THE INDUSTRIAL TRIBUNALS

CASE REF: 1717/16

CLAIMANT: **University and College Union**

RESPONDENT: **Ulster University**

DECISION

The decision of the tribunal is that there was a failure to consult with the Trade Union and the tribunal hereby grants a declaration to that effect. The tribunal hereby makes a protective award of 90 days.

Constitution of Tribunal:

Employment Judge: **Employment Judge Murray**

Members: **Ms E McFarline**
Mrs M O'Kane

Appearances:

The claimant was represented by Mr T Brown, Barrister-at-Law instructed by Ms Gavin of Francis Hanna and Co Solicitors.

The respondent was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Ms Flannery of Arthur Cox Solicitors.

THE CLAIM

1. The claim is by a recognised Trade Union that there was a failure to consult under the collective consultation provisions set out in the Employment Rights (NI) Order

1996 (as amended) ("ERO"). The respondent's case is that the duty to consult did not arise but that if it did, there was consultation and its extent was frustrated by the non-engagement of the Trade Union.

THE ISSUES

2. The issues at hearing narrowed to the following key issues:

(1) Was the duty to consult under Article 216 of ERO triggered?

(2) On what date was the duty to consult triggered?

(3) Was any consultation that took place compliant with the legislation? In particular did it take place in good time and was it sufficient in that any relevant information was given? Was any consultation genuine with a view to reaching agreement?

(4) If the tribunal makes a declaration of failure to consult, should a protective award be made and if so, for what period?

(5) It was agreed by the parties that the claimant was a recognised Trade Union. Does the bargaining unit include professorial grades?

(6) What are the relevant dates in relation to any consultation period and for any remedy?

THE LAW

3. Both sides provided written submissions which were supplemented by oral submissions at the submissions hearing. Counsels' written submissions are attached to this decision.

4. Booklets of authorities were provided by both sides and all relevant authorities were considered by the tribunal in reaching this decision.

5. The collective consultation obligations are set out in the Employment Rights (Northern Ireland) Order 1996 as amended (ERO) at Articles 216 onwards. The key provisions relevant to these proceedings are as follows:

> ***"Duty of employer to consult representatives of employees***
>
> ***216.****—(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;*
>
> *(2) 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 paragraph (1), at least 90 days, and*

(b) otherwise, at least 30 days, before the first of the dismissals takes effect.

…

(4) 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 the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

…

(6) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons 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 over 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 statutory provision) 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 in which those agency workers are working, and

(i) the type of work those agency workers are carrying out."

6. The remedy available is set out at Article 217 which provides in essence that the remedy available is a declaration together with payment for a protected period of up to 90-days. The guiding principle for a tribunal in assessing the protected period is

set out at Article 217(4)(b) which states as follows:

> ***"Complaint and protective award***
>
> ***217****(4) The protected period—*
>
> *(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 Article 216; but shall not exceed 90 days . . . ."*

7. The special circumstances defence was not raised by the respondent. (ERO Article 216(9)).

8. The claimant did not make the case that there was a technical breach of the provisions in relation to the way any information that was provided was delivered to the Trade Union. (ERO Article 216(7)).

9. Whilst in the issues document during the Case Management process, the claimant relied on three alternative dates for the date on which the duty to consult was triggered, at the submissions stage the primary date relied upon was 1 June 2015 in that the claimant argued that the duty was triggered on that date at the latest.

10. The legal framework set out in Mr Brown's written submissions which are attached, was agreed by Mr Mulqueen to be an accurate account of the legal framework. In view of this we do not set out in this decision a comprehensive account of all the legal principles but highlight below the principles and extracts from the authorities which are particularly relevant.

11. The issue of whether or not the termination of contracts that occurred amounted to dismissals or resignation or mutual termination, is not relevant to the question of whether or not, at the time the duty was triggered, the requisite number of redundancies was proposed. The question of whether the terminations amounted to dismissal is only relevant to whether or not individuals could include themselves in the group to benefit from any protective award which might be paid following any declaration that one is payable. This was the agreed legal position by both sides.

12. In the written submissions for the claimant there is discussion of the scope of the domestic legislation and the scope of the Directive. Mr Brown confirmed that the claimant does not allege that there was a failure to implement the Directive adequately. Mr Brown's point was that the domestic legislation could be read to incorporate the apparently wider scope of the Directive. In oral submissions Mr Brown confirmed that this was not a key point in the case given the way the evidence unfolded at hearing. We note that the domestic legislation was amended to implement the wider scope of the Directive and some of the authorities referred to by the parties predate that widening of scope. In view of our factual findings this is not an issue in this case.

13. In the case of **Sovereign Distribution Services Ltd v Transport and General Workers' Union [1990] ICR 31(EAT)** the following dictum outlines the rationale for the collective consultation provisions. The legislative provisions referred to are replicated in ERO.

"It is important in looking at this part of the Act to bear in mind that it is headed "Part IV Procedure for handling redundancies." As everyone knows redundancies can bring trauma to the individuals concerned. Although in many cases the decision is forced upon management, nevertheless the duty cast upon employers by these sections provides the only opportunity for employees through their recognised trade unions to be able to seek to influence the decision and to put forward other ideas and other considerations, not only as to the overall decision, but as to those individuals who should be made redundant and various aspects which may be material. It is therefore, in order to give them that opportunity, that section 99 was brought into being." (page 33 at F and G) (Emphasis added).

14. In the case of **Dewhirst Group V GMB Trade Union EAT [2003]** the following dicta outline the features of fair consultation in the context of large scale redundancies:

"25. The authorities makes clear that the duty to consult is a duty to hold meaningful consultations. We refer to the frequently repeated dictum of Hodgson J in R – v – Gwent CC ex parte Bryant [unreported] cited in, among other places, Middlesborough Borough Council – v – TGWU:

"Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation."

H H Judge Clark put the matter in this way (see paragraph 28):

"Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

We also bear in mind the approval by Glidewell L J of a passage in Harvey in R – v – British Coal Corporation Ex parte – v – Vardy [1993] IRLR 104:

"I agree with the passage in the current edition of Harvey on Industrial Relations. In paragraph 1365 the learned editor says:

'In substance, the Act places on employers an obligation to plan any redundancy programme well in advance, and to do so in conjunction with the unions where appropriate. Although it is mainly directed at larger-scale redundancies, it should be emphasised that its provisions also apply where the employer proposes to make even one single employee

redundant … However, according to the interpretation so far placed upon the Act by the English courts, the obligation is not so much to consult with the unions on whether there should be redundancies, but rather to consult on how to carry out any redundancy programme which management deems necessary." (paragraph 25).

15. In the case of **Scotch Premier Meat Ltd v Burns [2000] IRLR 642(EAT)** the following dictum sets out the rationale for regarding voluntary redundancy as dismissal:

> *"Given we consider that it is the duty of a good employer facing a redundancy situation in the interest of the whole workforce to consider as at least one option, voluntary redundancies, and call for such, given again that those who accepted such a procedure are benefiting the remaining workforce to some extent, unless as happened here, all are eventually dismissed. It would discourage, in our opinion, that voluntary redundancy being effected or taking place if by so doing the employees lost rights they would otherwise have if they were compulsorily dismissed. We consider it is the proper approach of this tribunal and the employment tribunal to assess the matter in the way most favourable to the retention of rights that the employees have and there can be no greater right than a right to claim unfair dismissal if the redundancy procedure is inadequately handled by the employer."* (paragraph 23).

16. In the case of **Optare Group Ltd v TGWU [2007] IRLR 931 EAT** the Court emphasised that the issue of whether a dismissal occurred is a question of causation as set out in the following extracts:

> *"The question of causation can properly be expressed as being "who really terminated the employment" or "who was responsible for instigating the process resulting in the termination of employment". Where people volunteered because invited to do so in circumstances where the employer sought volunteers to mitigate the impact of redundancies, and such facts were established, it would be wrong to go further and investigate each volunteer's individual psychological process and/or motives for volunteering. If it is clear that the employer in an existing redundancy situation has issued an invitation to employees to volunteer for redundancy, that certain of them did so and that, as a result, their employment terminated then that is enough, having regard to the guidance in Burton, Allton and Johnson Ltd v Peck, approved in Birch v University of Liverpool, to enable the tribunal properly to conclude that the cause of their termination was their volunteering to be dismissed. That is not to identify and apply a rule of law, but is a common sense application of the principle of causation to factual situations which arise repeatedly in industry."* (headnote).

> *"within the operation of a redundancy procedure, those who volunteer for redundancy will normally be regarded as having volunteered to being dismissed and so will have been dismissed. It points out that this analysis was commented favourably upon by the EAT in Birch and was, in turn, approved and adopted by Lord Justice Ackner in the Court of Appeal."* (paragraph 25).

17. The following extracts from **Harvey** are particularly relevant to this case:

On the meaning of redundancy **Harvey** states as follows:

> *"'Redundancy' for this purpose is very widely defined. A redundancy is a dismissal for any reason not related to the individual employee concerned, or for a number of reasons none of which is related to the individual concerned (TULR(C)A 1992 s 195(1) as substituted). 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 payments scheme. The label is unimportant. The initiative may be dubbed re-organisation, restructuring, regrading, redistribution, streamlining, automation, computerisation, slimming, demanning or a dozen different things. The central question is whether the individual has simply been sacrificed to the needs of the organisation". (paragraph 2524 Division E).*

18. In the case of **Susie Radin Ltd v GMB and Others [2004] EWCA Civ 180** (Court of Appeal) the following summary in the headnote outlines the factors for a tribunal in assessing compensation for failure to consult:

> *"Employment tribunals should have the following matters in mind when deciding in the exercise of their discretion whether to make a protective award and for what period:*
>
> *(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of that breach.*
>
> *(2) Tribunals 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 the availability to the employer of legal advice about his obligations under s.188.*
>
> *(5) How the length of the protected period is assessed is a matter for the tribunal, 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 tribunal considers appropriate".*

19. In the case of **UK Coal Mining Ltd v National Union of Mineworkers [2008] ICR** the EAT emphasised the punitive nature of the remedy and stated that it was no answer to such a claim to say that consultation would have been utterly futile:

*"**46** The Court of Appeal has held that this is a penal provision and that "The required focus is not on compensating the employees but on the default of the employer and its seriousness. It is that seriousness which governs what is just and equitable in all the circumstances": per Peter Gibson LJ in Susie Radin Ltd v GMB [2004] ICR 893, para 26. Furthermore, as his Lordship made clear in the same case, at para 43, it is no answer to a failure to consult collectively (as it might be in an unfair dismissal case) that any such consultations would have been utterly futile.*

*Furthermore, the mutual trust which needs to exist between the employer and the Unions, if there are to be successful consultations, is put at risk if the Unions have cause to believe that they have been given false information". (*paragraph 46).

20. **Harvey** states in relation to remedy:

*"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' (s 189(3)). Putting it crudely, either the employer consults before dismissing any employees (so that they get their normal wages during the consultation period) or else, if he dismisses prematurely, he risks being condemned to pay them a broadly equivalent amount under a protective award. He pays his money and he takes his choice, but pay his money he must. A protective award is thus a collective award. It is issued to the complainant for the benefit of all or any relevant employees in respect of whom the employer has failed to consult (Smith v Cherry Lewis Ltd [2005] IRLR 86, EAT). Its focus, however, is emphatically not on compensation for them: the focus of a protective award is on the default of the employer and its seriousness (**GMB v Susie Radin** at para 26)."* (paragraph 2739 Division E).

SOURCES OF EVIDENCE

21. The tribunal had written statements and oral evidence from the following witnesses:

For the claimant:

(1) Ms Katharine Clarke
(2) Ms Linda Moore
(3) Ms Goretti Horgan
(4) Professor John McCloskey
(5) Dr Suleyman Nalbant
(6) Dr Nuala Rooney
(7) Dr Ian Taylor

For the respondent:

(1) Professor Alistair Adair
(2) Mr Peter Hope
(3) Mr Ronnie Magee
(4) Mr Andrew Caldwell

(5) Professor Liam Maguire
(6) Professor Jan Jedrzejewski
(7) Dr David Barr
(8) Professor Paul Carmichael
(9) Professor Ian Montgomery
(10) Professor Carol Curran
(11) Ms Ann Newland (written statement only by agreement).

22. The tribunal was referred in detail to documentation amounting to approximately 900 pages.

FINDINGS OF FACT AND CONCLUSIONS

23. Set out below are the tribunal's primary findings of fact drawn from the extensive evidence which was presented. It is important to note that this decision does not record all the competing evidence on all points, but concentrates on the principal findings of fact and conclusions drawn from the extensive detailed evidence which was provided.

Amendment issues

24. There was an application to amend the response form at the outset of the hearing by Mr Mulqueen. The application to amend related to an argument by the respondent that the meaning of "establishment" meant that the four campuses in issue in the University should be treated separately rather than as one establishment and that the consequence of this was that there was no duty to consult at all in view of the numbers involved. As Mr Mulqueen decided after submissions to withdraw the application for an amendment at the outset of the hearing, the case proceeded on the agreed basis that the tribunal could look at the University as one establishment albeit that there were four campuses involved.

25. Mr Mulqueen made the point that the claimant was restricted in the case it could present to the case outlined in the interlocutory process prior to the hearing in relation to the date relied upon for the triggering of the duty to consult. In looking at this point we note that the interlocutory process in tribunal proceedings is not akin to a pleadings process in the High Court. The point of the process is to ensure that neither side is taken by surprise by a key point being raised by the opposition.

26. The evidence presented in tribunal and the cross-examination was in relation to the whole process leading up to the termination of employment of a large group of employees and there was no question of the respondent being taken by surprise or of different evidence being required due to the refinement of the claimant's case as the case unfolded. We accept Mr Brown's point that documents emerged and there were answers to cross-examination questions which refined the claimant's case further and meant that in oral submissions one date was the primary date relied upon rather than the three which were proposed during the interlocutory stage.

27. We note that the claim form did state as follows:

> *"The Respondent dismissed 140 members of staff on the 30th April 2016. This came about as a result of the Respondent having to make cutbacks following the announcement of cuts in government funding in October 2014.*

On foot of this the Respondent embarked on a course of action starting in or around January 2015 to plan a reduced budget and for corresponding reductions in staff. This clearly defined business decision that fewer staff were needed gave rise to the existence of an impending redundancy situation and therefore the obligation to consult with the recognised Trade Unions under Article 216 of the Employment Rights NI Order 1996, was triggered at that time.

The Respondent had a statutory obligation to consult the recognised Trade Unions at an early stage of this process and it clearly did not do so in the period between January 2015 and August 2015".

28. In our judgement this encompasses the case which was presented.

29. We therefore find in this case that the respondent had sufficient information on the claimant's case in advance of the hearing to enable it to gather and present the relevant evidence in rebuttal. We also find that this is not a case where the claimant needs to amend the claim in order to rely on a specific date following the evidence.

30. If we are wrong in this we grant the application made by Mr Brown at oral submissions stage for an amendment to the pleadings to enable that date to be relied upon. We note that the authorities state that an amendment can be made at any stage in proceedings including at the conclusion of the case. We invited Mr Mulqueen to make specific submissions on the application to amend and in particular on the balance of hardship test which must be applied to any amendment application which is made at any stage of proceedings. Mr Mulqueen declined to make any specific submissions on this point.

Background

31. This case concerns the circumstances which led to a reduction in teaching and other staff in the Ulster University whereby 143 staff left in April 2016.

32. The claimant is a recognised Trade Union which at the relevant time represented 600 or more members in the respondent University.

33. A principal source of funding for the respondent was the budget given by DEL each year which was communicated in funding letters.

34. The respondent's primary submission was that the duty to consult did not arise at all essentially because no dismissals were proposed because a voluntary scheme was envisaged. In this regard the respondent relied on its contention that no dismissals actually took place. If the tribunal found against the respondent on that point, it was common case between the parties that there was a proposal at some point during the relevant period to make redundant 20 or more staff within a period of 90 days and, as a consequence, the duty to consult was triggered at some point. In contention between the parties was the date the duty to consult was triggered, whether any consultation that took place was timely and sufficient, and whether any dismissals actually took place.

35. A key to main abbreviations and acronyms is as follows:

BRG - Budget Review Group. This was a Management Sub-Group set up by the Senior Management Team in April 2015 to carry out planning for the budget cuts which were recognised to be imminent following three letters from DEL in 2015 which related to funding cuts.

JNC - Joint Negotiating Committee

JUCNC - Joint Trade Union Consultative and Negotiating Committee

REF - Research Excellence Framework. This was a biannual peer review scheme which graded research and was a key indicator of a University's ranking and was therefore very influential in relation to funding and numbers of students.

VSS - Voluntary Severance Scheme. This was the title given to the scheme which was devised by Management and which Trade Union side contended was a redundancy scheme.

36. Senate and Council are the two governing bodies in the University.

37. Professor Adair, who was Acting Pro-Vice-Chancellor at the relevant time, gave evidence of the planning process which takes place annually in the University and stated that the respondent planned annually when they knew the level of funding and when, amongst other things, courses which were underperforming were identified.

38. We find that the planning in 2015 (being the year in issue in this case) was, however, different in that the funding cut was of a bigger magnitude than previously and came on the back of several years of funding cuts some of which had been absorbed without staff cuts. This did not therefore involve a case of re-organisation to deal with falling student numbers as had happened in previous years. The numbers and funding issues were such that substantial numbers of staff would have to go and this was well recognised from early on. The "scenario planning" carried out by senior managers in November 2014 outlined the likely effect of a loss of 50, 100 or 150 students.

