Case Number: 3302128/2012

# EMPLOYMENT TRIBUNALS

**Claimant** **Respondent**

**Unison** **v** **(1)London Borough of Barnet**
**(2) NSL Ltd**

**Heard at**: Watford **On**: 17 and 18 December 2012

**Before:** Employment Judge Manley
Mr J Ballard
Ms D Fowler

**Appearances:**

**For the Claimant:** Mr O Segal QC, Counsel

**For the Respondents:** (1) Ms L Cohen, Counsel
(2) Mr D Mitchell, Counsel

## RESERVED JUDGMENT

1. There was a failure by the first respondent to comply with s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 with respect to the redundancies with took effect on 31 March 2012 (**the Barnet Redundancies**). The complaint by the claimant trade union is well founded and the tribunal makes a protective award. The protected period commenced on 31 March 2012 and the tribunal determines it is just and equitable that that protected period should last for 60 days.

2. The tribunal also finds that there was a failure to comply with regulation 13 of the TUPE Regulations 2006 and that complaint is also well founded with respect to the two TUPE transfers on 1 April and 1 May 2012.

3. With respect to the transfer to Barnet Homes (**the Housing Transfer**) the tribunal determines that the appropriate compensation to be paid to the people who transferred is the payment equivalent of 40 days' pay.

4. For the TUPE transfer which took effect on 1 May (**the Parking Transfer**) the tribunal determines that the appropriate compensation to be paid to the

people who transferred to NSL (and/or RRD) is the equivalent of 50 days' pay.

5. We have insufficient information to decide whether there were two transfers on 1 May for four of the first respondent's employees transferring to RRD having first transferred, on the same day, to NSL. We take the view that it is unnecessary for this point to be decided.

# REASONS

## Introduction and issues

1. This is a case which involves the duties of employers to consult employee representatives provided by s.188 to s.190 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") and similar provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regs") between regulations 13 to 16. In summary, the complaints arise out of the alleged failures to provide information regarding agency workers. The relevant information provisions were added to both TULRCA and the TUPE Regs on 1 October 2011 in line with the Agency Worker Regulations. This complaint relates to a redundancy exercise which concluded on 31 March 2012 and two TUPE transfers on 1 April 2012 and 1 May 2012.

2. The issues were clarified and set out in a Case Management Summary after a discussion on 16 October 2011 and these read as follows:

3. ***The issues***

It is now definitively recorded that the issues between the parties which will fall to be determined by the Tribunal are as follows. Throughout the issues, the claimant is referred to as "UNISON", the first respondent as "Barnet" and the second respondent as "NSL".

3.1 It is agreed that the following occurred:-

3.1.1. On 31/3/12 Barnet made around 16 dismissals by reason of redundancy as a stage in a council-wide redundancy programme ("**the Barnet Redundancies**"). It is agreed that the provisions of s.188(1) of TULCRA were engaged in respect of these dismissals;

3.1.2. There was a TUPE transfer on 1/4/12 of housing staff from Barnet to Barnet Homes ("**the Housing Transfer**");

3.1.3. There was a TUPE transfer on 1/5/12 of about 59 or 63 parking staff from Barnet to NSL and, on the same day, 4 staff transferred from Barnet to RR Donnelley ("**the Parking Transfers**"). However, it is disputed whether or not, on that

day, those 4 staff actually transferred over to NSL and then on to RR Donnelley.

3.2 It is agreed that the provisions of TUPE did not apply to the Barnet Redundancies; and that the provisions of s.188 TULRCA did not apply to the Housing Transfer or to the Parking Transfers.

The Barnet Redundancies

3.3 It is agreed that a formal process of consultation and information took place in relation to this round of redundancies during which Barnet provided to UNISON in writing the information required by s.188(4)(a)-(f).

3.4 It is in dispute whether Barnet provided to UNISON the information required by s.188(4)(g)-(i) (see in particular Barnet's Grounds of Resistance paragraph 40). *Clarification is required of what information (and when) Barnet contends it did provide in this regard, in particular prior to 31/3/12.*

3.5 The correspondence referred to at paragraph 11 of the Grounds of Complaint and paragraphs 30-31, 34-35 of Barnet's Grounds of Resistance is admitted. The proper interpretation of that correspondence, and whether it amounted to compliance with s.188(4)(g)-(i), is in dispute.

3.6 If a breach of s.188(4)(g)-(i) is established, it is in dispute whether, and if so what, protective award ought to be made and to whom.

The Housing Transfer

3.7 It is admitted that the provisions of Reg.13 TUPE applied and that a formal process of information and consultation was held between Barnet and the recognised trade unions.

