

# Ignorance of need to consult collectively no bar to protective awards

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# Ignorance of need to consult collectively no bar to protective awards

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An employer's claim that it failed to consult collectively because it was not aware that it was obliged to do so is no

excuse, and protective awards (of up to three months pay per employee) remain payable in such circumstances. Further, if an employer has relied on its ignorance to justify non-consultation, it cannot also suggest that special circumstances had rendered collective consultation not reasonably practicable.

A school operated by E Ivor Hughes Educational Foundation was suffering from financial difficulties caused by a decline in pupil numbers. At a meeting in February 2013, the governors recognised the problem and discussed options for how to keep the school open if pupil numbers remained low. Once the actual number of pupils for the next academic year was confirmed in April 2013, it transpired that numbers were worse than predicted. As such, the governors decided that the school would have to close at the end of that term. Three days after that decision was made, school staff were given notice that their employment would end in August 2013. No collective consultation took place.

The staff brought claims challenging their dismissal and the lack of collective consultation. The Foundation argued that the governors had not been aware of the obligation to consult collectively and, even if they had been, special circumstances had meant that it would not have been reasonably practicable for the Foundation to consult collectively. The Foundation identified the special circumstances as (i) that informing staff about the potential need to close the school would have leaked to parents, causing them to remove their children and further affecting the school's budget; and (ii) the fact that school staff must be given one term's notice of termination, meaning notice had to be served quickly to avoid having to pay wages for another term.

The Employment Appeal Tribunal held that it was immaterial that the governors were unaware of the obligation to consult collectively, and accordingly upheld the order for the maximum protective award of 90 days' gross pay. As the order was a

punitive measure, it was not linked to the extent of any loss suffered by the staff. It was artificial for the Foundation to argue that special circumstances existed as the governors' lack of knowledge that they must consult collectively meant they would not have evaluated whether or not they could carry out the consultation. Circumstances identified in hindsight cannot be relied on.

E Ivor Hughes Educational Foundation v Morris and others,  
UKEAT/0023/15

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