39. In April 2015 (after the third letter that year from DEL relating to funding pressures) Professor Adair and the senior management team established a sub-committee named the Budget Review Group (BRG) to develop proposals to deal with the loss of student and staff numbers which would result from the anticipated further reduction in budget from DEL.

40. The terms of reference of BRG were outlined in a report to Senate and it was clear from that that one key driver in the development of proposals was the REF process and the need: *"to be able to invest in areas of strength in delivery of our teaching and research objectives while divesting from areas of weakness".* The final funding letter from DEL was therefore not crucial to that exercise which clearly envisaged a loss of staff.

41. The complexity of the decision making is shown by the "metrics" which had to be considered. The "metrics" are the measures by which the "success" of the University was measured and had an important effect on funding. These metrics

included: the REF scores; the National Student Survey; employability rates; UCAS tariff rates; and student retention rates. Other important considerations were, firstly, the need to take account of 4 campuses and to maintain balance in relation to courses and numbers across them, and, secondly, the issue of funding conditions connected to external funding received from organisations other than DEL.

42. A paper was produced by a senior manager following the BRG meeting on 21 April 2015 and this outlines the key strategic objective from an early stage in relation to boosting the University's REF scores:

> *"… we need to return AT LEAST 100 extra academic staff in REF2020 functioning at the 3* and 4* level. One way to do this is to support those staff who almost made it into REF2014 but either lacked the quality or volume of outputs. Another way is to invest in new REFable staff through new posts or through replacing leavers with REF returnable staff. I would recommend a mixture of both approaches".*

43. Later in the same paper the author states as follows:

> *"To do so, we would need to double the amount of research activity and maintain the quality levels as within our top 10 performing Research Institutes. We do not wish to lose those staff who are producing world leading and internationally excellent research. Furthermore, we do not wish to lose those staff who are capturing substantial research grants from prestigious funding bodies that pay overheads or those staff who are having a research impact as defined by HEFCE.*
>
> *However, we have staff in Research institutes that are underperforming either in terms of grant capture or REF profile. Unless, these staff can prove that they can do so or have the potential to do so, they must be removed from the research institute and replaced by higher performing staff. In addition, there are some staff in Schools who have a poor record of teaching quality and research quality. They must be targeted for redundancy and replaced with REFable staff who will also be high quality teachers".*

44. It was therefore clear from the evidence that, when it was evident that there would definitely be job losses, senior managers took the decision that this could be used as an opportunity to strengthen the respondent's REF research profile by concentrating on certain areas of research to target perceived weaker staff and areas of research and to recruit staff who could contribute to the research profile and thus affect the University's ranking in a positive way. This was the REF process whereby research was submitted to that process periodically and led to a REF score for the University. The claimant did not know that REF considerations were part of the decision-making until after these proceedings were launched by the claimant. From our assessment of the evidence as a whole we find that the inclusion of REF considerations in this process was deliberately kept from Trade Union side.

45. On 1 June 2015 BRG decided on what they termed the "big bang". This meant that the job losses which had to take place because of the funding cuts would take place in one go. We find that it was therefore clear on 1 June 2015 that large scale redundancies would take place at one time.

46. On 31 August 2015 a joint meeting of Senate and Council (the governing bodies of the University) took place and they gave approval for the detailed BRG proposals which had been developed over the previous months relating to the closure of courses and schools.

47. Clearly very difficult and complex decisions were taken by the Deans in relation to closure of some faculties entirely (such as Modern Languages), the closure of some courses, and the reduction in the number of undergraduate students. The cuts of undergraduate numbers were such that it was inevitable that there would be a consequent loss of numerous academic jobs.

48. We do not accept any suggestion by the respondent's witnesses that the scenario planning by BRG was part of the normal planning which was done annually. The DEL funding letters were dated 7 February, 30 March, 15 April and 30 July 2015. The funding cut was of such a magnitude that everyone knew that this would lead to large scale job cuts. At the latest, by 1 June 2015 the issues for discussion were in relation to which members of staff would go rather than whether a large number of staff would go.

49. It was clear from the documents that the position from DEL funding was that there would be large scale redundancies and everyone knew that the situation could only get worse. We do not therefore accept the respondent's case that it was a requirement for the final funding letter to be received from DEL in July 2015 before matters could be put to the Trade Union. That funding letter contains a caveat whereby it could change even in-year so that further cuts might result. That is what happened in 2015 in that in-year cuts were imposed. There was no suggestion at all in the evidence to us that there was any possibility of the situation improving.

50. We therefore reject the respondent's case that any discussions about redundancies which led to the "voluntary" VSS scheme meant that there were no proposals to make redundancies. In essence the respondent argued that because there were no dismissals in prospect that there was not a proposal triggering the duty to consult. We reject that argument and find that redundancies were proposed which triggered the duty to consult. As set out below we also find that the terminations that ultimately resulted were indeed dismissals and that that issue is relevant solely to remedy.

Date duty to consult was triggered

51. The authorities do not stipulate a specific time when a proposal crystallises and triggers the duty to consult. A 'proposal' for these purposes needs to be more than a possibility and less than a probability, or a decision. In this case, the issue is whether, and when, there were concrete enough proposals to make the requisite number of redundancies which should have been put to the Trade Union for any ensuing consultation process to have any meaning. We have no hesitation in deciding that there was at some point a proposal to make 20 or more staff redundant within the requisite period and that the duty to consult was thus triggered. The next issue is for us to identify the date upon which it was triggered.

52. It was agreed by both counsel that our initial focus had to be in on the date of any proposal and whether at that date 20 or more redundancies were in prospect and

that those redundancies would be made within a 90-day period.

53. The numbers in issue and the period of 90 days were not in contention between the parties as the respondent agreed that (if its primary submission that the duty did not arise at all was rejected) a proposal existed at some point in relation to the requisite number of redundancies, albeit that the respondent's case was that the proposal crystallised at a later date than 1 June 2015.

54. At the outset of the case the dates relied upon by the claimant's side as to when the duty to consult was triggered were January 2015, early April 2015 or 1 June 2015. The claimant ultimately relied in submissions on 1 June 2015 as the latest date that the duty to consult was triggered. The respondent relied on 14 December 2015 being the date when the HR1 form was sent to DETI to put them on notice that multiple redundancies were in prospect. In a meeting with Trade Union side on 31 August 2015 Mr Magee stated that his discussion in the meeting of 31 August 2015 was the beginning of consultation and that was the date inserted by the respondent in the HR1 form. The HR1 form is a form which the respondent was obliged to send to DETI to alert them to proposed large-scale redundancies.

55. The HR1 form was sent to DETI by Mr Caldwell on behalf of the respondent in December 2015 and when questioned on this he could not indicate why it was sent at that point. It was entirely unclear to us therefore as to how that form related to whether or not a proposal had crystallised unless it related to a proposal date on 31 August 2015 which was the date relied upon by Mr Magee at the time and was the date inserted in that form. That date was when the BRG proposals were voted upon by Senate and Council. We note that the document outlining the proposals was not actually given to the Trade Unions until 11 September and no reason was given to us for this delay.

56. Scenario planning had continued under BRG and had culminated in proposals by the Deans in a paper produced after BRG meeting in April 2015

57. The respondent's answer to any delay in the scenario planning amounting to a "proposal" was three-fold:

    (1) That they had to wait for the DEL letter. As set out below, we reject that point because the decision-making process did not depend on the final funding letter from DEL particularly as REF considerations were a key driver in the decisions being made about who to target for redundancy.

    (2) That they were refining the closures and reorganisation. As set out below we find that that is precisely what the Trade Unions should have been involved in at a formative stage.

    (3) That Senate and Council had to approve the plans and this occurred on 31 August 2015. As outlined below we reject that point.

58. We prefer the claimant's submissions and find that the duty to consult was triggered at the latest on 1 June 2015 for the principal reasons set out below.

59. The point made by the respondent's witnesses was that the respondent had to wait for the final funding letter from DEL before they could be sure that their plans would

become a set of proposals. We reject that point. It was clear from the documentation and evidence that funding letters gave details of the funding for the forthcoming year. They were however subject to the caveat that funding could change and this did in fact happen when funding was cut during the funding year in 2015. The fact that funding might change therefore was not definitive in relation to whether or not the scenario planning became a proposal.

60. Virtually nothing of substance changed in the paper which was put to Senate from the date it was produced many months before by the Deans aside from the DHSSPS-funded Speech and Language Therapy course.

61. The authorities set out in **Harvey** are clear that the decision-making process which was alluded to in the evidence in this case, is not a bar to the duty to consult being triggered. It is not the case that the final decision-making body must ratify proposals before the duty to consult is triggered. The legal position is that HR managers (in this case the Deans and senior managers) have delegated authority to formulate proposals and those proposals can crystallise triggering the duty to consult before they are signed off by the decision-making body. We find that there was therefore no requirement in this case to wait for the Senate and Council decision on 31 August 2015 to enable the proposals to amount to proposals in law in relation to the duty to consult.

62. It is our finding that the duty to consult crystallised, at the latest, on 1 June 2015 given the history of funding cuts and cuts to student numbers. By that date it was clear, not only that substantial job cuts would be necessary and that this would involve a large number of redundancies at one time, but the faculties, schools and courses to be targeted had also been finalised.

63. Mr Brown put forward a point that the closure of schools amounted to the closure of a workplace and that the duty was triggered once that decision was made in line with the **NUM** case. We find that it is not central to our decision-making to decide on this point given our findings and conclusions on the relevant dates. If it is necessary for us to determine this point we find that the closure of a school was analogous to work of a particular kind no longer being required. This is an element of the definition of redundancy which is referred to elsewhere in ERO. It is our view that this is a better conceptual fit rather than the concept of closure of a workplace as, in this case, all of the campuses remained open albeit in a slimmed-down form.

Engagement with TU side

64. The decision to make redundancies is a management decision. The method by which the redundancies would be achieved is the focus of any consultation process. The rationale behind a consultation process is that when there are proposals to make redundancies then the Unions must be involved in meaningful consultation with a view to reaching agreement. If agreement is unlikely or is ultimately not reached, that is not to the point.

65. There were some references in the evidence to a reluctance of the Trade Union to be involved in redundancy exercises in the past. There was also reference to the Trade Union's refusal to go to a meeting in September shortly after they received the written proposals on 11 September 2015. This appears to be an argument that it would have made no difference if they had consulted. This is irrelevant to our

deliberations on liability. There is a statutory obligation to consult and any prior non-participation by the Trade Union is not an answer to any failure to comply with that statutory obligation.

66. The respondent's case in essence was that if the duty was triggered the respondent then tried to engage with the Trade Union. The respondent's case was that it was the Trade Union which frustrated the process by not attending a meeting arranged for 16 September 2015 and it was at that meeting that detailed consultation would have occurred. We reject that argument. By the time the Trade Union refused to engage with the respondent they were justified in our judgement to do so given the following:

(1) They were presented with a fait accompli ie finalised detailed decisions, which in reality could not be changed, rather than proposals which could be consulted upon. The proposals document which had been formulated following input from the Deans and senior management team and BRG was sent to the Unions on 11 September 2015 but was in final form at the end of August 2015 and was largely unchanged from its form in January 2015.

(2) VSS had already been formulated and was opened to staff from 1 September 2015. This was a redundancy programme into which the Unions had no input. The only change of substance was that the Speech and Language Therapy course was not closed due to a veto by DHSSPS which, as the funding body for that course, had to be consulted in or around July 2015.

(3) There was no prospect of changing the decisions that had already been made and ratified by the Senate and Council following a lengthy period of refinement by the Faculties, Deans and senior management.

(4) The protests of the claimant Trade Union and its requests for information and consultation had been rebuffed to the extent that they had been actively misled about the extent of the planning and the decisions that had been made without reference to them.

67. On 2 September 2015 the claimant Trade Union requested that VSS be postponed pending receipt of information:

> *"… we would request the following: a full business case for the proposals overall, with full information regarding the effects the proposals would have on numbers of staff and students and the balance of curriculum on the four campuses of the university; a copy of the Equality Screening; your plans to consult with the trade unions on the voluntary severance package, or your confirmation that this is being imposed rather than collectively agreed.*
>
> *We would further request that the proposed timeframe be amended in order to fulfil management's responsibility to engage in meaningful consultation. It is impossible to carry out consultation about the proposals as a whole in good faith parallel with meetings with individuals to discuss their potential exit. We would therefore request that the proposed one to one meetings do not commence until after the 90 day consultation period has elapsed. It is in the best interests of our members and of future industrial relations at Ulster*

for us all to work through this situation according to law and best practice, and we very much hope to be able to report to our members and to the media that we are working closely and meaningfully with the management on avoidance, reduction and mitigation of the redundancies".

68. On 4 September 2015 Mr Magee's email in response to the Trade Union states as follows making reference to his meeting with them on 31 August 2015:

"In terms of the point re Consultation, I wish to clarify the question asked at Monday's meeting by Linda, if memory serves me right, was … "is this the beginning of formal consultation with the trade unions?" And I responded yes it was. Consultation with trade unions is not time bound. What is important in respect of consultation with trade unions and staff in redundancy situations is that when an employer selects individuals for redundancy and specifically the date by which the redundancy will take effect then it is important to comply with the statutory provisions and notice period and consultation. It is important to remember even at this early juncture that the University has not selected any person for redundancy at this point and no at risk letters have been issued or served to anyone".

69. We do not in these circumstances criticise the Trade Union for refusing to engage further with the employer. Their position was that they refused to lend legitimacy to a sham process. Using the terminology in the legislation and authorities we find that it cannot be said that the Trade Union was presented with plans which were at a formative stage.

Length of consultation period

70. The 90-day period for consultation is a minimum period set out in the legislation. The authorities are clear that this can be increased depending on the circumstances and the complexity of the redundancy exercise.

71. In this case we would have expected a substantial period of consultation in excess of 90 days prior to the proposed date of terminations because of the complexity of this redundancy process which related primarily to the following matters:

(1) The fact that 4 campuses were involved, the fact that some courses were spread across several campuses, and the requirement to have equitable campus distribution;

(2) The "metrics" in issue (ie the various and diverse indicators used to rank Universities) in relation to the University's ranking;

(3) REF considerations in particular;

(4) Funding considerations (aside from the DEL funding), for example the DHSSPS funding and the Peace Funding from the USA;

(5) The limited scope for redeployment as there was a recognition by everyone as at 31 August 2015 that redeployment opportunities were very limited indeed.

72. It is our finding that the Trade Union should have been involved in this process at an early stage shortly after 1 June 2015 for consultation to have any meaning.

Timeliness and sufficiency of information

73. The issue of timing and whether consultation was genuine with a view to reaching agreement are to a large extent intertwined in this case. The Trade Union was presented with a fait accompli with insufficient time and insufficient information for them to formulate counter proposals. The fact that REF was a key consideration in deciding who to target was also in our judgement deliberately withheld from Trade Union side.

74. Proper consultation involves consulting on ways of avoiding dismissal, on reducing the numbers to be dismissed and on mitigating the consequences of dismissal with a view to reaching agreement. The Trade Union has to be provided with enough information in order for that to be meaningful.

75. In this case the Union's request for information on 30 April 2015 stated:

> *"Over the past week we have been in contact with members in several different schools who tell us that they have been informed by managers at various levels that courses in their schools are ear-marked for closure, whole schools may close and job losses in certain areas are 'imminent'. These members are obviously extremely anxious about their futures, professionally and personally.*
>
> *UCU is concerned that there appears to be a failure to consult with the recognised trade unions representing the affected staff. You will be aware that under Part XIII of the Employment Rights Order 1996 you are required for the purposes of redundancy consultation to advise of the reasons for proposals to effect job losses, the numbers and descriptions of employees whom you propose to dismiss, and to enter into meaningful consultation about avoiding dismissals, reducing the number and mitigating the consequence of dismissal.*
>
> *In circumstances where our members are being told courses are to close UCU cannot see how this is not a redundancy situation.*
>
> *Please update us urgently on the latest situation. At best we would consider it a breach of trust should we once again learn of developments through the media, which as you are aware has happened on two occasions in the past year. At worst, we are concerned there might be a breach of statutory consultation obligations. You will understand that we need to be in a position to reassure our members. Given the urgency of the matter, we would appreciate your response in writing at the earliest opportunity".*

76. This was met the next day with a response from Mr Magee stating that:

> *"I can confirm to you that the Senior Management Team have not yet received any proposals from Faculties re course closures or redundancies, potential or otherwise. What is happening is that faculties are beginning to examine the potential and that is why conversations are beginning to happen.*

However obviously as per our existing protocols with the recognised trade unions, when proposals emerge then I will sit down with you to discuss those proposals.

I trust this is useful to you".

77. By that stage the Deans and senior managers had been analysing the figures and statistics in order to formulate detailed proposals driven by REF considerations. We therefore find that the Trade Union, far from being consulted was actively misled, when they sought information after hearing rumours that there were to be job cuts. Mr Magee's email to them stated that there were no plans when in fact firm decisions had already been made to close courses and schools and these decisions for the most part were ultimately implemented.

78. In the respondent's own policy on redundancy entitled *University of Ulster Redundancy Policy and Procedures* it states as follows in relation to collective consultation:

> *"When considering restructuring and/or reductions in staffing levels in a work area, which could lead to redundancies, the University will consult and enter into discussion with representatives of the Recognised Trade Union(s). The issues which make change necessary and the timescale for consultation will be clearly outlined at that stage to the relevant Trade Union. The timescale will allow Recognised Trade Union(s) time to consider proposals, seek views and make representations. This timescale will depend on the particular constraints of each case and these constraints will be clearly highlighted in the consultation". (emphasis added).*

79. The University's own redundancy policy therefore states that consultation is required when redundancies are under consideration. This underlines the level of obligation placed by the respondent on its senior managers in relation to assessing when it was proper for them to start consultation. This point is also relevant to remedy.