3.8 It is in dispute whether Barnet provided to UNISON the information required by Reg.13(2A) (see in particular Barnet's Grounds of Resistance paragraph 45). *Clarification is required of what information (and when) Barnet contends it did provide in this regard.*

3.9 If a breach of Regulation 13(2A) is established it is in dispute whether and if so how much compensation should be awarded and to whom.

The Parking Transfers

3.10 It is admitted that the provisions of Reg.13 TUPE applied.

3.11 It is agreed that a formal process of information and consultation between Barnet and recognised trade unions began on around 28/2/12 and ended on around 16/4/12.

3.12 It is in dispute whether Barnet provided to UNISON the information required by Reg.13(2A) (see in particular Barnet's Grounds of Resistance paragraph 48). *Clarification is required of what information (and when) Barnet contends it did provide in this regard, in particular as referred to at paragraph 27 of Barnet's Grounds of Resistance.*

3.13 It is denied by NSL that it was obliged to provide information pursuant to TUPE Reg.13(2A). *Clarification is required of the basis of that denial.*

3.14 NSL contends that in so far as it was in breach of its obligations to comply with Reg.13(2A), there were special circumstances rendering it not reasonably practicable to comply because the transfer of staff from it to RR Donnelley was "*in effect between [Barnet] and RR Donnelley Ltd*" (as admitted by RR Donnelley Global Document Solutions Group Limited in its response in case numbers 3302333/2012, 3302336/2012, 3302338/2012, 3302339/2012 and 3302340/2012). This is in dispute.

3.15 If a breach of Reg.13(2A) is established, it is in dispute whether, and if so what, compensation ought to be awarded against Barnet and/or NSL.

3.16 Barnet is not relying on the special circumstances defence in respect of any of the Barnet Redundancies, the Housing Transfer or the Parking Transfers.

**Summary list of issues**

The Barnet Redundancies

3.17 What information concerning agency workers did Barnet provide to UNISON, and when? Did that information comply with the requirements of s.188(4)(g)-(i)?

3.18 What level of protective award should be made if any, if liability is established, and to whom?

The Housing Transfer

3.19 What information concerning agency workers did Barnet provide to UNISON, and when? Did that information comply with the requirements of Reg.13(2A)?

3.20 What if any compensation should be awarded and to whom?

The Parking Transfers

3.21 What information concerning agency workers did Barnet provide to UNISON, and when? Did that information comply with the requirements of Reg.13(2A)?

3.22 Was NSL obliged to comply with Reg.13(2A)?

3.23 What level of compensation should be awarded, if any, if liability is established and to whom?

3.24 In line with certain orders made at the conclusion of that CMD further information was given, particularly in relation to the second respondent ("NSL"), contention that there was a transfer between the first respondent ("Barnet") and NSL and then between NSL and RRD.

A number of matters were clarified over the course of the hearing and in submissions and these will be made clear at the end of this judgment.

4. ***Evidence***

4.1 The tribunal heard evidence from two witnesses for the claimant; from Mr Burgess, who is the branch secretary of the Unison branch at Barnet and from Ms Davies who has had a number of roles with the claimant trade union. We also heard briefly from Ms Collins for NSL and Ms Murphy-Brookman who is assistant director of human resources with Barnet.

4.2 Unfortunately, this litigation allowed the parties to agree a bundle of documents which ran to two lever arch files and over 1,000 pages. Not only was that a considerable number of pages which, as is far too common in these cases, we did not read or even look at, but it was also arranged in a way which did not make it easy to handle during the course of this relatively short hearing. We estimate that our attention was probably drawn to around 30 pages within that bundle. Obviously we did not read all the documents in the bundles, nor could we within the time available, nor was it necessary for us to do so.

5. ***Facts***

These then are our relevant findings of fact.

5.1 In large part, these facts are not disputed and for the purposes of our determination of the issues, there are relatively few that we need to find. Any omissions are those where we consider a fact put before us does not have an impact of any significance on our findings.

5.2 Mr Burgess works for Barnet as a mental health social worker and has done so since 1995. He became branch secretary of the Unison branch in 2003 and has been undertaking trade union duties full time since then. Until 2008/2009 the union received information from Barnet on agency workers in redundancy and transfer situations.

This was said, by Mr Burgess on behalf of the claimant, to be sufficient information. We have seen examples of that information with the business area, the status of the job, the vacancy title, line manager, location, start date and end date (page 968). Unison's procedure was that they would then send that information to each directorate to check whether it was accurate and to ask about the strategy for cutting back the use of agency staff.

