense of the redundancy payment scheme. ... The central question is whether the individual has simply been sacrificed to the needs of the organisation."*

14. "Dismissal" is defined in Section 298 of TULRA. It is to be construed in accordance with Part X of the Employment Rights Act 1996 (in particular Section 95). Dismissal therefore extends to not only actual dismissal by the employer (with or without notice) but also expiry of a limited term contract and constructive dismissal. Of relevance in this case is Section 95 (1) (b) of the Employment Rights Act 1996 which provides that an employee is dismissed by his employer if –

> *"He is employed under a limited term contract and the contract terminates by virtue of the limiting event without being renewed under the same contract."*

15. Accordingly, in relation to a fixed term (or limited term) contract, simple expiry or determination does not constitute the dismissal. The dismissal occurs if the contract ends without being renewed on the same terms and conditions. Since the employer's obligation is to consult about his proposal to dismiss, it follows that for those employees engaged upon fixed term or limited term contracts, the employer must consult before making any final decision not to renew the contract.

16. On a complaint to the Tribunal, it is, on general principle, for the complainant to establish his case that the employer failed to comply with the relevant statutory duty. The burden of proof is shifted in certain circumstances. We have made reference to Section 195 (2) already. The burden of proof is also shifted in relation to an employer who seeks to run a special circumstances defence. It is for the employer to prove the existence of those special circumstances and also to prove that he did what he reasonably could in the circumstances towards fulfilling his duty to consult (Section 189 (6)).

17. Relevant case law establishes important propositions as to the approach with tribunals should take when dealing with a claim for a protective award. We shall refer to relevant case law later in these reasons. The statutory scheme provides that it is for the employer to initiate the process of consultation. He must as part of the process provide certain information to the appropriate representatives (Section 188 (4)) of TULRA and he must begin the process of consultation in good time (Section 188 (1A)). TULRA specifies a minimum time scale and minimum agenda (Sections 188 (1A) and 188 (2)). As Harvey puts it in paragraph 2694 of Division E:-

> *"The whole object of the exercise is that, faced with the apparent need for collective redundancies, the employer should, in consultation with the union or other employee representatives, seek to achieve an agreed solution to the problem".*

18. We now turn to our findings of fact. The Claimant has a Recognition Agreement with the Respondent. This is at pages 74-79 of the bundle. The

Claimant has sole bargaining rights on terms and conditions of employment for academic and academic related staff.

19. Ms Monaghan gave evidence that the Respondent has a redundancy procedure which applies to academic and academic related staff. This is known as Statute 20 and is the Respondent's version of the model Statute imposed on chartered universities following the Education Reform Act 1988. The redundancy procedure is set out in Part II of Statute 20 and our attention was drawn to pages 40 and 41 and 46-48 of the bundle. The procedure provides that the governing body of the University (known as 'the Council') should appoint a Redundancy Committee to select and recommend the academic/academic related staff to be made redundant should it determine there to be a redundancy situation. The Redundancy Committee is made up of two lay members of Council not employed by the Respondent, two members of academic staff and a Chairperson. If the Redundancy Committee's recommendations are approved by the Council, it authorises an officer of the Respondent to dismiss the member of staff selected by giving the appropriate notice. Ms Monaghan said that Statute 20 applied to academic and academic related fixed term contract staff.

20. In practice, the Respondent rarely made academic/academic related staff employed on a permanent contract redundant. It was common for those employed on a fixed term contract to be dismissed but the Respondent rarely if ever applied the redundancy procedure under Statute 20 in practice to the fixed term staff.

21. Mrs Walshe told us that many academic and academic related staff are employed upon fixed term contracts because the length of their engagement depends upon the duration of funding. Funding of such staff is typically sourced and provided by a number of external funding bodies. She gave evidence that there was an expectation on the parts of those individuals that their employment was for a limited term unless future funding or an alternative role at the Respondent could be found when the funding stream was exhausted. Further, decisions regarding the timing and duration of funding would often be entirely outside the control or influence of the Respondent. Indeed, an employee of the Respondent known as a Principal Investigator, (usually a staff member on a broad academic contract), would, amongst other things, seek funding for research roles.