80. We therefore find that the Trade Union could have been given information at a much earlier stage and certainly not much later than 1 June 2015 when the duty to consult was triggered. The fact that the respondent did not do so meant that they failed to consult in good time.

81. The thrust of the evidence presented by the respondent was that the trade Union side was kept informed generally and that consultation and engagement was ongoing particularly after 31 August 2015 following ratification by the Senate and Council of the proposal document produced by the Deans.

82. However the following email sent from Mr Magee on 16 September 2015 gave inadequate information and did not reveal that REF considerations were the key driver in relation to who was chosen to be targeted for VSS:

> *"You highlight two aspects of the proposals in which you are seeking additional detail i.e. REF results and student/staff ratios. The REF results are in the public domain and requests for staff student ratios can be provided of course, however a review of the rationale provided at both University and*

Faculty levels reveals the impact of the reduction in MaSN together with financial cuts and the future strategic direction of the faculties are the dominant factors in these decisions. Today's requested meeting of the JUCNC is to facilitate you as union representatives to explore this further with each Dean as part of the consultation process".

83. In the same letter Mr Magee rejects the request that VSS be postponed.

> *"Your demand that the 'VSS is postponed with immediate effect until the employer formally notifies the recognised trade unions is commencing its statutory obligations to consult for 90 days and exhausts that process' again shows a clear misunderstanding of the legislation to which you refer. Let me be clear that the University is in a voluntary process at the moment. There is no question of postponing this process and as you are well aware, the consultation process has already commenced. The 90 days referred to in the legislation relates to the period of consultation prior to notice to terminate employment is issued. The University has not issued any such notice to date, however, although we are currently in the consultation process with the trade unions, this does not prevent the University from fulfilling its obligations to also consult with individual staff in areas affected by the proposals which includes making them aware of the options available to them, including voluntary redundancy".*

84. We find the respondent's failures to amount to egregious failures especially in circumstances where one key consideration in the decision-making process (before the Trade Union were involved in any way) was that staff should be targeted according to REF considerations. The purpose of this was to get rid of perceived weaker staff and to boost the REF profile in readiness for the REF 2020 score. The Trade Union did not know about this key point until after these proceedings were issued in the tribunal. In submissions the respondent's position was that this information was not required information and they therefore did not have to share it with the respondent. We reject that argument.

85. We find that the REF element of the decision-making was relevant information under Article 216(6)(a) and (d) as this related to the interlinked reasons for the proposals to make redundancies and the proposed method of selecting the employees who might be dismissed. This information also related to Article 216(6)(b) as it concerned the numbers and descriptions of employees whom it was proposed to make redundant.

86. We therefore find that failure to provide that information was, of itself, a serious failure to comply with the obligations to consult as set out in ERO once the duty was triggered as this was information which was central to the decision-making and to the formulation and implementation of the VSS Scheme.

Dismissal

87. A key issue is whether or not those who availed of VSS were dismissed or whether they left by way of consensual termination. The authorities are clear that the presumption is that, in a voluntary redundancy situation, those who take voluntary redundancy are dismissed. It was agreed that the dismissal issue is relevant solely

to the issue of identifying the group of individuals who can expect a remedy ie only those who were actually dismissed on a specific date.

88. We have no hesitation in finding that the VSS scheme was a redundancy scheme and that those who took it were dismissed. We so find for the following principal reasons:

(1) The VSS scheme emerged in the context of proposed redundancies. Everyone in management recognised that substantial numbers of staff would have to go because of the funding gap and the purpose of VSS was to achieve that quickly by targeting staff in order to further the respondent's strategy as regards strengthening their REF profile.

(2) If the VSS did not achieve enough numbers then compulsory redundancies would inevitably result.

(3) The respondent's case, that this was a voluntary severance scheme, was fatally undermined by the fact that, rather than opening VSS to all staff, particular staff were targeted and invited to make applications for VSS.

(4) This targeting was underlined by the fact that in one-to-one consultations those staff were told that if they did not take VSS they would lose their jobs anyway or schools would close and they would then receive a statutory redundancy payment which was much lower than the payment applicable under the VSS. We find that this clearly introduced pressurisation or coercion to the process and we therefore find that the process could not be compared to the early retirement scenario of consensual termination referred to in **Birch**.

(5) Staff had to consider whether to go for VSS in a vacuum as no information had been forthcoming to their Trade Union representatives prior to the opening of the VSS scheme on 1 September 2015.

(6) The respondent's senior managers themselves regarded it as a redundancy scheme as the terminology in a number of documents reflects that belief and understanding on their part.

(7) Once they became aware of VSS (on the day it was offered to the staff concerned) the relevant Trade Unions, UCU and Unite, made pleas to open the VSS to all staff and these were immediately rejected.

89. The claimant in correspondence to the respondent termed the targeting as "putting a gun to the head" of the targeted staff. We agree with that assessment. In no way was it consensual for individuals to be targeted in this way and then to be told in one-to-one meetings that if they did not take the offer that they would go anyway but with a much reduced payment.

90. The fact that it transpired that statutory redundancy was not paid to the three staff who were made redundant compulsorily is not relevant to our deliberations on dismissal. Similarly the fact that the terms of VSS were generous is irrelevant to the issue of whether the staff who took VSS were in fact dismissed.

91. The **Birch** case was relied upon by the respondent on this point of whether the terminations were dismissals. We note that the **Birch** case concerned a retirement scheme and we find that a key point of distinction is that there were several references in that case to there being no question of pressurisation or duress when staff were assessing whether to go for the retirement scheme. In the current case there was clearly duress placed on the staff who were targeted. This is a case where volunteers for redundancy were not only "volunteering for the firing squad" (as termed in **Harvey)** they were being told "volunteer or else". This was coercive.

92. There was no need for such a short timescale between VSS opening and the irrevocable acceptance of it by individuals. The intention was to actually effect the redundancies as at 30 April 2016 and we conclude that the aim of imposing a deadline of 31 January 2016 was probably to put individuals under pressure to accept VSS.

93. As a result we find that the 143 staff who took VSS and left in April 2016 were dismissed.

Bargaining Unit

94. We find that that the 143 staff who took VSS and left in April 2016 constitute the bargaining unit and include the Professors. Our principal reason for so finding is that in the respondent's own replies they outline the Professors as constituting members of the relevant bargaining unit. It was Mr Magee who suggested that Professors were not included. This was at odds with the replies, was raised for the first time in his evidence and we reject it given our adverse view of his credibility generally.

Credibility and motive

95. The respondent made the point that there were issues with the credibility and motivations of several of the claimant's witnesses. The respondent further made the point that the fact that more people were not called to give evidence to us on the circumstances and reasons for them taking the VSS was something from which we should draw an adverse inference of some sort.

96. We reject the respondent's arguments on these points. We find that the credibility points made by respondent were not central to our assessment of the claimant's witnesses given the nature of this case. In other words, the duty to consult, the date it was triggered, and the timeliness and sufficiency of consultation did not depend on the credibility or otherwise of those witnesses. The issues of whether dismissal occurred was determined by us on the documentary evidence and that of the respondent's own witnesses and, in the event, the credibility of the claimant's witnesses was not key to that assessment.

97. Credibility however was relevant in relation to the evidence of Mr Magee who averred that in the one-to-one consultation meetings staff were not told that if they rejected VSS they would lose their jobs anyway and would only receive statutory redundancy. We reject Mr Magee's account as it was at odds with the documents and with the evidence of the respondent's other witnesses who actually conducted the one-to-one meetings. Mr Magee was not in attendance at any of them. This tainted Mr Magee's reliability and credibility. We also found Mr Magee to be

generally evasive and lacking in credibility in answering questions. His credibility is relevant to any points in mitigation as regards remedy.

98. We find that Mr Magee also misled the Unions when they were asking about information when he stated that the Deans had not considered certain points when they had in fact made concrete proposals to close some courses entirely, to close some courses at certain campuses and to make staff redundant following a closure of schools and faculties

99. We accept the evidence of Professor McCloskey and find that the points which Professor McCloskey changed or clarified in his evidence to us were not central to his evidence on the issues before us. We find that Professor McCloskey's oral evidence, in particular, showed the depth of feeling involved where staff were told that decisions had been taken to close areas of research, to close schools, or that jobs would go when no consultation about these decisions had taken place. Professor McCloskey gave undisputed evidence as to why his area of research was of high calibre, productive and profitable. He gave clear and convincing evidence, which we accept, that he was reluctant to take VSS but felt that he had no choice.

100. The way Professor McCloskey and his colleague Dr Nalbant were treated illustrates the deeply unsatisfactory consequence of the lack of consultation in this case. Professor Curran, Dean of the School of Environmental Sciences, gave a presentation to her school and said that the School of Geography would be closed because of adverse REF scores which meant, essentially that the School's REF score for research was deficient. Closure of the whole school meant that, as a consequence, the Geophysics Research Group (which comprised only Professor McCloskey and Dr Nalbant) was closed.

101. This was announced at an open meeting and was the first indication that Professor McCloskey and Dr Nalbant had that they would likely lose their jobs because their school was being closed. As it was announced in the context of closure of schools and courses because of concerns about research, they regarded it as an unjustified slight on their area of research when in fact their area was regarded as very high calibre, it attracted funding, and was of international renown with a REF rating of "outstanding". In these circumstances we can understand why Professor McCloskey reacted so strongly to the way this was communicated to him. Professor McCloskey secured substantial finding for his research which he now conducts for the University of Edinburgh.

102. In the statement from Ms Horgan (a UCU Union representative at the relevant time) she outlines, in a nutshell, the effect of lack of consultation on the process:

> *"By ostracising the Union they excluded staff from providing their expertise on how redundancies could have been avoided as we are experts in our own fields. By excluding the Union they were short sighted as the knowledge of the lecturing staff could have provided solutions and alternatives, however it was never up for consultation".*

103. We note that the proposal to close the Speech and Language Therapy course was one of the few proposals to be changed in the proposals put forward by managers and it occurred due to what was effectively a veto from the relevant Department. In that instance the Department had to be consulted because of a specific funding

issue. This occurred well before the proposals were put to Senate in August 2015 and this showed us that there was scope for re-organisation or listening to a consultee when the decision-making process was revealed to it. From this we conclude that consultation with the claimant Trade Union could have taken place if the will to consult had been there.

104. We find from an assessment of all the evidence over the lengthy period to which we were referred that there was very little will on the respondent's part to engage with the Trade Unions and, indeed the Trade Union was misled on key points. We were repeatedly given evidence by the respondent that the Trade Union had previously failed to engage meaningfully in previous redundancy exercises. Essentially the picture painted by the respondent' managers was that there would have been no point in engaging because the Trade Union had made it clear previously that they would not be engaged in choosing which of their members to be made redundant. We reject this point by the respondent as the consultation which was lacking in this case would not necessarily have involved the Trade Union in targeting individuals.

105. We completely reject as irrelevant any argument by the respondent that consultation would have made no difference because of a previous alleged attitude of non-engagement by the claimant. This point is irrelevant to whether or not the duty was triggered, whether or not there was consultation in good time, and whether or not relevant and sufficient information was provided when proposals were at a formative stage with a view to agreement. This may however be relevant to remedy (see below).

106. We hereby make a declaration that the respondent failed in its statutory obligations, there was a failure to consult in good time or at all given the withholding of key information, and this was in breach of the relevant provisions of ERO.

107. We find that the relevant bargaining unit was all 143 staff who were dismissed in April 2016.

Length of consultation

108. The point at which the proposal crystallised and the duty to consult was triggered in this case was 1 June 2015 at the latest and at that point the relevant date for calculation purposes is the date when the terminations are proposed to take effect. The date proposed at that point for the redundancies to take effect was 31 December 2015. The relevance of that date is that one works backwards for the 90 day period to establish when the consultation should have started at the latest. Working 90 days back from 31 December 2015 brings us to 30 September 2015. This is latest date by which the consultation should have started.

109. The respondent therefore could, and should, have started to engage meaningfully with the Trade Union from that point and that consultation should have started no later than 30 September 2015. This was a particularly complex situation (as set out at paragraph 71 above) so in our judgement consultation could and should have started earlier i.e. soon after 1 June 2015.

110. VSS opened on 1 September 2015, specific individuals were 'invited' to apply, and applications had to be in by 30 October 2015. Individuals whose applications were approved had to confirm acceptance by 31 January 2016 with termination of their

contracts envisaged for 30 April 2016. The claimant relied upon 31 January 2016 as equivalent to notice being given of the date of termination as this was when there was an irrevocable decision to accept VSS. In line with the reasoning of the ECJ in **Junk**, the point was that this was effectively the start of each individual's notice period. The significance of that date in this case is that that is the date relied upon by the claimant by which the consultation had to be completed and this point relates to whether consultation was adequate.

111. We accept the point made by Mr Brown that the 31 January 2016 date is tantamount to the date notice began. As VSS was irrevocable by that stage, consultation beyond that point would have been meaningless. We find that consultation therefore had to be completed by that date.

112. The authorities are clear that the consultation has to be completed by the date that notice is given. The date of the actual termination in this case was 30 April 2016 and that date is therefore not relevant for the purposes of the determining the date for completion of consultation. The rationale behind this is that, in reality, consultation with a view to reaching agreement on saving jobs or amending terms for redundancy can have little meaning if the notices of termination have been sent out and staff are already working their notice.

113. The EDT (effective date of termination) referred to in the settlement agreements which were signed by those who took VSS is not relevant to our deliberations on any dates for the purposes of calculating the consultation period.

Remedy

114. On remedy both sides agreed that it is the respondent which bears the burden of proving mitigation. It was therefore for the respondent to provide evidence or argument to support a reduction from the 90 days set out in the legislation.

115. The claimant's side urged us to award the full 90 days protective award because no points were put in mitigation by the respondent. The respondent's position on this was that there should be no award at all as the attempts to consult were frustrated by the claimant's side and that respondent should also be given credit for engagement with Trade Union from 2014.

116. Given our findings that consultation did not start in good time and when it did purportedly start that a fait accompli was presented to the Union, we find that this is a case of failure to consult at all. Two key points for us in assessing this are, firstly, that the Trade Union had been actively misled by Mr Magee in relation to the advanced nature of the decision-making process and, secondly, that the Trade Union was never told that REF considerations were central to the decision-making and targeting as this was not referred to until after these proceedings commenced.

117. We note that the authorities make clear that the assessment of remedy is not related to any loss suffered by any individual nor is it related to the motivations that individuals might have for taking redundancy. The thrust of the authorities and the legislation is that this is a sanction to penalise a respondent for failure to consult adequately, in time, or at all. We were told the amount of money received by several of the claimants' witnesses under the VSS Scheme. In common with any redundancy scheme, the amount of money provided varied according to the level of

each person's salary. We find it completely irrelevant to our deliberations to take account of how large or small any payment for redundancy was.

118. The authorities are clear on remedy that a benign motivation or genuine ignorance of obligations is not necessarily a point in mitigation justifying a reduction of the maximum period for compensation given the punitive nature of this remedy.

119. In mitigation the respondent appeared to rely on the Trade Union's failure to engage. As we have rejected that and we accept the Trade Union's reasons for that, this is a not a point in mitigation to reduce the 90-day period. We also find that the Trade Union did not frustrate the process. The onus is these situations is on management side which has all the information. VSS had been opened and the respondent refused to put it on hold following the Trade Union's reasonable request to do so. This showed to us how far along the process was in relation to decision-making, in that decisions had been made and were essentially irrevocable at that stage.

120. The respondent referred us to voluminous documentation relating to meetings of the JNC and the JUCNC from 2014 onwards. Effectively these were committees which included management and Trade Unions, the purpose of which was to apprise the Trade Unions of matters relevant to the running of the University. The respondent's point appear to be that these minutes of meeting showed that there was active engagement with the Trade Unions and that there was not a lack of willingness to engage with them.

121. We find it noteworthy however that despite the existence of these committees and their regular meetings, key information was kept from the Trade Unions and we infer from that that there was a deliberate unwillingness to consult with the Trade Union side about the ongoing decision-making.

122. Some of the evidence in cross-examination appeared to explore the motivation of managers. It was clear from the evidence of the respondent's witnesses that issues to do with complying with consultation obligations were left entirely to Mr Magee as head of HR. The level of unrest amongst staff was such at the relevant period and the protests of the Trade Union were so strong that there was an obligation on the senior managers as a whole to address their minds to what was being raised by the Trade Union. In the event the Trade Union side was, in our judgement, deliberately kept in the dark by senior management and this was clear to us from the documentation which emerged in the course of these proceedings.

123. The issue of whether or not the respondent wilfully or innocently failed to consult earlier is not relevant to our deliberations on whether or not the duty arose, the point at which it arose and whether it was complied with. It could however be relevant to remedy in assessing whether this was an inadvertent failure or whether it had a deliberateness about it.

124. We also take into account the fact that this is a large organisation with a HR Department with access to information and, presumably, to legal advice on the respondent's obligations. It was clear that Mr Magee knew (as shown in his letter of 9 October 2015 to UCU) what had to be consulted upon in order to comply with the respondent's statutory obligations. Numerous documents and meetings were generated by the decision-making process leading up to the termination of these

posts and at one point there was detailed discussion by managers of a communications strategy. We find it very telling that there was no reference at all in that communications strategy to any engagement with the Trade Unions.

125. We also find it significant that the date that the proposals were revealed to the Trade Union verbally on 31 August 2015 was the same date that they were revealed to the Press. In fact the Press had more details at earlier stages about course closures than the Trade Union had.