5.3 In around 2009 Unison and the other recognised unions started to experience problems with getting this information. We heard oral evidence that they were told it was to do with the Data Protection Act but there is nothing in writing about this. We accept the evidence of Mr Burgess and Ms Davies that someone did indeed mention this as a potential problem with giving the information. It is not clear that this would necessarily apply as there are no names of individuals recorded on the information provided to the unions up to 2008/2009. The trade unions continued to raise questions at an HR/TU meeting (MM being another Unison rep and PC being a GMB rep) in January 2011 where it is recorded as follows:

"

- *The TU's raised the question about agency temps and redeployment. SM-B explained that those temps involved in a restructure who are filling funded established posts will be expected to be displaced by redeployees.*

- *The TU's raised the question about agency temps across the organisation who are filling established posts but are not involved in a restructure and how at risk employees can find out about these opportunities. SM-B undertook to take this away to find a way of capturing these roles for re-deployees.*

- *MM requested a list of the agency temp workforce and roles.*

- *SM-B explained that this is not something that can be provided and that structures should be consulted to suggest where an agency employee could be displaced.*

- *MM argued that the data is not fit for purpose and detailed 304 temps in the organisation (10 of which in HR). She questioned the agencies not apart from Hays being paid as information is not on SAP. PC added that E&O had 86 temps.*

- *SM-B explained that there was no resource to provide such information but of the 304 temps quoted most are social workers who are not at risk. There must be an opportunity to displace for an individual to be put into that role.*

- *PC argued that the TU's to receive a list of posts filled by temps which was more helpful. He added that skills could be transferable in a different service department."*

5.4 We have also seen minutes from a meeting on 24 May (DCE-JCC) which reads:-

> *"Temporary Workforce Data*
> *It is recorded that JBu (*Mr Burgess*) said that the way in which this data was now presented was less transparent than before, as the information behind the data was no longer available, making it difficult to make informed comments."*

5.5 Barnet had started a process of looking into outsourcing, now known as the "One Barnet Programme". There were therefore a number of redundancy and transfer exercises going on over this period of time.

5.6 On 26 October 2011 Unison and other trade unions received notice under s.188 TULRCA from Barnet indicating that it was proposed to delete 77.5 full time equivalent posts which would place 97 people at risk. Barnet decided to commence a 90 day consultation period and included with that letter reasons for the proposals and suggestions about how the consultation process would proceed. It also included details on the time scales, proposing that redundancy dismissals would take effect by 31 March 2012.

5.7 In the information on mitigating the "impact of these proposals" this is said:

> *"It is proposed that the savings will be achieved through a variety of approaches:*
>
> *Deletion of vacant posts;*
> *Displacement of agency workers;*
> *Restructures;*
> *Volunteers where there are pool of staff at risk of redundancy.*
>
> *The council's redeployment committee will challenge services to ensure that agency workers are displaced wherever practical to "save" an employee."*

5.8 Amendments had been made to the provisions of TULCRA with respect to the information required by the Agency Workers' Regulations on 1 October 2011 but neither Barnet nor Unison (at least at branch level) knew of this amendment. However, Unison did raise the issue of information around agency workers and specifically referring to "lack of transparency" around agency workers in a meeting on 9 November 2011 between HR and Unison.

5.9 The information which the trade union did have in relation to agency workers was as follows. First, they had information contained within the quarterly reports for the cabinet resources committee. Within this period, for example, the quarterly report for the meeting on 28 February 2012 which was also seen by Unison, had a breakdown of "staff numbers by service". Under the headings "Establishment", "Occupancy" and "Other" further information was given which included numbers of "Agency/Interim". These are broken down into the seven directorates of Barnet, being Adult Social Care, Children's Service, Chief Executive Service, Commercial Service, Corporate Governance, Deputy Chief Executive Service and Planning Environment and Regeneration. The figures there provided have a heading for Agency/Interim under each of those departments. There are also columns for "Other" which appear to include "Consultants" and "Casual".

5.10 At some of the directorate meetings (two that we have seen) some further information was given with respect to agency workers indicating which "teams" they were in but without job titles. The other information which included reference to agency workers was that contained within Redeployment Opportunities Bulletin. This is a document that was sent to all Barnet employees including those at risk of redundancy. The evidence was that anyone could apply for these posts but those who were at risk would take priority. The evidence was that all these posts were covered by agency workers.

5.11 Looking at that Redeployment Opportunities Bulletin to which our attention was drawn for the closing date of 30 March there is indeed a description of various of the posts available, such as a solicitor/barrister, procurement manager, residential social support worker, local taxation officer and so on. No numbers of vacancies are given and it is accepted by Barnet that this does not include all the agency workers working for Barnet at the time. Indeed, it appears from the numbers that it might not even amount to a majority of the agency workers working for Barnet at the time.