22. In paragraph 8 of her witness statement, Mrs Walshe says this:-

> *"This [the funding arrangements] inevitably meant, despite the University's commitment to avoiding dismissals wherever possible and the support available to develop the careers of this group of staff, that there was a degree of uncertainty regarding the continued employment of the staff beyond the expiry of their existing contract. This was because decisions around funding and grants were generally made by external third parties and not by the University and it is this rather unique element that makes this different to a more traditional redundancy situation, together with the element of influence that individuals can have over their own positions. ... In my experience, these issues were clearly understood by staff and regarded as an integral and unavoidable/accepted element of the type of externally funded, project based work that they were performing. This was reflected in the fact that there were,*

to my knowledge, only a handful of staff engaged under this model who appealed the termination of their contracts during the 18 year period that I worked at the University, but despite the fact that, in any given year, there were significant numbers of staff employed by the University in this way".

23. She goes on in paragraph 9 to say this:-

"I also believe that the predictable and routine expiry of these finite, externally funded contracts, was very different in character to the proposed redundancy dismissals of staff resulting from, for example, the closure or restructuring of a department. In the latter, the potential redundancy would typically be a discrete event resulting from a decision to reduce or change activity or change of organisational structures in an area of the University. There would be an appreciation on the part of both the University and staff representatives that consultation in these circumstances had a very important role to play in influencing the outcome of the process and its potential impact on affected staff. To illustrate, in 2008 and 2009, the University did in fact engage in detailed consultation with the unions on a number of organisational changes, including large scale changes, in the non-faculty department and in a large science department and in relation to a TUPE transfer. This contrasts to the approach of affected staff and their representatives in cases involving the expiry of limited term engagements (across a large number of departments) of the type covered by this claim."

24. The details of complaint presented to the Tribunal by the Claimant's solicitors on 29 June 2009 says this:-

"2. On 3 November 2008 the Respondent sent an email to the Claimant informing them that they would provide notice of academic and academic related employees to be made redundant by way of a monthly list.

3. The Respondent subsequently sent notice by way of monthly list of all those academic and academic related fixed term employees at its establishment to be made redundant from 31 March 2009 until 30 June 2009.

4. Monthly notices were sent from 30 January 2009."

25. The complaint, therefore, is that there was a duty to consult under the provisions of TULRA set out above and that the Respondent failed to consult and proceeded to dismiss 89 employees whose details were set out in the monthly notices referred to.

26. Ms Monaghan largely agreed with the description of the Respondent's engagement of academic research staff set out in paragraphs 2-9 of Mrs Walshe's witness statement to which we have referred to above. Mrs Walshe gave evidence that in 2007, the Respondent embarked upon a major review of its key employment procedures. In January 2008, a joint working group was formed, being a subgroup of the joint consultative committee for the purposes of seeking collective agreement on six key employment procedures. The six procedures were to deal with fixed term

contracts, redundancy, redeployment, grievance, disciplinary and capability issues. Ms Monaghan gave evidence that one of the reasons for implementing changes to Statute 20 (dealing with redundancy issues) was following a decision of the Employment Tribunal in Scotland in the case of Ball v University of Aberdeen. Ms Monaghan said that:-

> *"the effect [of the decision] was to require employers to follow the same redundancy procedure as applied to permanent staff, to fixed term contract staff."*

27. The Respondent's intention therefore was that the proposed new procedures would replace the Statute 20 procedures and would apply to all staff (not only academic and academic related staff). Ms Monaghan also wished to negotiate an agreement on collective consultation as Statute 20 did not set out a procedure dealing with collective redundancies.

28. Ms Walshe gave evidence that the draft disciplinary, capability and grievance procedures were sent to the Claimant (and the other two recognised unions for other staff) in May 2007. Drafts of the redundancy, redeployment and management of fixed term contract procedures were sent in August 2007. The latter three appear in the bundle at pages 148-168. Within the same section of the bundle (between pages 169 and 239) are further draft policy procedures.

29. Mrs Walshe said that some 16 joint working group meetings to discuss the policies and procedures took place between January 2008 and May 2009. The Claimant attended 12 of those meetings.

30. Mrs Walshe described the procedure adopted by the Respondent for notification and consultation for academic and academic related staff whose fixed term contracts expired or were about to expire. The procedure which she describes in paragraphs 10-16 of her witness statement was followed for a period of around 13 years between 1996 and June 2009. Details of the procedure were set out in the fixed term contract tool kit a copy of which is at pages 92-113. The copy that we have in the bundle was in fact in place from 2006 as sections of it were developed to ensure compliance with the statutory dismissal procedure in the Employment Act 2002. However, she told us that a very similar process for advance notification had been in place from 1996.