126. It is clear to us that there was a poor relationship between management side and the Trade Union and the process in this redundancy exercise has led to palpable bitterness on the part of both the staff who went and those who stayed.

127. In this case it is relevant for us to reach a conclusion on the motivation of managers for failure to consult: whether it was their incompetence, whether it was due to their ignorance of legal obligations or whether it was due to their belief that because of previous non-engagement or opposition by the Trade Union that they did not have to try to engage. We find on an assessment of all the evidence that this was a deliberate failure to consult in that management wanted to keep the Trade Union side in the dark probably because of the poor relationship with them and because of the concentration on REF considerations which would have been controversial if revealed.

128. In all of this the Trade Union was in an invidious position for months where its own members were asking what was happening because they were being told locally that their schools or courses were closing, there were press reports to that effect, and the Trade Union was unable to give any assurance that members' concerns or views were being put forward in the formulation of redundancy plans as they had received no information despite their repeated requests.

129. Taking account of the above matters we find this to be a very serious failure to consult at all warranting the full protective award. We therefore find that a 90 day protective award is the appropriate remedy for those in the bargaining unit.

130. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 (as amended) ("the Regulations") set out the recoupment provisions which apply to this decision. The Regulations set mandatory steps which must be followed before payment of any protective award is made. The Recoupment Notice annexed to this decision is hereby incorporated into this decision.

Employment Judge

Date and place of hearing: **9, 12, 13, 14, 15, 16, 19, 20, 21, 23 June 2017 and 15 August 2017 at Belfast**

Date decision recorded in register and issued to parties:

IN THE INDUSTRIAL TRIBUNALS CASE REF. 1717/16

BETWEEN:

UNIVERSITY AND COLLEGE UNION

Claimant

-and -

ULSTER UNIVERSITY

Respondent

CLAIMANT'S CLOSING SUBMISSIONS

INTRODUCTION

1) Under Article 216 of the Employment Rights (Northern Ireland) Order 1996, an employer 'shall consult' where it:

   a) is proposing
   b) to dismiss
   c) as redundant
   d) 20 or more employees at one establishment
   e) within a period of 90 days or less.

2) Following the University's withdrawal of its application to amend its response to contend that it comprised several establishments, there is no issue about whether the University comprised an establishment, and therefore numbers of employees can be considered across the University as a whole.

3) The University has not sought to contend that any dismissals or proposed dismissals were not 'as redundant.' The University would have borne the burden of proving to the contrary: see Article 223(2).

4) Therefore, the remaining issues, in dispute between the parties are whether, and if so when, the University proposed to dismiss 20 or more employees within a period of 90 days or less.

5) UCU's case is that the employer did so propose not later than 1 June 2015.

6) If this is accepted, the University was required by Article 216(2) to consult 'in good time,' with a long-stop of 90 or 30 days before the first dismissal took effect, depending on whether the University was proposing to dismiss 100 or more employees. UCU's case is that the University was proposing to dismiss 100 or more employees.[1]

7) A dismissal takes effect for these purposes when notice is given, not when the employment relationship ends.

8) UCU's case is that the University did not consult in good time.

9) Further, for the purposes of consultation, by Article 216(6), information must be provided to an appropriate representative. UCU's case is that the University did not disclose to it in writing the required information.

10) Article 216(4) provides that consultation shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives. UCU's case is that the University was not consulting with it with a view to reaching agreement: the matters presented to UCU on 31 August 2015 were a *fait accompli*.

11) Therefore, the University failed to comply with the requirements of Article 216 and accordingly UCU seeks, pursuant to Article 217(2) a declaration and a protective award.

LEGAL FRAMEWORK

[1] It does not seem that there could now be any dispute that, if there was a proposal to dismiss employees, it must have been to dismiss 100 or more employees.

12) It is a proposal to dismiss which triggers the statutory obligation to consult.

13) A proposal need be no more than comparatively tentative, although it is well settled by UK authority that to propose to dismiss is more definite than to contemplate dismissal. It means something less than a decision that dismissals are to be made and more than a possibility that they might occur: **Unison v Leicestershire County Council** [2005] IRLR 920.

14) However, where a decision is being taken which will lead to the complete closure of a workplace (including, it is submitted a University school or department), as a result of which redundancies will be inevitable, it is submitted that the duty to consult arises in the context of the proposed closure, since, once that decision to close has been taken, redundancies are inevitable. This approach is supported by **UK Coal Mining Ltd v NUM** [2008] ICR 163, although a point of EU law remains undecided in light of **Akavan Erityisdojen AEK v Fujitsu Siemens Computers** C-44/08 [2009] IRLR 944, and of the CJEU's decision not determine the reference made to it by the Court of Appeal of England and Wales in **United States of America v Nolan** [2011] IRLR 40, noting a difference in approach between **UK Coal Mining** and **Akavan**.[2]

15) A proposal is such even before its formal ratification by the person or body with the power of ratification (in this case, the University's Senate and Council): **Unison v Leicestershire County Council** [2005] IRLR 920; **MSF v Refuge Assurance plc** [2002] ICR 1365; **Dewhirst Group v GMB**

[2] UCU's primary argument is that it is unnecessary to resolve this apparent conflict of authority, because the University failed to consult in good time of June 2015. However, were the Tribunal to conclude that there had been no unlawful failure to consult by reference to June 2015, UCU would, in light of **UK Coal Mining** and **USA v Nolan**, seek to rely on the earlier dates on which the decision to close schools and courses was 'agreed' by the University's senior management as giving rise to a statutory obligation to consult, since by this time, dismissals were inevitable or foreseeable, in light of the agreed closures.

UKEAT/0486/03 (19 August 2003, unreported), [2003] All ER (D) 175 (Dec). Indeed, since the purpose of consultation is to seek to reach agreement about ways to avoid dismissals, or reduce the numbers of them, a formal decision that a proposal may be effected will never be a necessary condition before consultation can begin; the lack of ratification cannot operate to absolve an employer of the duty to consult, and in many cases will betray an unlawful failure to consult in good time.

16) A fixed, clear, albeit provisional, intention to make collective redundancies gives rise to the statutory duty to consult, even if the employer does not wish to make redundancies and hopes that a change in circumstances for the better will avoid the need to do so: **E Ivor Hughes Educational Foundation v Morris** [2015] IRLR 696.

17) Where an employer has determined a plan of action which has two alternative scenarios, only one of which necessarily includes redundancies, this can amounts to a proposal to dismiss employees as redundant: **Scotch Premiere Meat Ltd v Burns** [2000] IRLR 639.

18) '...before the first of the dismissals takes effect,' refers to the *proposed* date of the first dismissal, not the actual date: **E Green & Son Castings Ltd v ASTMS** [1984] IRLR 135.

19) An employer must begin the process of consultation 'in good time': article 216(2); CRD Directive 98/59/EC art 2(1)). That is, in good time to enable meaningful consultations to take place: **Transport and General Workers' Union v Ledbury Preserves (1928) Ltd** [1985] IRLR 412, and to achieve an agreed solution to the problems posed by the redundancy situation: **Junk v Kühnel**: C-188/03 [2005] IRLR 310, ECJ, §43; **GMB v Susie Radin Ltd** [2004] [2004] IRLR 400. The specified minimum periods for consultation are without prejudice to the overriding obligation to begin

consultations in good time. In a complex case, the employer may need to begin consulting well in advance of the statutory minimum period.

20) Whether consultation has begun in good time is a matter of fact and degree: Unison v Leicestershire County Council [2006] IRLR 810.[3]

21) The information required to be provided to the appropriate representative in writing must be provided in proper form: it is insufficient to say that it may be gleaned from the surrounding circumstances, and from a number of documents: Sovereign Distribution Services Ltd v TGWU [1990] ICR 31.

22) An employer should supply the information specified in article 216(6) at the very beginning of the statutory process, before any consultations actually take place, because the information is intended to form a basis for those discussions: E Green & Son (Castings) Ltd v ASTMS [1984] IRLR 135 at 139. The appropriate representatives can then embark on the discussions 'fully informed:' GMB v Susie Radin Ltd [2004] IRLR 400, at §24.

---

[3] ... we accept that one cannot adopt a too mechanistic or arithmetical approach to working out what is or is not good time. It will depend on many factors and is essentially a question for a Tribunal. A number of the matters involved will obviously be: firstly the numbers of staff and indeed unions to be involved in the process; secondly what is a reasonable time for the union to be able to respond to the proposals and to make counter-suggestion regarding redundancies whilst the proposals are still at a formative stage. Timing will depend on the eventual outcome that is being envisaged, how many are to be relocated or redeployed, and the ancillary issues involved in association with that redeployment— issues such as rehousing expenses and if necessary new schooling for children involved. What are the subjects to be discussed within the consultation process? How many meetings are likely to be required to cover that process? And as the process develops one may have to consider what changes are taking place to the proposals and how those changes will affect the time for consultation and whether the time for consultation thereafter as a result needs to be extended: Amicus v Nissan Motor Manufacturing (UK) Ltd UKEAT/0184/05, [2005] All ER (D) 128 (Sep), §11.

23) An employer must consult on all matters set out in Article 216(4), which are to be viewed disjunctively: Middlesborough Borough Council v TGWU [2002] IRLR 332.

24) Article 216(2) specifies a minimum timescale and article 216(4) a minimum agenda. Article 2(3)(a) of Directive 98/59/EC indicates a much wider duty: the employer must supply the appropriate representatives with 'all relevant information' during the course of the consultations. Article 216 should be taken to imply that wider duty.

25) Where dismissals are inextricably linked to the closure of a workplace. a duty to consult over the closure of the workplace arises: UK Coal Mining Ltd v NUM [2008] ICR 163.

26) In considering whether employees have been dismissed—and whether there has been a proposal to dismiss them—the circumstances in which employment has terminated are relevant.

27) In Martin v Glynwed Distribution Ltd [1983] ICR 511, at 519, Sir John Donaldson MR said:

> Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?" "

28) An employee who volunteers for redundancy is routinely to be regarded as dismissed: Burton Allton & Johnson Ltd v Peck [1975] ICR 193.

29) The different principles applicable to termination for early retirement do not apply to termination in the context of a redundancy situation: see Birch and Humber v University of Liverpool [1985] ICR 470;[4] Morley v

[4] '...the fact that an employee has no objection to being dismissed, or even volunteers to be dismissed, does not prevent his dismissal, when it occurs, from being a dismissal within the meaning of the Act. We do not read the judgment as encroaching in any way upon the distinction which exists in law between a contract which is terminated unilaterally (albeit without objection, and perhaps even with

CT Morley Ltd [1985] ICR 499; Scott v Coalite Fuels and Chemicals Ltd [1988] ICR 355.

30) In Optare Group Ltd v Transport and General Workers' Union [2007] IRLR 931, Wilkie J said (emphasis added):

> What was the cause of the termination of their employment? If it was that they volunteered to be made redundant, what was it that the volunteers were volunteering for? Was it to be dismissed as part of the redundancy exercise or was it, in some way separate from that exercise, their agreeing to a consensual termination of their employment which might have a knock-on effect on the redundancy exercise?

31) Where an employee resigns because s/he prefers to resign rather than to be dismissed (the alternative having been expressed by the employer in the terms of the threat that if s/he does not resign s/he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal: Sheffield v Oxford Controls Company Ltd [1979] IRLR 133. If an employee resigns upon being told that unless s/he resigns s/he will be dismissed, that is a dismissal in law: Staffordshire County Council v Donovan [1981] IRLR 108.

32) In Jones v Mid-Glamorgan County Council [1997] IRLR 685, Waite LJ said at §6:

> Courts and tribunals have been willing, from the earliest days of the unfair dismissal jurisdiction, to look, when presented with an apparent resignation, at the substance of the termination for the purpose of inquiring whether the degree of pressure placed on the employee by the employer to retire amounted in reality to a dismissal. In the instant case, the employee had framed his claim in constructive dismissal, and the industrial tribunal dealt with it upon that footing. There was accordingly some discussion before us as to whether the principle I have just mentioned is to be regarded as deriving from an inference of circumstances giving rise to a constructive dismissal under s.95(1)(c) of the Employment Rights Act 1996, or whether it is more broadly based as a species

---

encouragement from the other party,) and a contract which is terminated by mutual agreement. The phrase "consensual dismissal" which the industrial tribunal used seems to us, with respect, to blur this critical distinction. In every case it will be necessary to determine what it is that has had the effect, as a matter of law, of terminating the particular contract...'

of direct dismissal. For my own part, while tending to favour the latter view, I do not find it necessary to resolve that question in the present case because the principle itself (whatever its origins) is well settled. It is a principle of the utmost flexibility which is willing in all instances of apparent voluntary retirement to recognise a dismissal when it sees it, but is by no means prepared to assume that every resignation influenced by pressure or inducement on the part of the employer falls to be so treated. At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum: "Retire on my terms or be fired" - where it would not be surprising to find the industrial tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty - where one would expect the industrial tribunal to draw the contrary inference of termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the industrial tribunals are required to apply their expertise in determining whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat. I doubt myself whether, given the infinite variety of circumstance, there can be much scope for assistance from authority in discharging that task: indeed, attempts to draw analogies from other cases may provide more confusion than guidance. In cases where precedent is nevertheless thought to be of value, the authority that will no doubt continue to be cited is **Sheffield v Oxford Controls Co Ltd** [1979] IRLR 133.

33) Resignation implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee: **Sandhu v Jan de Rijk Transport Ltd** [2007] IRLR 519 at §37.

SUBMISSIONS ON THE ISSUES

When did the University first propose to dismiss as redundant the requisite number of employees within a period of 90 days or less?

34) The question posed by **Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy**, C-44/08 [2009] IRLR 944 ECJ is when was a strategic or commercial decision taken compelling the employer to plan for collective redundancies?

35) UCU's case is that by not later than 1 June 2015, a decision was taken by the University which gave rise to the statutory duty to consult:

a) by 30 March 2015, the University was 'aware of the level of block grant funding [it] would receive in 2015–2016 [...] this will provide a clearer basis on which you will be able to plan for the future.' [191@196§5];

b) by 13 April 2015, the Senior Executive Team had agreed to establish a Budget Monitoring Review Group ('BRG') to plan and remodel 'for the existing and any future funding cuts' [199];

c) by 25 May 2015, the BRG had identified a need to make salary savings of £9.6m [257];

d) As PH accepted in cross-examination, this could not be achieved without the loss of substantially in excess of 100 posts across the University, given the level of salaries;

e) also by 25 May 2015, the BRG had agreed [257–259]:

i) reduction by 30.5 FTE in the Arts Faculty;

ii) closure of Modern Languages;

iii) closure of Mathematics

iv) closure of the School of Computing and Engineering in Coleraine;

v) closure of Psychology at Magee;

vi) closure of Environmental Sciences;

vii)closure of Postgraduate Legal Education at Magee;

viii) discontinuation (i.e., closure) of Politics

36) the inevitable consequence of these cuts therefore, as the minutes from the time show, was the loss of more than 100 posts;

37) on 1 June 2015, the BRG-and-Deans decided that, rather than the phased departure of employees, there would be a single cut-off date (a 'big bang') [294@299; 293];

38) The date by which it was then envisaged that staff would leave was 31 December 2015 [293];

39) On 1 June 2015, the previously-agreed decisions as to staffing and closures were reiterated; it was agreed that the staff of the Faculty of Arts, Design and the Built Environment would be reduced by 52.8 [295], which, combined with the reductions previously agreed by the BRG by 25 May

2015, and set out above, took the number of FTE equivalent posts being lost to more than 100 and closely reflects the 120 posts in fact lost through the VSS to employees in UCU's bargaining group;

40) Indeed, as at June 2015, the BRG and Deans were envisaging a reduction of 210 FTE staff posts: [295].

41) The number of employees whom whose employment it was proposed to terminate, and the agreement to the 'big bang' approach gave rise to a proposal to dismiss as redundant more than 100 employees within a period of 90 days or less.

The University's case on when it first proposed to dismiss

42) The University appears to raise three grounds which, it says, delayed the time when it first proposed to dismiss as redundant (and therefore delayed the start of its obligation to consult):

a) the receipt of its funding letter from DEL in July 2015;
b) the 'fine-tuning' of closures and consolidations; and
c) the need for Senate and Council to approve the proposals.

43) None of these factors is a pre-condition for the University's plans to have amounted to a proposal and therefore, the date on which the proposal was made preceded these events:

DEL's funding letter

44) PH's evidence was that the 30 March 2015 funding letter from Dr Stephen Farry [191–197] set out the position of DEL on the University's core funding;

45) the letter itself purported to be confirmation of the University's funding for the year [196]–the position was clear without the formal documentation which gave it effect;

46) in fact the formal documentation in July 2015 [369–407] did no more than reflect the communication from DEL in March 2015;

47) the University in fact began to plan, and planned, on the basis of the position as set out in DEL's 30 March 2015 letter;

48) public communications were made by Professor Adair in June 2015 [335, 341] on the basis of the position communicated in DEL's March 2015 letter;

49) while the University's core funding situation would never be guaranteed – the 2014 – 15 budget year had seen a requirement from DEL for in-year cuts – there was no suggestion that the University's core funding would improve, so as to lead to smaller salary budget cuts.

50) The University's proposal to dismiss, formulated during early 2015, was not, therefore conditional on DEL's funding letter in July 2015, and the University did not in fact treat this as a condition for the reaching of its proposal.

Fine-tuning of closures and consolidations

51) It is well-established not only that a proposal need not be a final, finely-detailed decision, but that a proposal cannot be a final, finely detailed decision if it is genuinely to be subject to consultation. An employer cannot avoid its obligation to consult collectively through fine-tuning of a plan. The University could not avoid its obligations through its fine-tuning.