5.12 During the course of the consultation on this issue, the matter appears to have been discussed at a Corporate Governance Directorate/Chief Executive Service joint JNCC meeting on 20 January. The chairman who was the director "JEL", is quoted as *"Noted that he had initially discussed this with Sharon Dacunha and that he had no objections for the information to be released on a team by team basis. CP (*Assistant director*) concurred. JEL asked VM (*HR*) to provide the information with as much detail as possible".* It is clear that this was not provided at a subsequent meeting which is after the redundancies had taken effect. The explanation given for this is "*VM advised she had looked into this and the only information available was that on the website due to SAP access and the need to extract information manually*". It is accepted by Barnet that it was

aware that Unison was unhappy about the information they were getting on agency workers.

5.13 Redundancies took effect on 13 March 2012. Happily, the number of employees being made compulsorily redundant on that date had reduced considerably to 16. We have no evidence as to what happened to the others, whether they displaced agency workers or were otherwise retained or left under other circumstances.

5.14 In the meantime another matter was proceeding which was the transfer of a number of staff based in Housing to Barnet Homes. This was to be an Arms Length Management Organisation (ALMO). The transfer, which was a TUPE transfer, proceeded on 1 April 2012. During negotiations on that or on other matters, it came to Mr Burgess' attention that agency information should be made available in the format set out both in s.188 and regulation 13. He sent an email on 18 April 2012 to Ms Murphy-Brookman which enclosed a weekly email from the trade union and states as follows:

> *"As you can see from reading the post contained in the work document entitled "Barnet Job Opportunities" there was a significant discrepancy between the agency figures given at cabinet resources committee"* There is then a link to another document which the tribunal has not seen.
>
> *He goes on "I have been making my requests for agency data in line with the requirement of ss.4 of s.188 of the Trade Union Labour Relations (Consolidation) Act 1992 by virtue of the Agency Workers Regulations 2010"* There is then another link.
>
> *"I am expecting that the following is now made available to the trade unions.*
>
> - *The number of agency workers working temporarily for and under the supervision and direction of the employer;*
> - *The parts of the employer's undertaking which those agency workers are working, and;*
> - *The type of work those agency workers are carrying out*
>
> *There is a significant restructure taking place in Revenues & Benefits where staff are at risk of redundancy. I am requesting that this request is expedited."*

5.15 In reply to that email on 19 April Ms Murphy-Brookman replied:

> *"Hi John.*

*I wanted to let you know that the answer to your question is proving a little more complex to unpick than I had hoped. A first analysis suggests that the agency figure of 48 represents all agency workers who have worked in the quarter, not posts covered by agency workers as I had indicated.*

*So for example a post may have had three agency workers in it during the quarter with a new worker per month. We are having an internal meeting next week and I should be in a position to come back to you after that."*

5.16 That email being dated 19 April, Mr Burgess sent another email on 15 May:

*"Hi Sarah*

*Can I have an outcome of the meeting referred to in your email below?"*

There being no response from that that we have seen, Mr Burgess sent up a more detailed email on 17 May. This reads:

*"Hi Sarah*

*As you know for the past two years Unison has consistently raised the issue of Agency figures being provided in the format to enable meaningful consultation particularly at the time of redundancies. It is also a fact that HR have consistently refused to provide the data in the form that we have requested and HR have advised all JNCC's to provide only the headline figures of Agency workers across each directorate. I have on many occasions explained that the council used to provide this information in a format that was helpful and meaningful. The rationale given by many senior HR staff for not providing information has been it somehow breaches data protection guidelines."*

Mr Burgess then goes on to further detail saying where else he has raised this issue and repeating the request he made on 18 April for the required information under s.188. A reply to that dated the same day reads as follows:

*"Dear John*

*I believe that my previous email has dealt with your points.*

*I had added this item to the PMG on 8 May which Unison subsequently notified that it would be unable to make. My intention is that this agenda item will be carried forward to PMG on 8 June."*

At that meeting on 8 June it is recorded that Ms Murphy-Brookman believed that the information given to Unison complied with s.188(4)(g) and (h) and that "s.*188(4)(i) will be provided as part of the s.188 information*". Details are given again of numbers by directorates and then there was some further information

5.18 Since that time, Unison accept that they have been getting sufficient information which complies with the legislation and is useful to them in the negotiations for ongoing redundancies (and presumably TUPE transfers). We have seen examples of this (Page 1001) and can see that this Agency worker information is broken down both by job title and business unit with some other information. Those two first columns (names and business unit) it was accepted by Ms Murphy-Brookman, would have been relatively easy to provide at an earlier stage. It appears that one of Ms Murphy-Brookman's concerns was that the information should be correct and include those agency workers covering "established" or "secure" posts.