31. Four months before the end of the proposed expiry date of the contract, the Human Resources Department would write to the Head of Department where the affected employee worked to ask if the individual's contract was to be extended or whether it was at risk of termination. The Respondent would also write to the employee to remind the employee that the contract may be at risk if funding was not renewed and offering a meeting with his or her line manager to discuss this situation. The employee was invited to be accompanied to that meeting by a colleague or trade union representative. The purpose of the consultation meeting was to cover the reasons for the proposal, the possibilities of redeployment, extension to the contract, securing further funding and alternative projects, redeployment and career development. A second consultation meeting would be held before the expiration of the fixed term contract as, presuming that it had not been possible to redeploy or extend the contract, confirmation would then be sent by the Human Resources

Department to confirm termination upon expiry. Practical examples of the operation of this procedure were in the bundle at pages 488-600A.

32. As well as individual consultation, the Respondent would also provide the Claimant with lists of staff whose contracts were due to expire in the following four month period. Some examples of the type of notification given are in the bundle between pages 456 and 487. The notification consists of a list of names of all staff whose fixed term contracts were due to end in the relevant period along with that member of staff's job title and department. The list also contained particulars of the date upon which the contracts commenced, the end date of the appointment and the date of the last extension (if any).

33. Originally, the lists were sent to the unions in hard copy form but a practice developed of sending the lists by email.

34. Of relevance to the redundancies which we are concerned are the lists at pages 477-484 inclusive. The covering email in each case (at page 475, 477 and 479) says this:-

> *"I attach advance notification of staff employed on fixed term contracts which are due to expire during the next four months. The list will be provided to the representative of the recognised trade unions for consultation purposes (TURER) on a monthly basis. Information on individual staff will continue to be provided".*

35. Mrs Walshe says this about the notification lists (at paragraph 14.3 of her witness statement):-

> *"The intention was to provide the unions with sufficient information regarding the University's proposals to allow them to raise any concerns or issues or make representations in relation to the proposals. Throughout the period during which these lists were being issued to unions, I cannot recall UCU ever raising any concerns or making any representations in response to these notifications despite the fact that we would meet with them on a regular basis throughout the relevant periods. Had they done so, we would have addressed these concerns."*

36. Ms Monaghan took up her position as Regional Support Officer for the Claimant on 1 September 2008. Her own perception of matters is set out in paragraph 30 of her witness statement (following a JCC meeting of 7 October 2008):-

> *"It seemed to me that this [a draft matrix] did not meet the legal obligation to enter meaningful negotiations particularly in relation to 20+ redundancies and in relation to changes to terms and conditions. Nor did the matrix set out what information would be provided and when."*

37. In evidence before us, she said that her perception was that the Respondent simply wanted to inform the Claimant of its decisions. She said that the Respondent did not fully understand its obligation of collective consultation.

38. On 19 November 2008, the joint campus trade union response to the draft revised redundancy and fixed term contract policies was issued. This is at pages 295-302. Ms Monaghan had no hand in the drafting of this document. With reference to the draft redundancy policy of 16 October 2008 (pages 176-184), the joint campus unions note the recognition by the Respondent of the need for collective consultation in order to comply with Section 188 of TULRA. The unions called for "a culture of engagements in which unions are seen as constructive partners who have a role to play in the sustaining of positive relations among employees and managers". On 20 November 2008, at a JCC working group meeting, the Claimant acknowledged that the monthly lists about fixed term contracts expiry dates were useful (page 305).

39. At the JCC held on 16 December 2008 (at which Ms Monaghan was present) the question of relationships between the recognised trade unions and the Respondent was a specific item on the agenda. The same day, there was a consultation meeting on proposed changes to Statute 20. There was an acknowledgement of the hard work and commitment from both sides which had contributed to the negotiations. Ms Monaghan had no involvement in these matters prior to 16 December 2008. She was however aware of previous discussions about redundancy procedure and Statute 20. She was also aware of the six new proposed procedures advanced by Mrs Walshe but about which agreement could not be reached.

40. On 2 February 2009, Ms Monaghan asked her local branch for information as to how many fixed term contract staff had been made redundant in the last 12 months. She was concerned that from her experience of other universities (at Manchester and Hull) the number of fixed term contract staff who were made redundant exceeded 20 and so triggered obligations under TULRA.