52) In any event, the proposal (as such) was in place by June 2015 at the latest; a decision to make collective redundancies had been taken by 25 May 2015 at the very latest, and probably by April 2015 when the BRG was established; thereafter, the decision was about who would be made redundant, not whether there would be redundancies;

53) much of the consideration was about specifically whom would be made redundant, where the University's policy was to retain staff who would enhance its Research Excellence Framework submission and lose those who would undermine its performance in the REF – this decision-

making process was independent from the University's proposal to dismiss 100 or more staff as redundant; it was concerned exclusively with the question which of those staff would be targeted: .

Ratification by Senate and Council

54) In light of the case law referred to above (UNISON, MSF, Dewhirst), the fact that proposals had to be ratified by Senate and Council for the purposes of the University's internal governance did not prevent senior management proposals amounting to a proposal for the purposes of article 216.

55) In any event, Dr Taylor's unchallenged evidence was that the meeting of Senate at which the changes were agreed was a perfunctory affair (IT§12).

Was there a proposal for employees to be dismissed?

56) The University seems to have accepted that the termination of the employment of VSS applicants involved dismissal (or at least arguably did), hence its completion of an HR1 in respect of the VSS terminations [660–665],[5] and its notification in that HR1 of 30 April 2016 as the date of the first proposed redundancy.

57) UCU submits that—whatever the University's position—there were proposals for dismissal in three alternative (and cumulative) ways:

a) there was from no later than 25 May 2015 [256@257] a clear necessity (and proposal) to effect compulsory redundancies if insufficient VSS applicants were confirmed);

[5] However, in light of Junk v Kühnel, C-188/03 [2005] IRLR 310 ECJ, UCU takes issue with the identification of 30 April 2016 as the date of the first dismissal, since this was the date on which employment ended, and not the date by which termination was irrevocable. See further below.

b) for many employees there was no alternative to termination: staff had no option but to take VSS or still be made redundant but with (they were told) a statutory redundancy payment;[6]

c) in any event, the termination of the employment of VSS applicants entailed a dismissal.

58) Each of these areas will be considered below in more detail.

The prospect of compulsory redundancies

a) PH accepted in cross-examination that, if the University did not achieve the necessary numbers of applicants for VSS, it would be necessary to make compulsory redundancies;

b) The initial one-to-one consultation documentation envisaged the prospect of compulsory redundancies (with compulsory redundancy payments) [207@208];

c) Therefore, the University was, from no later than 25 May 2015, proposing to dismiss collectively if it did not receive enough applicants for VSS.

d) Therefore, even if, contrary to UCU's primary case, VSS employees were not themselves dismissed, the fact that employees would be subject to conventional compulsory redundancies if there were insufficient VSS applicants gave rise in any event to a proposal to dismiss requiring the University to consult collectively: see **E Ivor Hughes** and **Scotch Premiere Meat**, above.

'...some staff may have no option where areas/schools are discontinuing'

e) CC [330] herself recognised the lack of choice for employees whose areas/schools were discontinuing, to do anything except take VSS or

[6] Although in fact employees made compulsorily redundant received a normal contractual redundancy payment—the reason for this change between its stated position and the reality was not explained by the University in its evidence.

face termination with a statutory redundancy payment; there was no other choice.

f) Given the specialised nature of academic work, it would be unrealistic to imagine that academic staff could be redeployed to do other work. Even if an employee continued to work for the University, the inevitable substantial change to terms and conditions of employment would involve a dismissal and re-employment.

g) Given the University's significant and enduring financial constraints, there was no prospect of redeployment for staff whose schools or areas were closing; there were no vacancies, and since the University was targeting employees who were perceived to undermine performance in the REF, they were not staff whom it would be likely to redeploy.

h) The unchallenged evidence of Professor McClosekey (JMcC§29), Dr Nalbant (SN§4), Dr Rooney (NR§8) and Dr Taylor (IT§19) was that they believed that they had no choice except to take VSS;

i) There is no evidence from employees within affected subjects/schools to the effect that they believed that they had a free choice not to take VSS;

j) It is evident that other staff, also believed themselves to be at risk, because of uncertainties about their contractual status, and a lack of assurance that their jobs were not at risk (see the case of Dr Fang [674–675, GH§14–17].

k) The only alternative to affected employees' accepted of VSS in these circumstances was also dismissal, and the absence of any real choice in making this decision renders the termination of employment a dismissal, and the proposal to adopt this course a proposal to dismiss.

The mechanism by which the employment of VSS applicants terminated was a dismissal

l) The form which employees were required to complete is at [13].

m) Employees thereafter received letters in the form at [771], setting out the basis on which an offer under the VSS could be accepted.

n) The form for acceptance of the offer [773] was not a set of detailed terms and conditions, itself involving a settlement of any claims, or itself providing for how the employment relationship was to end, but rather a bare acceptance. There were no terms contained in the form at [773].

o) The date for confirmation of acceptance was 31 January 2016, after which time an employee who had accepted VSS would face termination of employment; there was no ability to resile from acceptance.

p) Employees would only 'receive a communication from Human Resources outlining the details relating to the termination of [their] employment o these grounds,] *following* receipt of confirmation of acceptance [771].

q) In fact, CC told SN on 14 January 2016 that there was no scope for decisions that had been taken to be changed [671].

r) 30 April 2016 was the date on which employees' employment would *end*, and not the date on which termination would be effected (which was by completion of the VSS paperwork by 31 January 2016).

s) Thereafter, employees received a letter in the form set out at [775]. This letter confirmed the termination of employees' employment and gave notice that termination of employment would take effect on 30 April 2016.

t) The settlement agreements provided for an effective date of termination—a statutory concept specific to dismissal from employment [see, for example, 784].

u) The settlement agreements were first provided *after* employees had irrevocably volunteered by 31 January 2016, but they had not volunteered with knowledge of the proposed terms of the settlement agreement.

v) Other relevant factors, which support the conclusion that VSS volunteers were dismissed (and that the VSS proposal was a proposal to dismiss are):

i) VSS was expressly targeted at those employees whose posts had been identified for closure. It was not an open process of seeking volunteers, independent of the redundancy situation which had been identified. The University rejected calls to open the process to all staff.

ii) In any event, the employees involved (with the exception of employees in the Faculty of Art, Design and the Built Environment) appreciated that if they did not volunteer under the VSS, the termination of their employment was inevitable or virtually inevitable, such that their volunteering was under sufficient duress that it should be treated as dismissal.

59) In all these circumstances, the University was proposing to dismiss more than 100 employees (and did in fact dismiss more than 100 employees).

60) Collective consultation therefore had to be *completed* before 31 January 2016 and begun 90 days before then.

61) 90 days before 31 January 2016 was 2 November 2015.

THE UNIVERSITY'S FAILURES TO COMPLY WITH ITS STATUTORY CONSULTATION OBLIGATIONS.

'In good time'

62) The simultaneous announcement by the University of a collective redundancy situation and the opening of the VSS to applications prevented meaningful consultation about the collective redundancy situation where, as was the case here, the proposed VSS itself amounted to a proposal to dismiss and the staff to whom VSS was opened were those targeted in the redundancy situation.

63) It is evident that the University's Senior Executive Team had delegated entirely to RM questions relating to consultation – the minutes of the BRG and BRG-and-Deans address the University's communication strategy in detail, but, after the reference to the need for an agreed consultation plan on 21 April 2015 [209@210], the minutes are silent about the substance of a consultation plan with UCU.

64) The University's simultaneous embarkation on one-to-one consultation highlights its failure to consult in good time. It should not have been necessary to embark on one-to-one consultation alongside purported collective consultation with the trade unions, and it was not appropriate to do so. The statutory considerations required by article 216(4) to be consulted on should have been resolved first and only once resolved was opening the VSS and beginning one-to-one consultation appropriate. The pressure the University felt to begin one-to-one consultation simultaneously is the best evidence that they had left collective consultation too late – in other words they had not started it in good time, having regard in particular to the complexity and scale of the redundancy situation, and the obvious interrelationship between the redundancy situation, the advantage of having true volunteers for redundancy and the risk – as the University saw it – of attracting volunteers it wished to retain and not attracting as volunteers those whom it wished not to retain.

Provision of information

65) RM first sent information in writing to UCU on 11 September 2015 [535 – 536; 537 – 549=433 – 445]. On 15 September 2015, UCU pointed out the deficiencies in the information provided [552 – 553]. On 16 September 2015, RM, replied [556 – 557]. Instead of providing all of the information requested, he contended that information was in the public domain [556]. As well as being unhelpful for relations between staff and management

sides, that approach was inconsistent with the University's legal obligations.

66) It was not until 9 October 2015 [587–591] in response to a letter from Katharine Clarke on 24 September 2015 [572–573] that RM purported to provide information. This information purported to address each of the express statutory requirements for information, but it did not provide all information relevant to collective consultation on the University's proposed redundancies. This was a perfunctory response to UCU's proper request for all relevant information.

67) Most notably, and egregiously, in respect of the selection (in fact targeting) of employees, the University failed to provide UCU with relevant information about how the process of closing and 're-modelling' courses and schools had been carried out so as to target individual staff perceived to have a poor record of teaching and/or research quality [211@214; 334]. That is unsurprising, since the information, if provided, would have been incendiary. And this approach was wrong, since it put the cart before the horse, and would undermine the fairness of any compulsory redundancy exercise where assessments of relative performance had already been made and used to inform the process thus far. This approach should never have been adopted by the University, much less without consultation with recognised trade unions. But the non-disclosure of this information, plainly relevant to consultation, is the most obvious breach of the University's obligations to provide information under article 216.

Genuine consultation with a view to reaching agreement

68) The consultation process which the University embarked on was in fact a sham for the following reasons:

a) the University had, by 31 August 2015, made detailed, specific decisions, ratified by Senate and Council about what it would do in response to the funding crisis. This was not expressed to be a provisional decision, and there is no evidence that consideration was given to revisiting it. The University was not seriously open to revising these plans. Had it been open to doing so, it would have:
   i) consulted with UCU before ratification by Senate and Council,
   ii) made all relevant information available to UCU at an early stage;
   iii) engaged with the observations that UCU did make.
b) The University had not been frank with UCU about what was happening—even when specifically pressed in response to rumours, UCU had been told that there were no plans, or that they were at a formative stage [223—224], when in fact planning was well underway.
c) The University was probably intent on executing the plan which had been formulated and refined during 2015. In particular, the plan to target, for removal, staff perceived to undermine the University's performance in the REF was central to the University's plan and not something which was shared with UCU. The University was not prepared to revisit this plan; had it been prepared to, it could and would have consulted about it, and done so earlier than it did. UCU's officers were correct to describe what they encountered as a *fait accompli* by the University.
d) The effect of opening VSS at the same time as purporting to start consultation undermined a core purpose of consultation (avoiding dismissals), divided attention between the VSS and the wider context of the University's proposal to make redundancies to save costs, and, inevitably, unsettled and unnerved affected employees, who knew that their jobs were not only at risk but gone, and who had to make a critical decision whether to express an interest in VSS. This was a profound decision for employees to have to take, even if it was not immediately legally binding, and it was a distraction from the wider issues raised by

the collective redundancy proposals. The University could have consulted about a proposal to make redundancies before opening the VSS had it wanted to do so; there would have been time to do so. Its failure to do so (seen in the context of a total absence of planning for collective consultation by the Senior Executive Team) tends to suggest that this was a strategic decision, to avoid meaningful consultation.

e) The evidence tends to suggest that the University had no desire to reach an agreement on terms different those which it made known to UCU on 31 August 2015. In particular, the University saw its re-modelling and closures as critical to improving performance in the REF and thereby the funding position.

69) UCU's decision not to engage with the University after 15 September 2015 [552—553] in respect of consultation must therefore be seen in the light of:

a) the University's conduct in the period up to 31 August 2015, in the face of rumours and announcements about course closures, without prior consultation, and in breach of assurances [159, 160, 223] and of;

b) the University's conduct in the period following 31 August 2015, including:

i) not suspending the VSS process to enable consultation to take place without the pressure and distraction of one-to-one consultation and VSS applications;

ii) non-provision of minimum information until 9 October 2015 [587591];

iii) non-provision of all information relevant to the University's obligation to consult, until disclosure in these proceedings.

70) The comparison which the University seeks to draw with the conduct of Unite is a false comparison: employees within Unite's bargaining unit were not themselves directly affected by the first round of cuts, and the numbers of employees within Unite's bargaining unit who took VSS were

small: [27]. Unite's principal request, which echoed a position taken by UCU – to open VSS to everyone [550] – was rejected by the University. Had VSS been opened to everyone, the lack of targeting might have avoided it amounting to dismissal, and would have enabled Unite members who wished to leave the University's employment to leave with a financial package.

71) In the circumstances, UCU was reasonably entitled to adopt the position which it did in requiring the University, at a minimum, to suspend the VSS process in order to engage in consultation. UCU was reasonably entitled to conclude that engaging in 'consultation' with the University would bring false legitimacy to a process which was flawed and did not amount to genuine, or lawful, consultation.

REMEDY

72) Accordingly, UCU seeks a declaration that the University failed to comply with the requirements of article 216: article 217(2).

73) Further, UCU seeks a protective award: article 217(2).

74) The description of employees to be paid should be: those employees within the bargaining unit in respect of which UCU is recognised: **TGWU v Brauer Coley Ltd (in administration)** [2007] IRLR 207. In other words, there is no requirement that an employee need be a member of the UCU in order to be eligible to receive a payment.

75) The grades within UCU's bargaining unit are all academic and research staff and business support professional staff [27 – 31].

76) In its Schedule of Loss, UCU sought a protective award of 90 days. That remains UCU's starting point.

77) As paragraph 12 of, and the appendix to, UCU's Schedule of Loss makes clear, the complaint relates, and only relates, to dismissals which took effect on 30 April 2016. Each of the employees in respect of whom a protective award is sought left the University's employment by virtue of volunteering for the VSS.

78) It is accepted that the University made some purported attempt to consult with UCU from 31 August 2015. However, for the reasons set out above, this consultation was not genuinely with a view to reaching agreement about the matters set out in article 216(4); it did not begin in good time; the University provided relevant information either late or in many significant respects not at all; and the University refused to suspend the VSS so as to enable meaningful consultation to take place.

79) The result of these failures was the termination of the employment of long-standing employees of the University, whose concerns were not properly heard and addressed. The evidence led by UCU in these proceedings from directly-affected employees evidences the significant strength of feeling on the part of UCU's officials and members about the deficiencies in the University's purported consultation, to the extent that the University's conduct appears to have been a sham.

80) In **Suzie Radin v GMB** [2004] IRLR 4014, the Court of Appeal of England and Wales provided the following guidance on the determination of the protective award:

a) The purpose of the protective award is to ensure that consultation in accordance with the requirements of [the cognate to article 216]. takes place by providing a sanction against failure to comply with the obligations imposed on the employer.
b) Whilst that sanction results in money being paid to the employees affected in the form of remuneration paid to them, there is nothing in

the statutory provisions to link the length of the protected period to any loss in fact suffered by all or any of the employees.

c) The only guidance given as to the length of the protected period is that, subject to the maximum of 90 days, it is to be what the employment 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 [the cognate to article 216];'

d) The required focus is not on compensating the employees but on the seriousness of the employer's default in complying with the mandatory obligation to consult.

e) It is that seriousness which governs what is just and equitable in all the circumstances. Compensation for loss could not be implied into the statutory provisions, given that the award, if one is to be made, is across the board for all employees falling within a particular description, as distinct from an individual award to each employee.

f) [Industrial] Tribunals should have the following matters in mind when deciding in the exercise of their discretion whether to make a protective award and for what period:

   i) The purpose of the award is to provide a sanction for breach by the employer of the obligations: it is not to compensate the employees for loss which they have suffered in consequence of that breach;

   ii) Tribunals 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;

   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 the availability to the employer of legal advice about his obligations;

   v) How the length of the protected period is assessed is a matter for the tribunal, 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 tribunal considers appropriate.

81) If the Industrial Tribunal, here, were to accept UCU's submission, above, that consultation embarked upon on 31 August 2015 was a sham, and that the University had no intention of varying the plans it had made by that date, and which had already been ratified by the University's Senate and Council, then it is submitted that it would be appropriate to start from the position that there was no consultation, and therefore to start with the maximum period of 90 days, and to reduce it only in light of any mitigating circumstances advanced by the University which justify a reduction. However, were the Tribunal to conclude that, although the University had failed in some respect(s) to consult, it was not a total failure to consult, UCU accepts that the starting point could not be the maximum period.

82) The University has yet to set out any mitigating factors on which it would seek to rely if it was held that there had been a failure to comply with its statutory obligations to consult. Therefore, UCU will respond to any factors which are advanced by the University in reply. However, pending any such submissions, UCU would rely on each of the matters set out above in support of a submission that the University:

a) totally failed to consult, or consult meaningfully, with UCU about the proposed dismissals;

b) failed to provide to UCU information relevant to collective consultation; and

c) did not consult with UCU with a view to reaching agreement about:

   i) ways of avoiding dismissals,

   ii) reducing numbers of dismissals; and

   iii) mitigating the consequences of dismissals.

83) In those circumstances, it is submitted that a long period, if not the maximum period, of protective award is justified on the facts; this was the opposite extreme from a technical failure by the University; it was a calculated and total failure by the University meaningfully to consult with UCU about the proposed collective redundancies, so as to achieve the University's aim of targeting for termination, without consultation or challenge, those employees whom the University perceived as detrimental to its future prospects. It is submitted that such conduct merits a stringent protective award to sanction this egregious failure by the University to comply with its statutory obligations.