5.17 In any event, the TUPE transfer of parking operatives had taken place by this date. Outsourcing parking discussions and proposals started sometime in 2011 and we have seen a number of pieces of correspondence about the parking contract particularly later in the year when it appeared that it would be awarded to NSL. A number of questions were asked of Barnet and NSL with respect to this outsourcing. By February 2012 NSL were writing to those Barnet employees who they felt might transfer to them inviting them to meetings to ask questions and so on. A number of tri-partite meetings were arranged, facilitated by Barnet, so that those affected employees could ask questions. At some point it appeared that part of the parking work (notice processing and post team) might be transferred to Croydon and/or to Doncaster. It is stated there that this would be "post transfer" and it will be a "pass through". We have seen other references to this in minutes of meetings that it was expected that all those people would transfer to NSL and then immediately to the organisation who subsequently were awarded the sub-contract by NSL, RR Donnelley (RRD).

5.18 There is a written and detailed contract for the parking services between Barnet and NSL. There is not one between Barnet and RRD. There is also a contract between RRD and NSL with reference to the services that RRD were undertaking on behalf of NSL under the Barnet contract. We have also seen letters from RRD to Barnet's HR which suggests that a number of people would be transferring to RRD's employment. The date of transfer is said to be 1 May. There is no suggestion in that document or statement that those employees would be transferring first to NSL.

5.19 The detail of this is that there were 64 employees and between 4 and 7 of them were involved in the services which were to be provided by

RRD. We have seen a document which shows 60 people transferring to NSL and the same document which indicates people going to RRD. None of these are conclusive as to whether there was to be a transfer in between. Ms Murphy-Brookman's evidence was that she believed there was a transfer at midnight to NSL and then another immediately thereafter to RRD but there is no other evidence before us of that. On a balance of probabilities, we have insufficient evidence that that there was a transfer from NSL to RRD of around 4 people.

6. ***The law***

6.1 The relevant law is contained between s.188 and s.190 of TULRCA. S.188 reads 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 should 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."*
>
> (sections 1A and 1B deals with timing and who are appropriate representatives).
>
> *"(2) The consultation shall include consultation about ways of -*
>
> *(a) Avoiding the dismissals,*
> *(b) Reducing the numbers of employees to be dismissed, and*
> *(c) Mitigating the consequences of dismissals,*
>
> *and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives."*

6.2 At subsection (4) it reads:

> *"For the purposes of the consultation an employer shall disclose in writing to the appropriate representatives –*
>
> *(a) The reason for his proposals,*
> *(b) The numbers and descriptions of employees whom it is proposed to dismiss as redundant,*
> *(c) The total number of employees of any such description employed by the employer at the establishment in question,*

*(d) The proposed method of selecting the employees who may be dismissed ...*
*(e) 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,*
*(f) 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,*
*(g) The number of agency workers working temporarily for and under the supervision and direction of the employer,*
*(h) The parts of the employer's undertaking which those agency workers are working, and*
*(i) The type of work those agency workers are carrying out."*

6.3 At s.189 the powers of the employment tribunal are set out as follows:

*"(1) Where an employer has failed to comply with a requirement at s.188 a complaint may be presented to an employment tribunal on that ground –*

*(a) -*
*(b) -*
*(c) In the case of failure relating to representative of the trade union, by the trade union and*
*(d) - "*

*(2) If the tribunal finds a complaint well founded it shall make a declaration to that effect and may also make a protective award.*

*(3) A protective award is an award in respect of one or more descriptions of employees –*

*(a) Who have been dismissed as redundant, or 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 s.188, ordering an employer to pay remuneration for the protected period*

*(4) 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 any requirement of s.188;*

*but shall not exceed 90 days."*

Subsection (6) deals with special circumstances but is not relied upon by either of the respondents.

6.4 S.190 deals with the entitlement under the protective award and will only become relevant if there is some dispute arising from our judgment. As indicated the s.188 (4)(g)(h) and (i) provisions were added with effect from 1 October 2011.