41. The next Statute 20 meeting was held on 10 February 2009. Minutes are at pages 378-380. By this time, the Respondent's position was that as no agreement had been reached, the Section 20 Redundancy Committee would be activated. At this meeting Ms Monaghan raised the Respondent's obligations to consult under TULRA. The meeting records that Ms Aiken presented a revised version of Statute 20 and the recognition by the Respondent of its obligations to comply with employment legislation and to follow the procedures set out in the statutes. Mrs Walshe acknowledged, under cross-examination, that Ms Monaghan had raised the issue of the statutory obligation under TULRA at the meeting of 10 February 2009. Ms Monaghan gave evidence that at that meeting, Mrs Walshe asked why she was threatening her. In cross-examination, Mrs Walshe said that Ms Monaghan's tone was threatening and that certain of her comments were hostile. Ms Aiken described Ms Monaghan as a "very committed Trade Union Officer" but said that she "can be difficult". She can "push aggressively" and this can lead to tension in meetings. Mrs Walsh said that at the meeting of 10 February 2009 Ms Monaghan was questionning the legitimacy of the Redundancy Committee established under Statute 20 and acknowledged that Ms Monaghan reminded the Respondent of its obligations under TULRA.

42. Mrs Walshe gave evidence that she considered that the Claimant was pursuing a "growing agenda around redundancies". She described the relationship

between the parties as "amicable and constructive" until around late 2007 from when she perceived there to be a deterioration in the relationship.

43. Having seen Ms Monaghan's demeanour in the witness box, the Tribunal accepts the evidence of Ms Aiken that Ms Monaghan is a committed full time union official who forcefully makes her point. We do not accept that Ms Monaghan threatened Mrs Walshe. We find that Ms Monaghan was (albeit forcefully) pointing out to the Respondent its failure to comply with the collective consultation obligations in TULRA.

44. On 18 March 2009, Ms Monaghan wrote to Mrs Walshe (page 359). She said that she was the appropriate representative for receipt of the Section 188(4) TULRA notice and reminded Mrs Walshe of the collective consultation obligations under TULRA. This letter was written after Ms Monaghan had received the lists which we have referred to above and which had been sent to the local branch in November, December, January and February. Both lists were received by Ms Monaghan on 16 February 2009. She considered that the Respondent was "clearly failing to recognise their duty to consult with us over the proposed dismissal of more than 20 fixed term employees in March, April and May."

45. Ms Aiken proposed a meeting on 3 April 2009. Ms Monaghan agreed to meet with her. The ongoing statute 20 issue was the item on the agenda.

46. In addition to the ongoing Statute 20 issues, Ms Monaghan requested an additional item be placed on the agenda for the meeting on 3 April 2009 to deal with the question of collective consultation. She enclosed a copy of her letter to Mrs Walshe of 18 March 2009 to which she had not received a response. Ms Aiken agreed to add the issue of collective consultation to the agenda (page 392).

47. In fact, the Claimant withdrew from the discussions of the Statute 20 issues at the meeting of 2 April 2009. The reason for this was that the Respondent only received the revised proposed Statute 20 on 1 April 2009 thus giving the Claimant insufficient time to consider the revised proposals which had been submitted to the Claimant by the Respondent pursuant to the procedure agreed at the meeting of 10 February 2009.

48. Minutes of the meeting of 2 April 2009 are at page 393. It is recorded that the Respondent and the Claimant had for more than a year been seeking to negotiate a suite of key policies and procedures that included redundancy and the Claimant had yet to respond to the latest set of proposals. The Respondent also recorded that it was introducing "new systems to manage redundancy for staff covered by Statute 20" and that a Redundancy Committee had been established by the Council of the Respondent. The Respondent was looking to "improve systems for managing potential redundancies" a part of which "included improved mechanisms and the information for consulting with the trade unions. In the interim the University would continue to provide monthly listings of the fixed term contract expiries".

49. Ms Monaghan gave evidence that the minutes at page 393 are not a full record of matters discussed at the meeting on 2 April 2009. Ms Monaghan said that she raised the issue of how and when the Respondent proposed to consult on the lists of fixed term contract staff to be made redundant at the end of April, May and

June (it now being too late for those dismissed at the end of March). Mrs Walshe, according to Ms Monaghan, said that the Respondent was individually consulting with fixed term employees who were being made redundant.

50. The Tribunal accepts Ms Monaghan's evidence upon this issue. It would be surprising if she did not raise at the 3 April 2009 meeting the issue of collective consultation by way of particular reference to those employees due to be dismissed at the end of April, May and June 2009 in circumstances where she had raised this specific issue in a letter of 18 March 2009 and called upon the Respondent to discuss those matters at the meeting.

