

UK Update

Consequences of failing to inform and consult

Employers who fail to inform and consult employees in connection with a TUPE transfer may have to pay a penalty of 13 weeks' gross pay to all affected employees. The recent case of *Shields Automotive Limited v Langdon & another* guides employers on the size of the award where there has only been a minor breach of the employer's duties. The case illustrates how easy it is to make a mistake - in this instance a management decision on running an election for an appropriate representative. It serves as a reminder of how employers should conduct an election to avoid any liability.

Before looking at this case, it is worth setting out the general principles.

Consequences of failure to inform and consult

In a TUPE transfer, both transferor and transferee must inform and consult with recognised trade unions or elected employee representatives in relation to any affected employees. If there is no trade union, these representatives will either be existing employee representatives or newly elected representatives for the purposes of the transfer. There are special rules about the election process, but the principle is that employees are entitled to vote, and they (rather than the employer) must choose the representatives. Breach of this duty can be costly: as the maximum Tribunal award is 13 weeks' gross pay for each affected employee, and there is no limit on the amount of a weeks' pay, employees can potentially receive 13 weeks' gross pay on top of any pay received during the same period. Ultimately, any Tribunal award, however, should be "just and equitable having regard to the seriousness of the failure of the employer to comply with its duty". Furthermore, the transferee and transferor will both be liable for any Tribunal award payable to the employees.

A complete failure to consult

Following a number of important cases decided by the Employment Appeal Tribunal (EAT), the Tribunals now tend to apply the following principles:

- Compensation is intended to penalise the employer for its breach, not to compensate the employee(s) for any loss suffered
- Focus is on the seriousness and deliberateness of the employer's default, but the tribunal's discretion to do what is just and equitable in all cases is wide
- Where there has been no consultation at all, the starting point of the maximum 13 weeks' pay should only be reduced if the tribunal feels there are particular mitigating circumstances
- The above guidance should not be applied mechanically to cases where some information has been given or some consultation has occurred

Further information

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Minor breaches

In *Shields Automotive Limited v Langdon & another*, the employer tried to inform and consult, but made technical errors. It called an election at 2pm with voting to be completed by 5pm the same day, though one employee (Mr Brolly) was on his day off, and another (Mr Langdon) abstained in protest. When votes tied for the second of the two posts, rather than telling the employees or candidates about this the employer chose from the tied candidates itself, thinking this would be most practicable.

The Tribunal found the employer's decision to proceed, without showing a good reason why the election couldn't have waited for Mr Brolly's return on the following day, to be unfair. Conversely, the EAT said it was primarily a question of whether the rules had been followed, and gave the following guidance:

- The award ensures employers are mindful of the duties to consult and inform
- Genuine attempts to inform and consult, even if technically insufficient, merit a lesser punishment than where no steps have been taken at all
- Employers must make reasonably practicable arrangements to ensure the election is fair. If there is a reason why it cannot reasonably practicably be taken over a longer time-scale, the employer must prove it to the Tribunal
- Employees must get the chance to exercise their right to vote. Where no such opportunity can be had, the employer should explain why
- Employee representatives should be elected or appointed by affected employees. Here, the employer should have shown why it wasn't reasonably practicable to tell employees about the tie and allow them to resolve it

Though the Tribunal found the employer to be in breach of its duties as a result, its efforts to inform and consult, and the technical nature of the breach, were accounted for in assessing the compensation to be awarded to the affected employees. On balance, the EAT awarded Mr Brolly 3 weeks' pay (reduced from the Tribunal's award of 7 weeks' pay), and upheld Mr Langdon's award of 2 weeks' pay, as he had been able to vote but chosen not to.

Quick reference table summarising other relevant cases with the awards made

Case name	Summary and awards made
<i>UNISON v London Borough of Barnet & anor, Watford Employment Tribunal 4.2.13 3302128/12</i>	60 days' pay (protective award for collective redundancy) and 40 and 50 days' pay (TUPE) – "serious and wilful" failure to provide agency information but mitigating factors included obligation to provide this information was a new law and there was some consultation
<i>Susie Radin Ltd v GMB & Others [2004] ICR 400 CA</i>	Maximum award - no meaningful consultation had taken place
<i>Sweetin v Coral Racing [2006] IRLR 252 EAT</i>	Maximum award - no information, warning of the transfer, or consultation
<i>Todd v Strain [2011] IRLR 11</i>	Seven weeks' pay - the employer had taken significant steps to give its employees some basic information and, importantly, a reassurance that there would be no changes in staffing or terms and conditions of employment consequent upon the transfer. Consultation was inadequate