6.5 The Transfer of Undertakings (Protection of Employment) Regulations 2006 TUPE includes regulation 13 headed *"Duty to inform and consult representatives"* and reads as follows:

*"(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, or to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.*

*(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of -*

*(a) The fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;*

*(b) The legal economic and social implications of the transfer for any affected employees;*

*(c) The measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or if he envisages that no measures will be so taken, that fact; and*

*(d) If the employer is a transferor, the measures in connection with the transfer which he envisages the transferee will take in relation to any affected employees, who will become employers of the transferee after the transfer by virtue of regulation (4) or, if he envisages that no measures will be so taken, that fact.*

*(2A) Where information is to be supplied under paragraph (2) by an employer –*

*(a) This must include suitable information relating to the use of agency workers (if any) by that employer; and*

*(b) "Suitable information relating to the use of agency workers" means –*

*(i) The number of agency workers working temporarily for and under the supervision and direction of the employer;*

*(ii) The parts of the employer's undertaking which those agency workers are working; and*

*(iii) The type of work those agency workers are carrying out."*

6.6 Regulation 15 deals with the situation where there is an alleged failure to inform or consult giving the right to complain to an employment tribunal by a trade union in similar terms to that in TULRCA.

6.7 Paragraph 8 of regulation 15 reads as follows:

*"Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may -*

*(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or*

*(b) - "*

6.8 Paragraph (9) of regulation 15 reads:

*"The transferee shall be jointly and severally liable with the transferor in respect of compensation payable in sub-paragraph 8(a) or paragraph (11)"*

6.9 Under regulation 16 (3)

> *""Appropriate compensation" in regulation 15 means such sum not exceeding 13 weeks' pay for the employee in question that the tribunal considers just and equitable having regard to the seriousness of the failure to comply with his duty."*

6.10 So it can be seen that there is considerable overlap between the provisions in TULRCA and TUPE and to some extent the identical wording is used.

6.11 Because the amendment with respect to agency worker information has only been in place since October 2011, we have not been directed to any cases specifically on that point. However, we have been directed towards a number of cases which assist us with how to decide the compensation level should we decide to make a protected award or one under the TUPE Regs all of which were before the agency worker amendments.

6.12 First, we must decide whether there has been a failure. If we decide there is such a failure, we then move to deciding under TULRCA whether to make a protective award and if we do the protected period and, if necessary, the description of employees. The leading case is Susie Radin Ltd v GMB and others [2004] IRLR 400. The Court of Appeal there set out the matters that employment tribunals should have in mind when deciding on the exercise of discretion about making a protective award. Gibson LJ at paragraph 45 said this:

> *"I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:*
>
> 1. *The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: this is not to compensate the employees for loss which they have suffered in consequence of the breach.*
>
> 2. *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 employer's default.*
>
> 3. *The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.*

4. *The deliberateness of the failure may be relevant, as may be availability to the employer of legal advice about his legal obligations under s.188.*

5. *How the ET assesses the length of the protective period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with a maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate."*

6.13 The case of Sweetin v Coral Racing [2006] IRLR 252 makes it clear that the guidance set out in Susie Radin applies equally in a case of failure to consult under the TUPE regulations. That case points out that the same terminology is used and that the intention must be that the assessment of compensation should be approached similarly. In that case it was said that the similar wording indicates that tribunals should *"focus on the nature and extent of the employer's default. That gives rise to the inevitable inference that Parliament intended the awards in each case to be penal in nature, rather than solely compensatory, albeit that the use of the words "just and equitable" would entitle a tribunal also to have regard to any actual loss that a claimant employee shows that he had in fact suffered as a result of the failure to consult"*. We are reminded to consider the assessment of compensation to be punitive rather than compensatory.

6.14 Similarly a case that considered the TUPE regulations is that of Todd v Strain & Others [2011] IRLR 11 which puts a slight gloss on the Radin guidance so that this is said:

> *"The guidance given in Radin that the starting point was the maximum award, which should be discounted if appropriate for mitigating circumstances is directed at the case where the employer has done nothing at all and it should not be applied mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure."*

6.15 We were also referred to Leicestershire County Council v Unison [2006] IRLR 810 which was a case which was concerned with the TULRCA provisions where it was found that the employment tribunal's approach which had made different protective awards for different groups of employees had not constituted an error of law. There was no perversity in the outcome.

6.16 We were also referred to Lancaster University v The University and College Union [2011] IRLR 4, again on the provisions of TULRCA. This rule dealt with the question whether the mitigating factors came under the head of "futility". The one which did not was, according to the judgment:

> *"The fact that the union had effectively condoned the employer's practice for around 12 years. On that basis it reduced the protective award to 90 days' remuneration."*

That was found not to be an error of law.