51. The minutes of the meeting of 2 April 2009 evidence that the Respondent was carrying on with a practice that had routinely been undertaken from 1996: of sending the list to the Claimant and then individually consulting the employee. Mrs Walshe readily accepted, in cross-examination, the need for collective consultation. She took the view that the notification by way of the monthly list was the first step in the consultation process and that that then allowed the Claimant to revert to the Respondent with any points which it wished to raise. As Ms Aiken put it, the sending of the list "puts the ball in the union's court".

52. Mrs Walshe also accepted in cross-examination that there was no collective consultation with the Claimant about the fixed term employees whose contracts were due to expire between 31 March and 30 June 2009 and about whom a decision had been taken by the Respondent not to renew or reengage their contract.

53. As Mr Prior puts it in paragraph 30 of his submissions, the evidence from the Respondent was that those meetings were in the nature of "consultation about consultation". When it was put to her in cross-examination that none of the meetings over the relevant period were in the nature of collective consultation regarding these dismissals, Mr Walshe said "No, but the trade union had the opportunity to raise issues with us". She went on to say, "There is a duty on the trade union to participate and they seemed content with the procedure".

54. Mrs Walshe acknowledged that the revised fixed term contracts tool kit dated July 2009 (pages 128-147) recognises the legal requirement under TULRA to consult collectively with the trade unions upon potential redundancies. This feature is missing from the version of a fixed term contracts tool kit to which reference has already been made at pages 92-113. Mrs Walshe acknowledged in cross-examination that recognition of the need for collective consultation about the expiry and non renewal of fixed term contracts could have been incorporated in the pre-July 2009 version of a fixed term contracts tool kit "if there was an impetus for it". She acknowledged however that there was a legal requirement upon the Respondent to collectively consult.

55. We have already referred to the evidence of Mrs Walsh that she did not consider that the collective consultation obligations under TULRA were designed with the Respondent's circumstances in mind. She also raised as an additional argument that the Respondent was not a "single establishment" for collective consultation purposes. Indeed, the Respondent's solicitors pleaded this point in its grounds of resistance. This was not a point pursued by Mr Bowers before us.

56. The 2 April 2009 meeting concluded with Mrs Walshe agreeing that there was a need for a forum to consult on the fixed term contract terminations due to take place at the end of April, May and June 2009.

57. The next meeting took place on 21 April 2009 in order to discuss, again, the issue of Statute 20. Ms Monaghan says that she asked Mrs Walshe about the dates that she had promised to send through to consult on the fixed term employee redundancies then shortly to take place. Mrs Walshe denies that she was approached by Mrs Monaghan about this issue. However, we accept Ms Monaghan's evidence. It is recorded in the Respondent's own minutes of the meeting of 2 April 2009 that the issue of collective consultation was to be raised at the meeting of 21 April.

58. The issue of collective consultation was again raised on 15 May 2009 (page 397). On 3 June 2009, the Claimant's regional official wrote to the Vice-Chancellor of the Respondent to remind him of the collective consultation obligations under TULRA. It was proposed that once the Section 188 (4) notification had been served, local branch officials may undertake all or some of the consultations.

59. On 11 June 2009, a letter was sent by the Claimant's solicitors to the Respondent. Surprisingly, this letter did not feature in the bundle. However, it appears to be agreed by the Respondent that it was as a consequence of that letter that information in its letter of 18 June 2009, in relation to employees at risk of dismissal between 1 June 2009 and 31 July 2009 was sent in the format seen at page 401. In contrast to earlier notifications, as well as the numbers and descriptions of employees proposed to dismiss as redundant, the Respondent included additional information. This extended to the total number of employees in each description employed by the Respondent, the proposed method of carrying out the dismissals and the calculation of redundancy payments. The letter of 18 June 2009 was supplemented by further information sent by email on 26 June 2009 (page 408) where particulars as to the proposed method of selection and the carrying out of the dismissals was set out.

60. On 25 June 2009, a meeting was held the purpose of which was said to be "to start the process of collective consultation on potential redundancies". Mrs Walshe is recorded as saying that the legislation that applied (TULRA) "was not designed for the circumstances of a rolling set of potential redundancies". Mrs Walshe accepted that even at this stage, the parties were "still talking generalities" and that there were no proposals from the Respondent with a view to consulting about avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals. She accepts that the meetings which took place between October 2008 and 25 June 2009 were generic in nature. Those meetings were in the nature of consultation about procedures and policies to be utilised in the future.