Tom Brown

26 July 2017

INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL
CASE REFERENCE NUMBER 1717/16 IT

Between:

UNIVERSITY and COLLEGE UNION

(Claimant)

-and-

ULSTER UNIVERSITY

(Respondent)

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT

Introduction

1. The Claimant is the University and College Union (UCU). By way of application to the Industrial Tribunal dated 25th July 2016, the Claimant asserts that the Ulster University (Respondent) failed to consult, in accordance with its statutory obligations, following the dismissal of 14 employees on 30th April 2016. The Claimant relies on Article 216 of the Employment Rights (Northern Ireland) Order 1996 in support of its contentions and seeks a protective award for those employees dismissed by the Respondent (Pages 1-12 of the Pleadings Bundle).

2. Contained within the body of the Claimant's application to the Industrial Tribunal (Pages 1-12 Pleadings Bundle) are the allegations that the consultation process undertaken by the Respondent was a *"sham"* and that management had engaged in *"deception"* when dealing with same (Paragraphs 3, 4 and 6 pages 8-9 Pleadings Bundle).

3. The Claimant further clarified their stated pleadings in a reply to the Respondent's Notice for Additional Information dated 24th September 2016 (Pages 24 - 26 Pleadings Bundle). Contained within the said response dated 9th November 2016 (Pages 68 - 70 Pleadings Bundle) is the assertion by the Claimant that there was an obligation to consult with the recognised trade union in *"late 2014/early 2015"* (Reply 4 at page 68 Pleadings Bundle). Further, when requested to provide specific details of the purported *"deception"* maintained by management, the Claimant responded and stated .....*"management decided to keep the union in the dark and didn't disclose what decisions/actions it had taken in early 2015"*... (Reply 5 at pages Pleadings Bundle). When requested to provide exact detail regarding the assertion that the consultation process was a *"sham"*, the Claimant replied that this was a matter of evidence ...*"but it is clear that in light of the decisions already taken and the processes put in place by August 2015 any so called consultation thereafter*

could have been nothing but a sham" (Reply 10 at page 69 of the Pleadings Bundle).

4. With regard to the Voluntary Severance Scheme (VSS) operated by the Respondent (Pages 8-13 Trial Bundle 1) the Claimant alleged that employees were subjected to *"coercion"* and *"distress"* in relation to same (Paragraph 5 page 8 of the Pleadings Bundle). When requested to provide specific details of such *"coercion"* and *"distress"* the Claimant simply replied that this was a matter of evidence (Reply 8 at page 69 Pleadings Bundle). The Claimant also relied on the statement that staff were told that they had ....*"two choices, either apply for voluntary severance or alternatively be made compulsory redundant on less favourable terms"* (Paragraph 3 page 8 of the Pleadings Bundle). No details were provided by the Claimant as to who made such representations and when.

5. At no time during these proceedings has the Claimant sought to amend its formal pleadings. The Respondent therefore respectfully suggests the case it must meet is contained in the said formal pleadings presented by the Claimant. The Claimant was at all times aware of the necessity to clearly particularise their complaint in it's initial claim form (See written requirement at paragraph 7.4 page 9 of the Pleadings Bundle) and in response to any Notice for Additional Information.

Tribunal Hearing/Witness Evidence

6. This Tribunal hearing took place between 12th and 16th June 2017, 19th and 21st June 2017 and on 23rd June 2017. The list of witnesses who gave evidence at hearing were as follows:

On behalf of the Claimant
Dr Suleyman Nalbant
Dr Nuala Rooney
Dr Ian Taylor
Professor John McCloskey
Ms Goretti Horgan
Dr Linda Moore
Ms Katherine Clarke

On Behalf of the Respondent
Professor Alastair Adair
Professor Liam Maguire

Mr Peter Hope
Mr Ronnie Magee
Mr Andrew Caldwell
Professor Carol Curran
Professor Jan Jedrzejewski
Dr David Barr
Professor Paul Carmichael
Professor Ian Montgomery

Background

7. The unchallenged position of the Respondent was that, since 2011 it had been subjected to year-on-year reductions in it's budget allocation from the Northern Ireland Executive. The evidence presented by Mr Hope (Chief Finance Officer) was that in 2010/11 Block Grant Funding was £89.7m whereas by 2015/16 this had been reduced to £70.3m. Funding had been reduced by £19m in cash terms and funding per-student-per-year was on average £1700 less than a comparable English Higher Education Institution. Confirmation of the 2015/16 Block Grant Funding to the Respondent was notified to the Respondent on 30th July 2015 in correspondence from the then Minister for Employment and Learning, Dr Stephen Farry MLA (Pages 368-407 Trial Bundle 1) (Paragraphs 3-4 of statement presented by Mr Hope).

8. From 2011, the Respondent had absorbed any reduction in funding by cutting operating costs and placing a moratorium on recruitment of staff. By October/November 2014, with the possibility of future cuts in funding, all six Faculties were requested to carry out a number of scenario exercises based on subjects areas and student numbers. It was also decided to discontinue three low demand courses without the loss of any staff. As stated by Professor Adair in his evidence, protection of staff jobs and student numbers has been a central rationale for the Respondent since reductions began in the Block Grant in 2011 (Paragraph 11 of the statement presented by Professor Adair).

9. This Tribunal were informed of regular meetings which took place between the Respondent, the Claimant and Unite the Union. Notes of meetings held between same can be reviewed as follows:

a) 11th November 2014 - UCU Joint Negotiating Committee (JNC) - (Pages 90-93 Trial Bundle 1).

b) 20th November 2014 - Joint Trade Union Consultative and Negotiating Committee (JUCNC) (Pages 100-102 Trial Bundle 1).

c) 19th December 2014 - Unite JNC (Pages 139-140 Trial Bundle 1).

d) 18th February 2015 - UNITE JNC (Pages 165-167 Trial Bundle 1).

e) 25th March 2015 - JTUCNC (Pages 188-189 Trial Bundle 1).

f) 9th June 2015 - UCU JNC (Pages 308-311 Trial Bundle 1).

g) 23rd June 2015 - JTUCNC (Pages 354-355 Trial Bundle 1).

h) 16th September 2015 - JTUCNC (Pages 554-557 Trial Bundle 2).

i) 26th November 2015 - UNITE JNC (Pages 647-648 Trial Bundle 2).

j) 10th December 2015 UCUJNC (Pages 654-656 Trial Bundle 2)

k) 10th March 2016 - UCU JNC (Pages 684-688 Trial Bundle 2).

l) 8th June 2016 - UCU JNC (Pages 715-718 Trial Bundle 2).

The Respondent asserts that at all relevant times to these proceedings, the Claimant and Unite the Union were kept informed by Respondent management as to potential/actual reductions in funding, the possibility of future funding cuts and the fact that Faculties within the University had been asked to look at scenario planning (Paragraphs 2-5 of the statement presented by Mr Ronnie Magee (Director of Human Resources)).

10. On 23rd January 2015, Ms Kathrine Clarke (Northern Ireland Official UCU) recognised the difficult situation faced by the Respondent and other Higher Education institutions when she wrote to Mr Simon Hamilton (Minister of Finance and Personnel) and Dr Farry (Minister for Employment and Learning) registering a trade dispute. The said Ms Clarke noted, *....."the responsibility of these budget reductions cannot be passed down to individual employing institutions. These institutions cannot be expected to be held accountable for*

job reductions in circumstances where the Minister or Department sets the overall amount of resource available to them as employers".... (Pages 157-158 Trial Bundle 1).

11. On 5th February 2015, Dr Linda Moore (Branch President UCU) sent an e-mail to Professor Richard Barnett (Respondent Vice Chancellor) requesting a meeting to discuss media reports of cuts to various courses within the University (Page 160 Trial Bundle 1). In a response e-mail dated 6th February 2015, Professor Barnett informed Dr Moore that course planning were matters for Senate and that any course closures did not include the closure of any subject areas, with the exception of Dance (Dance modules would continue to be available as part of the Drama Courses). It was further noted by Professor Barnett that,....."*We have not yet received our grant letter from DEL (Department for Education and Learning) for 2015/16 so we do not know what, if any, impact that there will be on the number of DEL funded students that we will recruit and/or if there will be any impact on staffing levels. As you will know, following the cut in our DEL grant for 2014/15 we had sought to protect jobs by imposing tight control on the approval of replacement posts. And there has been no reduction in the number of students that we have admitted".* ....(Page 161 Trial Bundle 1).

12. Further, at a JUCNC meeting on 25th March 2015, Respondent management advised that as the funding letter from DEL was still pending, it would not be possible to set the budget for the coming year. It was noted during this meeting that the Respondent would continue to absorb the in-year cut by reducing its recurrent budget/imposing a recruitment moratorium. Respondent management did however state it's position that cuts in 2015/16 would be significant (Pages 188-189 Trial Bundle 1).

13. Following correspondence from DEL on 17th February 2015 and 30th March 2015 (Pages 162-164 and 191-197 Trial Bundle 1) the Respondent set up a Budget Review Group (BRG). The purpose of the BRG was to undertake financial modelling, in light of the proposed budget cuts, in order to identify and protect areas of teaching and research performance through an analysis of student and staff numbers, course provision and recent Research Excellence Framework (REF) results.

14. The BRG was chaired by Professor Adair and comprised of Professors McKenna, McAlister and Millar, Mr Hope and Mr Magee and received input from the Deans of each Faculty, when required. Between 21st April 2015 and 9th July 2015, the BRG held 8 meetings during which each faculty brought forward proposals to meet the scale of the proposed budget cuts which had been provisionally indicated at this time. By late May

2015, it was clear that the scale of the cuts would require a VSS. Such a scheme was agreed at the BRG meeting on 1st June 2015 (Pages 294-299 Trial Bundle 1).

15. On 18th June 2015, Professor Adair made personal representations to Trade Unions and staff regarding the impact of the budget cuts on the Respondent. Information provided included an expectation of a reduction of some 1200 students and 210 members of staff (a summary of the content of the presentation made to staff by Professor Adair can be found at Page 336-340 Trial Bundle 1).The purpose of this presentation was to keep the Trade Unions and staff informed of the difficult conditions faced by the Respondent.

16. At a JUCNC meeting on 23rd June 2015, Respondent management provided an update on the implications of the budget cuts for Higher Education funding and indicated that they still awaited concrete proposals from each faculty. It terms of timescale, Respondent management informed the Claimant and Unite the Union that it was anticipated that proposals should be available by the end of August 2015 (Pages 354-355 Trial Bundle 1).

17. On 30th July 2015, the Respondent received confirmation of its funding from DEL for the academic year 2015/16 (Pages 368-407 Trial Bundle 1).

18. In accordance with the Respondent governance requirements under it's Statutes, a special Joint Council/Senate meeting was held on 31st August 2015 to approve proposals for a reduction of 1250 student places coupled a list of course closures. Senate voted and agreed to the said proposals and Council subsequently endorsed Senate's decision (Pages 412-414 Trial Bundle 1).

19. Following on from the Joint Council/Senate meeting and vote, Respondent management and the Faculty Deans met with the Claimant and Unite the Union on 31st August 2015. During this meeting, it was confirmed by Respondent management that the consultation process had commenced and each Dean thereafter presented their proposals affecting each Faculty (Professor Ruth Fee deputising for Professor Paul Carmichael (Dean of the Faculty of Social Sciences)). Details of the VSS and proposed timetable in relation to same, were provided at this meeting to each Trade Union (See Respondent notes of this meeting at Pages 447- 451 Trial Bundle 2). On the same day, the Claimant requested dates for a proposed JUCNC meeting to explore Respondent management *"proposals and process in more detail"* (Page 468 Trial Bundle2).

20. On 11th September 2015, the Claimant and Unite the Union were provided with a written document entitled "Faculty Proposals - DEL Budget Cuts" (Pages 433 - 445 Trial Bundle 2). This document set out the background to the budget cuts, the rationale for the decision and the specific proposals for each Faculty. On the same date, both Trade Unions were invited to a special JUCNC meeting on 16th September 2015.

21. On 15th September 2015, the Claimant informed the Respondent that they would not be attending the JUCNC meeting on 16th September 2015 unless the VSS was suspended, the statutory consultation period was commenced and the Respondent presented a fully evidence business case to support their proposals (Pages 552-553 of Trial Bundle 2).

22. At the JUCNC meeting on 16th September 2015, Unite the Union attended same and engaged with each of the six Deans on the specific proposals presented by same. Following these exchanges, Unite the Union advised that it would be encouraging those of its members in affected areas to attend individual consultation meetings, to obtain all information necessary to make a decision in relation to the VSS (Pages 554 -555 Trial Bundle 2).

23. On 24th September 2015, the Claimant declared a dispute with the Respondent, suggesting it had failed to consult in accordance with its statutory obligations (Pages 572 - 573 Trial Bundle 2). In a detailed response dated 9th October 2015, Mr Magee responded to the Claimant, noting that the Respondent were not in dispute over the matters which required consideration during the consultation process and provided further details and information relating to the process, as requested.

24. On 14th December 2015, the Respondent issued the required HR1 form to the Department of Enterprise, Trade and Industry (DETI) notifying same in advance of the intended date of any redundancies. A copy of the HR1 form was sent to the Claimant (Pages 660 - 665 Trial Bundle 2).

25. On 30th April 2016, 143 members of staff left the employment of the Respondent under the VSS. Only 3 Respondent employees were subjected to a compulsory redundancy process.

The Law

26. Council Directive 98/59/EC, often referred to as the Collective Redundancies Directive, was implemented into domestic law in this jurisdiction within the provisions of the Employment Rights (Northern Ireland) Order 1996. Article 216 of the 1996 Order states:

(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(F1 affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals

(2) 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 paragraph (1), at least 90 days, and
(b) otherwise, at least 30 days,
before the first of the dismissals takes effect".

Issues to be determined by this Tribunal

27. In order for Article 216 of the Employment Rights (Northern Ireland) Order 1996 to apply, this Tribunal must be satisfied that each of the stated employees were in fact dismissed from employment.

28. The Respondent, at paragraphs 6.2.3 & 4of its response, has clearly indicated that the terminations which took effect on 30th April 2016 were voluntary and by mutual consent (Page 18 Pleadings Bundle). Accordingly, the Respondent asserts there is no duty to collectively consult under Article 216 and as a consequence the Claimants case should be dismissed.

29. Parties to a contract of employment are free to agree to terminate same by mutual consent. The consequences of any such agreement are that both sides are released from further performance of their obligations under the contract and the contract is discharged and at an end. This is even the case where the initiative for the termination comes from the employer (**EC Commission -v- Portuguese Republic C-55/02** at paragraph 56).

30. Whether there has been a termination by mutual agreement or a dismissal by the employer is a question of both fact and law. In **Martin -v- Glynwed Distribution Limited (1983) ICR** the Court of Appeal stated that the question of who really ended the contract was one of fact. At paragraph 519 of the judgement, Sir John Donaldson noted, *"Whatever the respective*

actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?" "

In **Birch & Humber -v- University of Liverpool (1985) ICR 470** the Court of Appeal added that, the legal interpretation of those facts of whether they amounted to a dismissal or consensual termination was a question of law (See Purchas LJ commentary at paragraphs 50 - 60).

31. As can be observed from the wording of the VSS, it was voluntary and discretionary in nature and only open to permanent members of staff who had not already indicated or confirmed that they were leaving employment (Page 9 Trial Bundle 1). It required the employee to complete an application form indicating an expression of interest (Page 13 Trial Bundle 1) by 30th October 2015. This expression of interest did not represent a commitment to proceed with Voluntary Severance. When the employee submitted an application form, it was then up to the Respondent to either approve or reject same based on its institutional and management interests. There was no right of appeal for any applicant against a decision to refuse Voluntary Severance (Page 9 Trial Bundle 1). If the University accepted an application for Voluntary Severance then the affected employee would be provided with written confirmation in relation to same together with confirmation of Voluntary Severance calculations and a declaration document to be signed confirming acceptance of the stated offer (See draft documents Pages 767 - 787 of Trial Bundle 1).

32. The Respondent asserts that payments made under the VSS were very generous and well above any statutory or contractual redundancy payments which would be payable to its employees (Page 10 Trial Bundle 1). Where an expression of interest had been approved by the Respondent, the employee had until 31st January 2016 to accept the terms of the offer (Page 12 Trial Bundle 1).

33. Payment of the Voluntary Severance was thereafter subject to the employee signing a conciliation agreement in the presence of the Labour Relations Agency.

34. In **Birch & Humber -v- University of Liverpool (1985) ICR 470** two employees made requests for early retirement under a scheme offered by the University in the context that compulsory redundancies would be needed if not enough volunteers were forthcoming. The University had previously written to it's employees indicating that as a result of a reduction in funds, the workforce would have to be reduced. These requests for early retirement were considered and accepted, with both employees required to retire on a specific date. The

University also highlighted the fact that it was in their managerial interests to accept both applications. Both employees thereafter make claims for redundancy payments.

35. The EAT held that the employments were terminated by the combined effect of the employees offer to retire and the acceptance of this offer by the University. The Court of Appeal agreed that the EAT was entitled to come to such a conclusion and held that this was not a dismissal but termination by mutual agreement.

36. In **Scott and Others -v- Coalite Fuels and Chemicals Limited (1988) ICR 355** it was held that dismissals had not taken place in a situation where written notices of redundancy had been sent to employees but in the ensuing negotiations had agreed to take early retirement as an alternative to redundancy. The EAT stated that the notices of redundancy had been superseded by the subsequent agreement to terminate the contract by the employees taking early retirement.