6.17 Other cases to which we were referred were Amicus v GBS Tooling Ltd [2005] IRLR 683 which again reminds the tribunal to consider the nature and seriousness of the breach. It is said:

> *"A company which has deliberately set out to be secretive would appear to fall into a different category from a company which has completely failed to disclose information through negligence or misguidedness or, as here, a company which has not completely failed to disclose but has simply failed to disclose it at the right time and in the right context."*

6.18 Another case to which we were referred is Securicor Omega Express v GMB [2004] IRLR 9 which helps us only with the point about the description of employees which is agreed by the parties for the s.188 dismissals. We were also referred to some cases with respect to the question of whether there was a transfer from Barnet to NSL and then on to RRD. The burden of proof would seem to rest either on the claimants or on Barnet in proving that NSL were a transferor of those four people. Given the provision for joint and several liability and the paucity of evidence on this point we take it no further.

***Submissions***

7.1 We had oral submissions from all representatives. Much as they were helpful, we do not need to set out those from Mr Mitchell for NSL which were in writing as the point has already been decided within the facts in favour of NSL. Save for any joint and several liability they have under regulation 15.9, there is nothing further that need be said about NSL.

7.2 Claimant submissions. At the time Mr Segal made his oral submissions he was not aware that Barnet accepted that there had not been compliance with the requirement to give information. This was a point that was then conceded by Ms Cohen for Barnet. We therefore do not need to set out in detail his submissions on that point. He submitted that the information with respect to agency workers was by no means complete. In essence, further information was required under (h) and (i) with respect to the parts of the business where the agency workers were employed and the type of work being carried out. He pointed to the number of times this information was requested and encouraged the tribunal to consider that the information given was misleading. He reminded us of the purposes of the information to assist with consultation both under the

TULRCA provisions for redundancy and under TUPE regulations and took us through the law as set out above.

7.3 For Barnet, Ms Cohen accepted that those were the cases which we needed to consider and asked us to consider other paragraphs from them. In broad terms the legal principles are agreed save for this difference. Mr Segal asked us to start with the maximum when considering the period for the protective award, whereas Ms Cohen states that we only do that if there is ***no*** consultation. We will come back to this in our conclusions.

7.4 In the event Ms Cohen (and Mr Mitchell should it have been necessary) agreed that the information given on agency workers does not comply, particularly with s188 (4) (i). On Ms Cohen's case she believes that the information in s188 (4) (g), that is on number of agency workers, was provided and there was sufficient information on directorates to comply with that part. She asked the tribunal to take into account the fact that there otherwise was consultation and considerable information provided to the unions. With respect to any protected period or compensation she asked us to take account of that mitigating factor and a number of others (that neither the trade union nor the employer could have accurate agency worker figures). For the TUPE transfer to Barnet Homes she informs us that this would be a wholly owned ALMO with people only moving at most 1.5 miles. She also informed us there were five redundancies post that transfer. As for the parking transfer we understand that there were six redundancies after that transfer.

7.5 There is no significant difference on the law with these exceptions – whether we start with the maximum protected period and work backwards and the description of employees. Ms Cohen suggests that we can make an award under the TUPE regs only for those made redundant rather than for all those who were transferred. She says that was within the discretion to whom we can award compensation. The matters which she says we should take into account are the nature of the breach, the consequence of it and the state of mind of the parties. She also gave us information on the cost to Barnet of making a protective award or compensation.

7.6 There was then further discussion as the tribunal asked questions and the representatives attempted to deal with them. Both respondents' representatives accepted that the breach was not a technical breach but suggested that it was at the lower end.

***Conclusions***

8.1 We have already found that there is insufficient evidence for us to decide if NSL were liable as an employer of four people for a period of time on 1 May. All awards are therefore made against Barnet although the provisions of regulation 15 (9) may have come into play

as indeed may any commercial contractual arrangements that have been made with respect to indemnity. We are not concerned with those at this tribunal.

8.2 The first question for us therefore is to determine what information was provided by Barnet in each of the matters with which we are concerned. Have these been seen under the summary list of issues at 3.17, 3.19 and 3.21 which in our view can be answered together. We do accept that some information was supplied. Clearly a number of agency workers was provided and we accept that s.188 (4)(g) and regulation 13.2 (a)(b)(i) was complied with in all cases.

8.3 Turning then to the question of whether s.188(4)(h) TULRCA and Reg 13 (2A(b)(ii) TUPE were complied with, that is whether the parts of the employer's undertaking are properly described, we believe this was complied with in part. Clearly there is some information given to the trade union in relation to directorates which goes some way towards assisting them. In our view, it is not sufficient given the rather complex nature of Barnet's business and the fact that those directorates themselves are split up into business areas.

8.4 Finally, as is agreed, the information which was provided does not comply with s.188(4)(i) TULRCA or Reg 13 (2(A)(b)(iii) TUPE. Although there is some information, it is by no means complete and we consider that there is a complete failure to comply with that particular piece of information which Barnet had a duty to provide to the trade unions.