61. There was a further redundancy collective consultation forum on 14 July 2009. Obviously, the dates of this forum were after the last of the notifications with which we are concerned. Although we need not express nor conclude a view upon the issue, it does appear to be the case that this was the first occasion upon which

consultation took place about specific redundancies which were due to take place on the dates mentioned in paragraph 3.1 at page 430.

62. Ms Monaghan corresponded with the Respondent following the notification of 18 and 26 June 2009. She did not consider that the information provided was adequate as it did not properly set out the proposed method of selection. There was no mention of selection criteria. She therefore sent a further email on 1 July 2009 (pages 409-412). The Respondent maintained that its response was adequate (page 417) and the matter would be discussed at the collective consultation meeting which was held on 14 July 2009. Ms Monaghan again expressed her concerns in a letter of 9 July 2009 (pages 421-422). Ms Monaghan says that the collective consultation meeting of 14 July 2009 was "the first opportunity to discuss the actual lists of fixed term employees the University proposed to be made redundant in June but by now it was too late".

63. Part of the Respondent's case was that the Claimant in general and Ms Monaghan in particular did, in any event, know full well the answers to the issues which she raised with Mrs Walshe in the meetings of 10 February, 2 April and 21 April 2009 and in her correspondence of 18 and 25 March 2009 (and in Thompson's letter of 11 June 2009). This Ms Monaghan denied. She said that it was inappropriate for the Respondent to simply assume pool sizes of one in each individual case and that effective consultation entailed a discussion about issues such as funding and redeployment. She contended that some of the funding was, in fact, internal and that it was possible for the Respondent to extend funding to preserve jobs.

64. Having set out, in some detail, our findings of fact, we now turn to an application of the law to those factual findings. The duty to consult and to provide notification arises in circumstances where the employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The Respondent no longer seeks to argue that it is not one establishment. The first issue for us to decide therefore is whether the collective consultation and notification provisions were engaged at all. They would be where the Respondent was proposing to dismiss as redundant 20 or more employees within a period of 90 days or less.

65. All of the employees affected were fixed term employees. The dismissal of those employees arises not upon expiry of the fixed term but rather upon the decision being taken not to renew or reengage the employee on the same terms and conditions.

66. Mr Prior raises, as an issue, the question of when the Respondent proposed the dismissal of the employees. A proposal is more than a contemplation (R v British Coal Corporation ex parte Vardy [1993] IRLR 104 at paragraph 124). Mr Prior says that the lists sent out on 3 November, 2 December 2008, 6 January and 3 February 2009 were simply lists setting out the date of the expiry of each fixed term contract and not a proposal not to renew and/or reengage.

67. Mr Bowers did not advance, as an argument, that the collective consultation obligations did not arise at all because there was no proposal to dismiss 20 or more employees within a period of 90 days or less. Given the context in which the parties

were working, the Tribunal concludes that the lists effectively were the proposals. The Tribunal attaches particular significant to the fact that the funding of the posts in question was dependent almost entirely upon third parties and it was that funding which dictated the length of each fixed term contract. As Gladwell LJ said in Vardy, Section 188 applies when the employer has decided that it is his intention, however reluctant, to make the employees redundant. The Tribunal considers that the lists were effectively intimations of an intention to make those employees redundant and the state of the Respondent's mind was much further along the decision making process than a mere contemplation or possibility. The lists served on 3 November 2008 and 2 February 2009 in and of themselves propose the dismissal of 20 or more employees within a period of 90 days or less. The lists of 2 December 2008 and 6 January 2009 in fact name 17 and 16 individuals respectively. Plainly, however, the obligation arises in relation to those two batches given the proposal to dismiss as redundant 20 or more at its establishment within a period of 90 days.

68. Having established that a duty arises, the next question is whether the Respondent complied with the duty upon it under Section 188 (1) and if so, whether it began the process of consultation in good time and that that consultation included the matters as specified in Section 188 (2).

69. The obligation of consultation is a separate and distinct obligation to the requirement to supply information in accordance with Section 188 (4). As was said in Leicestershire County Council v Unison (2005) IRLR 920 at paragraph 41:-

> *"It [Section 188 (4) notification obligation] is a separate provision from the duty to consult, although it arises with a view to achieving meaningful consultation. In other words, without information, consultation will not be effective."*

70. We agree with Mr Priors' submission that the Respondent has not met and has not tried to meet his duty to consult collectively about the dismissals of the affected employees and, in particular, has not embarked upon or attempted consultation about any of the issues referred to in Section 188 (2) with a view to reaching agreement with the Claimant.