37. In the circumstances of this present application before the Industrial Tribunal, the Respondent would highlight the following matters in support of it's contention that the terminations, which took effect on 30th April 2016, were voluntary and by mutual consent, having due regard to questions of fact and applications of the law:

a) The VSS operated by the Respondent was not referred to as a voluntary redundancy scheme.
b) Employees were invited to register their interest in the VSS.
c) The Respondent considered each expression of interest, subject to it's institutional and management interests.
d) There was no right of appeal to any decision made by the Respondent in relation to an expression of interest.
e) Any offer made by the Respondent to an employee, if accepted by same, would result in a termination of the contract of employment.
f) the VSS payments were very generous in nature and well above any statutory or contractual redundancy payments which would otherwise be payable to its employees.

38. The Claimant presented the case that the Respondent employees felt pressurised or coerced into applying for the VSS. The Respondent rejects such an assertion and notes such a position was not put to any of the 10 Respondent witnesses under cross-examination. Further, the Claimant chose to call only 4 former employees (all UCU members) who had accepted the VSS. The Respondent would therefore question how a Tribunal can make

findings of fact that all 143employees felt pressurised or coerced or distressed into taking the VSS, without hearing evidence, at the very least, from a significant cross-section of affected employees, union and non-union members, from each Faculty. This Tribunal heard evidence from 2 former employees from the School of Environmental Sciences, 1 former employee from the School of Design and Built Environment and 1 former employee from the School of Computing and Mathematics.

39. With regard to the evidence presented by Professor John McCloskey (School of Environmental Sciences), the Respondent suggests it is clear that his attendance at Tribunal was motivated by a clear personal animosity towards Professor Carol Curran (Dean of Life and Health Sciences). This is evidenced by the fact that he waited until giving evidence at Tribunal to withdraw derogatory and degrading comments that Professor Curran was ....*"a ruthless dictator who could be vicious in her treatment of those who opposed her"*.... (Paragraph 30of the statement presented by Professor McCloskey). No explanation was given by Professor McCloskey as to why he withdrew this offending statement in the manner that he did. Further, Professor McCloskey indicated that he now accepted the position adopted by Anne Newland (HR Business Partner) in her witness statement, that she had written the e-mail dated 7th October 2015 (Pages 584-585 Trial Bundle 2) despite the statement by Professor McCloskey that he was in no doubt that she had not written same (Paragraph 26 of the statement presented by Professor McCloskey). The Respondent would also refer this Tribunal to the inconsistent manner of the responses presented by Professor McCloskey in relation to the alleged behaviour of the Labour Relations Agency at the time of signing the compromise agreement with same.

40. It was also clear from his evidence, that Professor McCloskey had made a relatively quick decision to leave the University. In his e-mail dated 12th November 2015 he informed many that ...."*I have put my name forward for voluntary severance which I will accept enthusiastically when its offered: there are no circumstances in which I could continue to work in this School*"... (Page 643 Trial Bundle 2). It was also accepted by Professor McCloskey that he received a severance payment of £137,085.00 and that he obtained alternative employment at Edinburgh University at a higher salary, some 1 month after terminating his contract of employment with the Respondent. This Tribunal will recall that Professor McCloskey indicated to the Tribunal that he did not know when he applied for the position in Edinburgh. This is surprising, to say the least, and the Respondent would therefore suggest that Professor McCloskey chose not to tell the Tribunal the date of his application for the post, in fear of undermining his assertion that he was forced to leave the University. This Tribunal is requested to conclude that Professor McCloskey was a very unreliable and inconsistent witness.

41. With regard to the evidence of Dr Suleyman Nalbant, he, like Professor McCloskey, was employed in the School of Environmental Sciences. Again, like Professor McCloskey, he waited until giving evidence at Tribunal to withdraw the statement made by him that Professor Curran mentioned his name as one of the persons to lose their jobs, at a meeting held on 1st September 2015 (Paragraph 4 of the statement presented by Dr Nalbant). Again, no explanation was given by Dr Nalbant as to why he withdrew this false statement in the manner that he did, apart from the suggestion that he had the *"opportunity to reflect on it"*. It was accepted in evidence that Dr Nalbant requested to be placed on the redeployment register and that he received a severance payment of £65,311.00. Again, the Respondent would respectfully suggest that this witness was not a credible witness and little or no weight should be given to the suggestion made by same that he had no other option but to apply for the VSS.

42. The Tribunal heard evidence from Dr Nuala Rooney (School of Design and Built Environment). The Respondent rejects the statements made by Dr Rooney that the VSS was a Voluntary Redundancy scheme, that it was compulsory and that she was forced to sign same (Paragraphs 7,16 & 17 of the statement presented by Dr Rooney). The scheme was a voluntary severance scheme, as defined in documentation supporting same. It was not compulsory and, as previously stated, required an expression of interest to be approved by the Respondent before an offer/acceptance scenario. It was common case that at or about this time, Dr Rooney had health issues and that as a consequence of partaking in the VSS she received £47,829.00.

43. In relation to the evidence presented by Dr Ian Taylor (School of Computing and Mathematics) he acknowledged his membership of the Senate since 2009 and the fact that he voted against the proposals presented by Professor Barnett to same at the meeting on 31st August 2015. It was noted by Dr Taylor that 5 mathematics staff applied for the VSS but one application was rejected by the Respondent due to the staff member's research activity (Paragraph19 of the statement presented by Dr Taylor). As with the other witnesses called by the Claimant in support of the allegation of *"coercion"* and *"distress"* it was open to Dr Taylor to seek alternative employment via the redeployment register and/or requesting a bumping exercise to be considered. In the case of Dr Taylor, he did not want to be placed on the redeployment register (Page 783 Trial Bundle 2) and remained with the Respondent until September 2016, undertaking duties in assessment and examination processes. The said Dr Taylor received a VSS payment of £15,683.00, having taken a personal decision to switch to a 60% contract in March 2015 prior to the announcement of the VSS.

44. This Tribunal heard evidence from Ms Goretti Horgan (UCU Representative) who made reference to the circumstances relating to Dr Fang (Paragraphs 14-17 of the statement presented by Ms Horgan). The Respondent respectfully suggests that any evidence presented relating to the specific circumstances of Dr Fang, amounts to hearsay and should be given little or no weight as the Respondent was denied the opportunity to cross-examine Dr Fang. This Tribunal will be conscious that it was open to the Claimant to call Dr Fang as a witness to support their position but they simply chose not to do so. It was acknowledged by Ms Horgan that Dr Fang is currently working in Coventry. In the alternative, Professor Ian Montgomery (Dean of the Faculty of Art Design and Built Environment) made it clear in his witness statement, and under cross-examination, that he invited all permanent academic members to a meeting with him to discuss all issues and that he specifically informed Dr Fang that he was not in a targeted area. Despite same, Dr Fang applied for VSS and was accepted for same, receiving £55,800.00. If anything, the decision taken by Dr Fang to apply for VSS was indicative of his personal decision to leave the Respondent voluntary.

45. With regard to the evidence presented by Ms Horgan, this Tribunal will be aware that same endorsed the Claimant's policy of advising employees not to attend one-to-one consultation meetings with the Respondent (Paragraph 10–12 of the statement presented by Ms Horgan).

46. The Respondent therefore asserts that the termination of employment with each employee under the VSS was by mutual consent. Further, the Claimant has failed in any or adequate regard, to present evidence at Tribunal, that all or any of the 143 employees identified in it's application to the Tribunal, were coerced or forced into accepting the VSS. As a consequence of same, the Claimant's case should be dismissed.

47. Further, and/or in the alternative, the Respondent states that they complied with the requirements imposed by Article 216 of the Employment Rights (Northern Ireland) Order 1996. In summary, where an employer is *"proposing"* (Respondent emphasis) to dismiss 100 or more employees at any one establishment, they are required to consult with appropriate representatives *"in good time"* (Respondent emphasis) and at least 90 days before the first of the dismissals take place.

48. In relation to what constitutes "consultation", in **R -v- British Coal Corporation, ex parte Price & Others (1994) IRLR 72**, Glidewell LJ noted at paragraphs 23 and 24: *"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt all or any of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council, ex p Bryant reported,*

as far as I know, only at (1988) Crown Office Digest p 19, when he said:
"Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information upon which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration … of the response to consultation.""

With regard to the meaning of "proposing" in **R -v- British Coal Corporation, ex parte Vardy (1993) IRLR 104**, Glidewell LJ noted, *''The verb "proposes" in its ordinary usage relates to a state of mind which is much more certain and further along the decision-making process than the verb 'contemplate'; in other words, the directive envisages consultation at an early stage, when the employer is first envisaging the possibility that he may have to make employees redundant. Section 188 applies when he has decided that, whether because he has had to close a plant or for some other reason, it is his intention, however reluctant, to make employees redundant'.*
This shows the distinction between the Directive and domestic legislation, with the latter only requiring consultation at a stage when the employer is conscious that dismissals will take place.

49. The pleaded case presented by the Claimant, is that consultation should have taken place in late 2014/early 2015 (Page 68 reply Pleadings Bundle). No explanation was provided by the Claimant in pleadings as to why consultation should have taken place some 1 1/2 years prior to the purported dismissals taking effect on 30th April 2016.

50. In the statement presented by Dr Moore, no reference is made to when the Claimant believed that the Respondent should have commenced a consultation process prior to the dismissals taking place. When Ms Horgan, under cross-examination, was asked when she believed consultation should have started she was unable to provide an answer to same. With regard to Ms Clarke she stated (Paragraph 17 of the statement presented by Ms Clarke) that the Respondent should have consulted ….*"well in advance of taking decisions to close courses and axe them from UCAS applications as it was obvious to me that a closure would result in people losing their jobs"*…. . This Tribunal will be aware that the closure of low demand courses in early 2015 did not result in any redundancies and do not relate to the subject terminations which took place on 30th April 2016. Any closures thereafter were in the context of the representations made by each Dean to the Claimant and Unite the Union on 31st August 2015, in the written proposals presented on 11th September and in relation to further information provided by the Respondent in numerous exchanges of correspondence

thereafter.

50. The Respondent asserts that the Claimant has failed, via direct evidence, to identify a time when consultation should have commenced. Further, at no stage was it put to the Respondent witnesses that consultation should have commenced on or by a particular date.

51. In any event, the duty to consult only arises when the employer is *"proposing"* to dismiss employees. As noted in **R -v- British Coal Corporation, ex parte Price & Others (1994) IRLR 72** this is when the employer forms a belief that dismissals will take place. As the consultation process is supposed to cover ways of avoiding redundancy dismissal, normally the employer must consult before he issues any notices of dismissals **(Transport and General Workers Union -v- Ledbury Preserves (1928) Ltd (1985) IRLR 412 at paragraphs 15 & 16).** The Respondent in this instance clearly commenced the consultation before any notice of dismissal was issued. With regard to what is meant by *"in good time"* in **Amicus -v- Nissan Motor Manufacturing (UK) Ltd UKEAT/0184/05** the EAT noted at paragraph 11 that:
"... we accept that one cannot adopt a too mechanistic or arithmetical approach to working out what is or is not good time. It will depend on many factors and is essentially a question for a Tribunal. A number of the matters involved will obviously be: firstly the numbers of staff and indeed unions to be involved in the process; secondly what is a reasonable time for the union to be able to respond to the proposals and to make counter-suggestion regarding redundancies whilst the proposals are still at a formative stage. Timing will depend on the eventual outcome that is being envisaged, how many are to be relocated or redeployed, and the ancillary issues involved in association with that redeployment— issues such as rehousing expenses and if necessary new schooling for children involved. What are the subjects to be discussed within the consultation process? How many meetings are likely to be required to cover that process? And as the process develops one may have to consider what changes are taking place to the proposals and how those changes will affect the time for consultation and whether the time for consultation thereafter as a result needs to be extended'.

52. The Tribunal heard extensive evidence in this case as to the number of UCU JNC and JUCNC meetings held between the Respondent and the Claimant and Unite the Union between 2013 and 2016. In the context of this present claim, the unchallenged evidence of Mr Andrew Caldwell (Head of Employee Relations) was that over the years the Respondent had offered the Claimant the opportunity to present alternatives to the manner in which any consultation process was to be conducted. The Claimant however rejected such an offer at the UCU JNC meeting on 18th December 2013, indicating that while they would comment on any proposals presented, they would not become involved in formulating proposals which

were likely to result in jobs of its members being affected (Pages 43- 44 Trial Bundle 1) (Paragraphs 3 & 4 of the statement presented by Mr Caldwell). The Respondent asserts that such a position, which was confirmed by Dr Moore and Ms Clarke under cross examination, ultimately affected the ability of the Claimant to take part in a consultation process at anytime when they were aware that UCU members would be made redundant.

53. At the next UCU JNC meeting on 15th May 2014, in response to the offer to present alternative proposals as to the manner in which any consultation process was conducted, the Claimant indicated that should the Respondent be faced with the need to implement further restructuring as a consequence of future cuts then it would talk to its members about adopting a different approach (Page 45 Trial Bundle 1). As was confirmed by Dr Moore in her evidence under cross examination, no such discussion with members took place thereafter. Again the Respondent suggests that such a failing on the part of the Claimant to engage it's members on ways in which consultation could be undertaken, was indicative of the unreasonable stance taken by the Claimant not to engage with the Respondent where the jobs of its members would be lost.

54. In the UCU JNC and JUCNC meetings thereafter, the Respondent asserts that they kept the Claimant informed of all relevant information concerning funding cuts. Despite the suggestion from the Claimant that that consultation process should have commenced in late 2014/early 2015, it is significant that Ms Clarke failed to attend any of these meetings from May 2014 onwards and was noted as having registered an apology in each instance. It was accepted by Ms Clarke that she had received the agenda and minutes for each of the UCU JNC and JUCNC meetings. If the Claimant truly believed that a consultation process should have commenced at such an early stage, then one would have expected Ms Clarke, as Northern Ireland Official UCU, to attend some or all of these meetings from her offices in Belfast to register such a belief.

55. Further, the pleaded position presented by the Claimant and confirmed under cross-examination, was that Respondent management had acted dishonourably, that they had been guilty of deception and that the consultation process was a sham. The Respondent highlights the fact that such allegations were not put to any of the Respondent witnesses under cross-examination. While Dr Moore refused to identify those members of Respondent management responsible for such inappropriate conduct, Ms Clarke identified Mr Magee and Professor Patrick Nixon (Respondent Vice-Chancellor) in relation to same. This was the first time such allegations had been made against these individuals. This Tribunal is asked to conclude that such statements made by and on behalf of the Claimant, were without any factual basis, were

false and derogatory in nature and that such allegations are indicative of the misconceived nature of the Claimant's case.

56. The Respondents position has been at all times clear, in that it could not present proposals to the Trade Unions for consideration and discussion until its funding arrangements for the 2015/16 academic year were confirmed. This did not happen until 30th July 2015, when the Respondent was notified by DEL in relation to same. As highlighted by Professor Adair in his evidence under cross-examination, it would have been a failure on the part of the Respondent if it had not waited until funding arrangements had been confirmed. This could have resulted in the Respondent presenting an inaccurate and misleading position to its employees in the interim period. The Respondent respectfully suggests that it would have been simply reckless on the part of the Respondent to have entered into formal consultation with employee representatives prior to establishing a true and final position.

57. The Respondent also respectfully suggests that it was correct for the Respondent to instigate preliminary exercises, having due regard to anticipated funding cuts. This enabled each Faculty to be in a position to report in an expeditious manner when confirmation of funding was made. It also allowed the Respondent to allow adequate time to consult on the proposals with Trade Union representatives.

58. At the BRG meeting on 21st April, each Dean was requested to revisit their scenarios from November 2014, reflecting on the REF 2014 results, recent course review datasets and current staffing within their Faculties (Pages 209-10 Trial Bundle 1). By 27th April 2015, Deans were requested to take a holistic view of their Faculty in developing proposals for courses that were at risk. Further, Mr Hope and Mr Magee were tasked with reviewing the Queen's University of Belfast discretionary voluntary redundancy scheme (Pages 220-221 Trial Bundle 1). At the BRG meeting on 27th May 2015, each Faculty brought forward broad proposals to reflect the provisional position on funding cuts that existed at that time (Pages 256-259 Trial Bundle 1). On 1st June 2015, the BRG met again to discuss further Faulty proposals and to agree, in principle, a VSS (Pages 293-299 Trial Bundle 1). At the BRG meeting on 4th June 2015, it was agreed to inform staff of proposed funding cuts resulting in a significant reduction in student numbers (1250) and in staff (210-240)(Pages 303-306 Trial Bundle 1). As noted by Professor Adair, the high numbers of possible student/staff reductions confirmed that courses impacted had not yet been agreed and were dependent on DEL confirming their final budgets (Paragraph 36 of the statement presented by Professor Adair).

59. Following communications made by the Respondent to staff and Trade Unions on 18th

June 2015, regarding the impact of proposed funding cuts, the BRG met again on 22nd June 2015, 3rd July 2015 and 9th July 2015. At these latter meetings the BRG again reviewed the proposals put forward by each Faculty so that when DEL confirmed the final budget settlement, the Respondent would be in a position to finalise same (Pages 316-317,347-353,359-363 & 364-367 Trial Bundle 1).

60. In addition to the position adopted by the Respondent that it was not possible to present proposals to the Claimant and Unite the Union until the final funding position was identified, each Faculty was also considering, refining and/or altering initial proposals over the summer of 2015. It was noted by Professor Curran that her initial Faculty proposal included the closure of Speech and Language Sciences. This position changed when the Department of Health refused to allow same. With regard to Professor Jan Jedrzejewski (Pro-Dean Faculty of Arts), he provided evidence under cross-examination as to his continual efforts to avoid closures during July and August 2015.