8.5 For these purposes we consider the failure together for all matters raised (the redundancies and the two transfers) before deciding what it is appropriate to award. In general terms, we accept that we have to consider what is just and equitable. The guidance contained within Susie Radin is quite clear and we must consider the seriousness of the breach. We also accept that Susie Radin indicates that we start with a maximum only where there is no consultation and that cannot be said to be the position in this case. Having said that, we are not quite sure where we should start if we do not start with the maximum and work down. It was not put to us by either of the respondents' representatives that there was a better place to start and given that, in our view, this is a relatively serious failure, we do indeed start with the maximum.

8.6 The factors that we have taken into account in deciding what sort of awards to make are these. On the evidence before us, the information on the type of work agency workers were doing was relatively easy to produce. It had been produced in the past and was produced again shortly after these matters. The respondent's HR was aware that the trade unions wanted this information. We also accept that it was central to the consultation process. The respondents accept it was more than a technical failure and across

the board we consider that it was indeed an important failure. We accept that Unison at branch level and the respondent did not know of the provisions as added by the Agency Workers' Regulations but it did know that the trade unions wanted the information for the consultation processes. Having taken all those matters into account we do believe it is appropriate for us to make a protective award for the redundancy failures under s.188 TULRCA and compensation for the TUPE transfers.

8.7 However, we do believe that there are some differences between those events which mean that the amount which we award is different in each case. Starting with the redundancies, in our view, having assessed the seriousness of this, we consider this to be the most serious breach. On any account, the information on agency workers and, in particular, the type of work they were carrying out, was most valuable to the Unison branch in the consultation process on redundancies where their main task is to save people's jobs if at all possible. We do accept that there was a fair degree of consultation and that quite a lot of information was given to the trade union which is in compliance with s.188 TULRCA. However, this significant piece of information was one which was missing and having considered the matter with some care, we have taken the view that it is just and equitable to make the protective award for 60 days. The protected period is therefore 60 days from 31 March 2012. It is agreed that the description of employees who are entitled to that protective award are the 16 people made redundant on that day by Barnet.

8.8 Turning then to the next event, the Housing Transfer. We have taken the view, when assessing seriousness of the particular breach in this case, that it is at a lower level. Our view of this is that the value of the information with respect to this particular transfer was likely to be less to the trade union given the nature of this particular transfer. Those transferring to the ALMO were only expected to move their base around 1.5 miles. However, it is an important duty and one which the respondent should have complied with. In our view, when assessing this relative to the other TUPE transfer and the redundancy we believe compensation in the order of 40 days' pay is just and equitable in the circumstances. The affected employees are all those who transferred being, as we understand it, 77 people who transferred or were made redundant as a consequence.

8.9 Lastly, then, we consider the Parking Transfers. We have already said that NSL was not obliged to comply with regulation 13 (2(A) as there was no transfer from them to anyone else. In our view the seriousness of the breach with respect to the Parking Transfer is not as serious as the March 31 redundancies but more serious than the Housing Transfer. This is for two main reasons. First is that before that took effect, Ms Murphy-Brookman had specifically been told by Unison that the agency workers information under the regulations should be given on 18 April. That gave Barnet a chance to remedy

the breach which it did not take up. The other matter which was taken into account is that this transfer clearly had a more important impact on the Unison's members. It appears that some members might have to transfer to other towns some distance away. Doing the best we can, we place that in between those other two matters above and believe it is just and equitable to award compensation of 50 days' pay. The relevant date for quantifying that pay is the date of transfer on 1 May and for the housing transfer on 1 April.

Employment Judge Manley

Sent to the parties on: 4 FEBRUARY 2013

For the Secretary to the Tribunals

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 3302128/2012

Name of case(s): . Unison v London Borough Of Barnet & NSL Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 4/2/13

"the calculation day" is: 18/3/13

"the stipulated rate of interest" is: 8%

MISS S BLOODWORTH
For and on Behalf of the Secretary of the Tribunals

# INTEREST ON TRIBUNAL AWARDS

## *GUIDANCE NOTE*

1. This guidance note should be read in conjunction with the booklet, which you received with your copy of the Tribunal's judgment.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding discrimination or equal pay awards* or sums representing costs or expenses) if they remain wholly or partly unpaid after 42 days.

3. The 42 days run from the date on which the Tribunal's judgment is recorded as having been sent to the parties and is known as "the relevant judgment day". The date from which interest starts to accrue is the day immediately following the expiry of the 42 days period called "the calculation day". The dates of both the relevant judgment day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request a reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.

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* The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 prescribes the provisions for interest on awards made in discrimination and equal pay cases.