71. Mrs Walshe accepted that there was no collective consultation with the Claimant about the redundancies of any of the affected employees. The meetings over the relevant period were, rather, to discuss the procedure to be adopted in any future collective consultation exercise.

72. The Respondent's approach was to serve notice by way of list and then effectively leave it to the Claimant to raise issues. That is an impermissible approach. The duty is upon the Respondent to consult. Mrs Walshe's view of matters appears to be coloured by her view that the provisions of TULRA were not designed to meet the Respondent's circumstances and further a belief that the Respondent was not in fact one establishment (a point that the Respondent later dropped).

73. Not only was there non-compliance with the duties under Section 188 (1), (1A) and (2), there was also, in our judgment, a failure to comply with Section 188 (4). The Tribunal accepts that the Respondent did, in the lists dated 3 November 2008, 2 December 2008, 6 January 2009 and 2 February 2009 comply with Section

188 (4) (a). The reason for the proposals was, clearly, the expiry of the fixed term and, given the course of conduct which the parties had adopted, the proposal not to renew or reengage the employee. We also conclude that the Respondent did comply with Section 188 (4) (b) in that the numbers and descriptions of employees whom it was proposed to dismiss as redundant were provided. The lists set out the numbers, the names of each employee, the post each employee holds and the department in which the employee is engaged to work for the Respondent.

74. However, we conclude that the Respondent failed to comply with the remaining obligations set out in Section 188 (4). The four lists fail to show the total number of employees of any such description employed by the Respondent, the proposed method of selection, the proposed method of carrying out the dismissals and the proposed method of calculating the amount of any redundancy payments to be made. Indeed, there is implicit recognition of this by the Respondent in its response to Thompson's letter of 11 June 2009. On 18 June 2009, the total number of employees of each description are provided and (when read in conjunction with the email of 26 June 2009), the Respondent does provide the proposed method of selection, of carrying out the dismissals and of calculating the amount of any redundancy payments to be made. That notification was, of course, too late for those employees dismissed prior to 18 June 2009. The notifications of 18 and 26 June 2009 may be contrasted with the earlier notification by way of the lists to which we have already referred in conjunction with the individual notification given examples of which are at pages 328 and 329. We agree with Mr Prior that it is far from clear as to how the method of selection may be by "reference to the contracts of service" and that the method of implementation is simply "by way of non-renewal of the fixed term appointment" (see paragraphs 41 and 42 of his submissions).

75. The Tribunal therefore concludes that the Respondent failed to comply with its obligations to consult and provide the requisite notification. We now turn to the question of reasonable practicability.

76. Mr Bowers submits that the Claimant was provided with relevant information as to the termination of fixed term contracts but did not ask to be consulted (paragraph 6 of his submissions). We agree with Mr Prior, however, that there were no special circumstances here which rendered it not reasonably practicable for the Respondent to comply with the requirements of Section 188 of TULRA. Indeed, the draft policies on redundancy of August 2007, October 2008, December 2008 and February 2009 recognised the need for collective consultation. The February 2009 draft policies on redundancy allowed for collective consultation. If those procedures contemplate collective consultation it is difficult to see why it can be said to have not been reasonably practicable to undertake it. Further, individual consultation did take place as evidenced by Mrs Walshe in her evidence at paragraphs 22 to 28. If individual consultation was practicable, it is difficult to see how collective consultation can be said not to have been reasonably practicable. The burden is upon the Respondent to show special circumstances which rendered it not reasonably practicable to comply with the requirement of Section 188. The judgment of the Tribunal is that the Respondent has failed to discharge the burden of proof upon it. The special circumstances defence is therefore rejected.

77. It is mandatory for the Tribunal to make a declaration of a failure to comply with the requirements of Section 188. The Tribunal does have a discretion also to make a protective award.

78. The nature of a protective award was considered by the Court of Appeal for the first time in GMB v Susie Radin Limited [2004] EWCA Civ 180. At paragraph 45, the Court of Appeal said this:-

> *(i) 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.*
>
> *(ii) The ET 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 employers default.*
>
> *(iii) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.*
>
> *(iv) The deliberateness of the failure may be relevant, as may be availability to the employer of legal advice about his obligations under Section 188 (5). How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no 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 ET considers appropriate.*

79. As is said in Harvey at paragraph 2739 of Division E:-

> *"A protective award is essentially a punitive award. Its purpose is to impose a sanction, and an effective sanction, for an employer's failure to observe his statutory duty to consult. Its effect is to entitle the employees concerned to minimum pay for a specified period called the "protected period".*

80. In Susie Radin, the Court of Appeal also rejected a submission on behalf of the Appellant that the futility of consultation is relevant to the issue of the amount of the protective award. The Court of Appeal in Susie Radin approved judgment of the Employment Appeal Tribunal in Middlesbrough Borough Council v TGWU [2002] IRLR 332, at page 338, paragraph 47:-

> *"The duties under the section are mandatory. It is not open to an employer, for this purpose, to argue, as would be open to him in defending a complaint of unfair dismissal by the individual employee, but consultation would, in the circumstances, be futile or utterly useless: See Polkey v AE Dayton Services Limited [1987] IRLR 503."*

81. Mr Bowers submitted that the following features mitigate against a maximum protective award. He argued that the Tribunal, if an award is to be made, should limit the period to a nominal three days. He raised the following issues:-

(i) The application for a protective award came out of the blue given that negotiations had taken place over many months (about the employment policies) and at which these issues could have been raised.

(ii) The Respondent accepted the need for consultation (as recognised by the Claimant in paragraph 7 of the details of complaint).

(iii) No prejudice had been caused to any of the employees given the extensive individual consultation and there was a very developed system of individual consultation.

(iv) The Respondent was not in control of the process as crucial funding decisions were taken by external bodies and the process used had been accepted by the Claimant over many years.

(v) The Claimant was difficult to deal with in negotiation

(vi) The Claimant failed to take the opportunity to raise any of the cases at any meetings after the lists were sent as they could have done.

82. Mr Prior, on the other hand, submits that the default could not be more serious. There was no consultation to the very purpose of the legislation.

83. Upon the basis of the authority of Susie Radin, the Tribunal cannot accept as mitigation the futility of consultation. However, the Tribunal does accept as mitigation that the Claimant had, for many years, effectively condoned the practice of the Respondent of sending out lists of those employees whose fixed term contracts were due to expire. It was only when Ms Monaghan came on the scene in December 2008 that the Respondent began to become aware that the Claimant was beginning to take a different view of matters.

84. On the other hand, undoubtedly, the burden is upon the Respondent to collectively consult and provide adequate notification under Section 188 (4). It did not do so. Indeed, Mrs Walshe took the view that it did not have to upon the basis that it was more than one establishment and accordingly the numbers being made redundant at each establishment was such as not to engage the collective consultation obligations. Further, she took the view that the provisions of TULRA had been designed for a quite different set of circumstances. Further, Ms Monaghan pointed out on several occasions the need to collectively consult about the proposals to dismiss as redundant those employees set out on the lists and to do this in good time before the first of the dismissals took effect. Mrs Walshe did not engage in any collective consultation notwithstanding what she was being correctly told by Ms Monaghan.

85. The authority of Susie Radin requires us to consider a maximum award of 90 days and to reduce it only if there are mitigating circumstances justifying a reduction. The Tribunal considers that there is a significant mitigating factor here: that the Claimant condoned the Respondent's practices for around 12 years between 1996 and the end of 2008. However, in recognition of the fact that the burden was upon the Respondent to collectively consult and appropriately notify under Section 188 (4), and taking account of the fact that the Respondent was notified by Ms Monaghan of

the need so to do in relation to the redundancies with which we are concerned, we consider that a 60 day protected period is just and equitable in the circumstances. This serves to recognise the mitigation to which we have referred but effectively sanctions the Respondent upon whom rests the burden of collective consultation and notification.

86. It was agreed between the parties that the appropriate description of employees entitled to the protective award is as set out in the Judgment.

87. There shall now be a case management discussion by way of telephone conference call with a view to clarifying the remaining outstanding issues and giving appropriate directions. The parties' solicitors are directed to write in with dates of availability for April, May and June 2010 for a telephone conference call with an estimated length of hearing of one hour. This step shall be taken within 14 days of the date that this Judgment was sent to the parties.

Employment Judge Brain

JUDGMENT SENT TO THE PARTIES ON
12.04.2010
FOR THE SECRETARY OF THE TRIBUNALS

[JE]