61. Further, the unchallenged position of the Respondent was that it was bound by it's Statutes and governance requiring Council and Senate to approve any proposals presented by the BRG before same could be presented to Trade Unions and staff for consideration. Both Council and Senate approved the Respondent proposals following a special meeting held on 31st August 2015.

62. On 31st August 2015, Respondent management and the Deans of each Faculty met with the Claimant and Unite the Union and confirmed that the consultation process had commenced and that as part of the process, alternatives to dismissals would be examined (Page 451 Trial Bundle 2). In addition, the details of the VSS were introduced to the Trade Unions and copies of the scheme were provided to same.

63. With regard to this meeting on 31st August 2017, apologies were received from Ms Clarke (Page 447 Trial Bundle 2). It was accepted by Ms Clarke under cross-examination that she had prior knowledge of this meeting and that she did not request an adjournment of same. The Respondent suggests that it is disingenuous for Ms Clarke to imply that there was some form of deliberate attempt by Mr Magee to keep her away from this meeting.This is disputed. The said Ms Clarke took the decision not to attend the meeting on 31st August 2017 and was represented at same by Dr Moore, Ms Irwin and MD T Irwin.

63. The Respondent highlights the fact that Mr Caldwell was not challenged under cross-examination in relation to the accuracy of his notes taken on 31st August 2015 (Pages 447-451 Trial Bundle 2). Further, Mr Caldwell was not pursued on the suggestion presented by

the Claimant, that Mr Magee had stated at this meeting that this was the start of the 90 day consultation process. Indeed, no effort was made to challenge Mr Magee on this specific matter. It also seems surprising that the Claimant representatives did not take any relevant notes of the discussions held during this meeting. Further, Ms Anthea Irwin, who was in attendance on 31st August 2015, was not called to give evidence on this and indeed other matters relating to this case. It was accepted that Ms Irwin had returned to employment with the Respondent in February 2017 and in fact took the time to be present at this Tribunal hearing. This Tribunal is also referred to Page 495 Trial Bundle 2 which sets out the response from Mr Magee on the suggestion that he had informed the Trade Unions of commencement of the 90 day at the meeting on 31st August 2915. This Tribunal is therefore requested to conclude that Mr Magee informed the Trade Unions about the commencement of the consultation process as recorded in the minutes of this meeting by Mr Caldwell, when in response to a question from Dr Moore, he stated ....*"this will be the start of the consultation process"*.... (Page 451 Trial Bundle 2).

64. On 1st September 2015, the Claimant notified it's members of the meeting of 31st August 2015 and that due to the DEL cutbacks, significant job losses were expected. The Claimant also informed it's members that they intended to meet with Respondent management to provide a response (Page 469 Bundle 2). Despite same, by 8th September 2015 the Claimant was advising it's members not to attend meetings with Deans, Heads of School or Human Resources unless specifically instructed to do so. The Claimant also noted in communication with same, that once the 90 day official consultation officially commenced, they would write to their members with an update (Page 503 Trial Bundle 2). The Respondent respectfully suggests that such a statement supports their own assertion that there was no mention of the 90 day consultation period at the meeting on 31st August 2015.

65. During this present Tribunal hearing, additional documents which were clearly discoverable documents, were identified and provided to the Respondent. Following a review of same, it became apparent that one of the proposals considered by the UCU Branch Committee meeting on 3rd September 2015 (Ms Clarke and Dr Moore in attendance) was the possibility of asking for the Respondent to be *"grey-listed"* (See Document A). The consequences of same would have been simply disastrous for the Respondent, in that, other academics and external examiners would have been requested not to attend the University. The Respondent suggests that such conduct on the part of Claimant is indicative of the unreasonable and confrontational approach adopted by same at this time. It also shows a total disregard for the well being of all Respondent employees, including UCU members.

66. As previously stated, it is common case that on 11th September 2015 the Claimant was provided with a written copy of the Respondent proposals. In her direct evidence, Dr Moore noted that she and her colleagues considered same and concluded that the Respondent was trying to *"con"* the Claimant *"into taking part in a fake consultation when it was clear that these were plans and not proposals"*. Further Dr Moore stated that,.... *"had it generally been a proposal document I would have expected an indication somewhere in the document that our views were being sought"* (Paragraphs 34 & 35 of the statement presented by Dr Moore). The Respondent would reply as follows:

a) The document is clearly marked as a proposal document (Ulster University Faculty Proposals - DEL Budget Cuts)(Pages 433-466 Trial Bundle 2). The ordinary meaning of *"proposal"* is the act of putting something forward for consideration.

b) At no stage, was it ever put to any Respondent witness, and in particular Mr Magee and/or Mr Caldwell, that the consultation process was fake, that the proposals were in fact plans and/or that this was an effort to *"con"* the Claimant. Further, it was never suggested to Mr Magee and/or others that the consultation process was a sham and/or that he and Professor Nixon had acted dishonourably.

c) No evidence was provided by the Claimant to support the assertion that the proposals were in fact plans and/or that the consultation process was fake and a con, a sham and/or that the Respondent management had acted dishonourably or in a coercive manner.

d) In e-mail correspondence dated 11th September 2015, to Dr Moore, Ms Clarke and others, Mr Magee stated *..."I am now providing the University and Faculty rationale for these proposals in writing as attached. In order to enable you to respond to these proposals, as requested, a meeting of the JUCNC has been scheduled for Wednesday 16th September 2015..... the opportunity will be provided to discuss Faculty proposals with each Dean"* (Pages 535-536 Trial Bundle 2). It is therefore factually incorrect for Dr Moore and the Claimant to state that they were never invited and/or provided with an opportunity to respond to the Respondent proposals. It was open at all times for the Claimant to provide verbal and/or written commentary on the proposals. The Claimant simply chose not to do so.

67. On 15th September 2015, Ms Irwin sent an e-mail to Mr Magee demanding the postponement of the VSS and suggested that by imposing a deadline in relation to same was essentially placing a gun to the head of its members. Without the opportunity to cross-examine Ms Irwin in relation to this statement, the Respondent would respond that given the then

imposition of budget cuts, it was clearly necessary to implement the VSS to enable employees to consider the options open to them at that time.

68. Despite requesting a JUCNC meeting on 16th September 2015 (Page 468 Trial Bundle 2), the Claimant refused to attend same. The evidence presented by Professor Curran was that, at the commencement of this meeting Mr Sean Smyth (Unite the Union) stated that they were there because they understood the law (Paragraph 17 of the statement presented by Professor Curran). It was further accepted by Dr Moore, under cross-examination, that Unite the Union were content with the consultation process adopted by the Respondent and they co-operated fully with same. Further, it is common case that Unite the Union have not brought protective award proceedings before this Tribunal on behalf of it's members.

69. The Respondent asserts that the meeting on 16th September 2015 lasted 2 hours and 15 minutes and allowed Unite the Union to question the Deans on their proposals, which they did (Pages 554 and 555 Trial Bundle 2).

70. Thereafter, the Claimant and Respondent exchanged correspondence on the issues relating to the consultation process. The Claimant sent a letter of dispute dated 24th September 2015 to the Respondent (Pages 572 & 573 Trial Bundle 2). The Respondent responded to the Claimant on 9th October 2015 setting out clearly the necessity to re-engage in the consultation process. In addition, the Respondent provided further information to the Claimant relating to the reason for the proposals, the number and descriptions of employees affected, the proposed method of selecting employees to be dismissed, proposed methods of carrying out the dismissals and proposed methods of calculating the amount of any extra statutory redundancy payments (Pages 587-591 Trial Bundle 2).

71. It was put to Dr Moore in cross-examination, that the failure of the Claimant to engage with the Respondent frustrated any consultation process. In response, Dr Moore did not dispute that the Claimant had frustrated the consultation process and stated that if this helped save jobs she would have been delighted. In addition, when it put to Dr Moore that it takes two or more parties to consult, she agreed. Further, the position adopted by the Claimant reinforces their adopted position outlined at the UCU JNC meeting on 18th December 2013, that they would not be prepared to formulate consultation proposals if it were likely to result in members losing their jobs. The failure of the Claimant to enter into the consultation process is again evidence of their unreasonable behaviour at this time and in the presentation of these proceedings at Tribunal.

72. In addition, the UCU Committee (Dr Moore and Ms Clarke in attendance) met again on 9th October 2015 when it was suggested that advice should be given to members not to apply for voluntary redundancy. The Respondent highlights that there was no voluntary redundancy situation as the Respondent operated the VSS. Further, such advice was again unreasonable and could have led to members missing the opportunity to apply for a generous termination package.

73. At the UCU JNC meeting on 10th December 2015, the Claimant indicated that it was still in dispute with the Respondent, was noted as not willing to discuss VSS but was now prepared to discuss funding cuts to Higher Education in general terms. The Respondent informed the Claimant that it was now necessary to meet with the Claimant to discuss limited compulsory redundancies (Pages 654-656 Trial Bundle 2).

74. On 14th December 2015, the Respondent issued the HR1 Form (Advanced Notification of Redundancies) to DETI and a copy of same was sent to the Claimant (Page 660-662 Trial Bundle 2). At section 6 of this document, both UCU and Unite the Union were confirmed as the recognised Trade unions and that consultation commenced with same on 31st August 2015 (Page 662 Trial Bundle 2).

75. At the UCU JNC meeting on 10th March 2016, the Claimant confirmed that it was still not willing to enter into discussions with the Respondent about the process surrounding the DEL cuts to Higher Education funding (Pages 684-687 Trial Bundle 2).

76. On the 30th April 2016, the alleged dismissals, which are the subject of these proceedings, took place. As stated by Mr Magee, the VSS was successful in limiting the number of compulsory redundancies to just 3 employees. Some 145 employees availed of the VSS, contrary to the advice of the Claimant and/or the failure of same to engage into the consultation process with the Respondent (Paragraph 93 of the statement presented by Mr Magee). In total, some 148 employees left the employment of the Respondent as a consequence of the funding cuts imposed for the academic year 2015/16.This was obviously less than the 210 employees previously suggested at risk of redundancy, by Professor Adair when representations were made to Trade Unions and staff on 18th June 2015.

77. While it is essentially a question of fact to be determined by this Tribunal, the Respondent respectfully suggests that it has complied with the statutory requirements of Article 216 Employment Rights (Northern Ireland) Order 1996 in that it consulted with the recognised representatives about the proposed dismissals in good time. Between 31st August 2015, when

the Respondent first consulted with the Claimant and Unite the Union and 30th April 2016 (date of termination of contracts of employment), some 243 days had elapsed. Further, between 14th December 2015, when the Respondent issued the HR1 Form (Advanced Notification of Redundancies) to DETI and 30th April 2016, some 138 days had elapsed.

78. The Respondent asserts that they allowed a significant period of time from the date of commencement of the consultation process to the date of the termination of the contracts of employment on 30th April 2016 having due regard to:

a) the nature of the proposals presented by the Respondent.
b) the number of employees affected by the stated proposals.
c) the number of recognised Trade Unions (2).
d) the time required to consider the stated proposals.
e) the time required to hold meetings between the parties.
f) the time required to consider and respond to any counter proposals.

79. As previously stated, Unite the Union was satisfied with the consultation process as presented by the Respondent and the Claimant, it is suggested, refused unreasonably to engage in same. In the circumstances, the Respondent asserts that the Claimant's claim is misconceived and should be dismissed.

Quantum

80. The Claimant states that they are entitled to seek a protective award on behalf of all those contained within their bargaining unit, from Grade 6 upwards and as set out in the spreadsheet at pages 87-89 of the Pleadings Bundle (Paragraph 62 of the statement presented by Ms Clarke).

81. Under cross-examination, Mr Magee accepted this assertion, with one unchallenged exception, namely that the Claimant would not have been entitled to represent those at Professorial Range grade.

82. A Tribunal has a general discretion to make a protective award of up to a maximum of 90 days pay for each affected employee. In determining the protected period to apply, the Tribunal must consider what is just and equitable in all the circumstances, having due regard to the employer's default (Article 217(4)(b) Employment Rights (Northern Ireland) Order 1996). In **GMB -v- Susie Radin Limited (2004) IRLR 400** Gibson LJ noted at paragraph 45, *"I suggest that employment tribunals, 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: it is not to compensate the employees for loss which they have suffered in consequence of the breach. (2) The employment tribunal 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 the availability to the employer of legal advice about his obligations under s 188. (5) How the employment tribunal assess the length of the protected period is a matter for the employment tribunal, 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 employment tribunal consider appropriate"... .

83. In these present circumstances, the Respondent asserts that even if there has been any breach or technical breach of its statutory obligations, which is strenuously denied, then this Tribunal should not make any protective award. The reasons for same are that:

a) The Respondent provided all required information in writing to the Claimant (Article 216 (6) Employment Rights (Northern Ireland) Order 1996) via the VSS documentation presented on 31st August 2015 (Pages 8-13 Trial Bundle 1), in the Faculty Proposals document (Pages 433-455 Trial Bundle 2), in correspondence form the Respondent on 16th September 2015 (Pages 556-557 Trial Bundle 2),9th October 2015 (Pages 587-591 Trial Bundle 2) and 13th October 2015 (Pages 610-611 Trial Bundle 2).

b) The Respondent provided details of its proposals verbally at the meeting on 31st August 2015 and again at the JUCNC meeting on 16th September 2015. In addition, each Dean made representations to Faculty staff and were available for one-to-one discussions with same. Further, this Tribunal has been made aware of the numerous
UCUJNC and JUCNC meetings held between the Respondent and the Claimant and Unite the Union between 2013 and 2016 during which issues relating to the DEL cuts in funding were discussed.

c) For the reasons as previously noted, the Claimant chose not to take part in any consultation process. This however did not the prevent the consultation process continuing with Unite the Union and with individuals who were not willing to accept the non-engage advice as presented by the Claimant. Such matters were beyond the control of the Respondent and as such, the

Respondent should not be punished as a consequence of same via the imposition of any punitive award.

d) The Claimant has led no evidence as to what extent, if any, the Respondent has failed to consult in accordance with its statutory obligations.

Conclusion

84. It is common case that the necessity to reduce the Respondent workforce on 30th April 2016 was due to the cuts in Block Grant Funding announced by DEL. The Claimant has concentrated on two central elements in the presentation of its case before this Tribunal.

85. Firstly, it asserts that the Respondent failed to act in good faith during the consultation process in that, decisions had already been taken and processes put in place before the meeting on 31st August 2015. In pleadings, and under-cross examination of Claimant witnesses, Respondent management were accused of acting dishonourably and that they were responsible for deception and subjecting staff to coercion and distress. Despite these most serious of allegations the Respondent asserts that the Claimant has failed to adduce any or adequate evidence in support of same.

86. When asked to given full, exact and precise details of the coercion and stress which employees were subjected to, the Claimant responded, "*this is a matter of evidence*" (See reply 8 b) to notice for additional information at page 69 Pleadings Bundle). The Respondent suggests that this answer supports the contention that employees were not subjected to coercion or distress.

87. When requested to give details of each and every way the Claimant asserted that the Faculty Proposal document presented to the Trade Unions on 11th September 2015 contained decisions already made, the Claimant responded, *"this is obvious from the Respondents own document which they can read for themselves"* (See reply 6 to notice for additional information at page 69 Pleadings Bundle. Again, the Respondent would assert that such an unhelpful response is supportive of the suggestion that the Claimant cannot adduce evidence in support of their contentions.

88. Further, none of the Respondent witnesses were subjected to any cross-examination on matters relating to good faith, dishonourable conduct, deception or coercion. In such circumstances, this Tribunal is invited to reject the Claimant's allegations that the proposals

presented by the Respondent were in fact pre-determined decisions.

89. The second element of the Claimants claim relates to the suggestion that the Respondent did not consult in good time. The relevant legislation does not define what it means as *"in good time"*. There is, at the very least, confusion within the Claimant's case as to what they believe to have been *"in good time"*. In any event, the Respondent suggest that there was a significant time period to allow consultation on it's proposals.

90. The Claimant, during the course of this Tribunal hearing, appeared to carry out a forensic examination of the process adopted by the Respondent leading up to the presentation of its proposals to the Trade Unions. The Respondent respectfully suggest that it was only required to present it's proposals to enable a proper consultation process to take place and not less than 90 days before the first of the dismissals took pace. It clearly satisfied this requirement and was fully entitled to commence the consultation process, even when it was clear that dismissals would have to take place. To suggest otherwise is a misunderstanding of the legal obligations imposed by Article 216 Employment Rights (Northern Ireland) Order 1996.

Barry Mulqueen BL
Bar Library
Royal Courts of Justice
Belfast BT1 3JP

INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL
CASE REFERENCE NUMBER 1717/16 IT

Between:

UNIVERSITY and COLLEGE UNION

(Claimant)

-and-

ULSTER UNIVERSITY

(Respondent)

LIST OF AUTHORITIES ON BEHALF OF THE RESPONDENT

Legislation

1. Council Directive 98/59/EC
2. Employment Rights (Northern Ireland) Order 2016 - Articles 216 & 217

Texts

Harvey on Industrial Relations and Employment Law

Volume 1 Division E Section 17 Paragraphs 2592 - 2675 & 2693-2801

Authorities

1. EC Commission -v- Portuguese Republic C-55/02
2. Martin -v- Glynwed Distribution Limited 1983 ICR
3. Birch & Humber -v- University of Liverpool (1985) ICR 470
4. Scott and Others -v- Coalite Fuels and Chemicals Limited (1988) ICR 355
5. Transport and General Workers Union -v- Ledbury Preserves (1928) Ltd (1985) IRLR 412
6. R -v- British Coal Corporation, ex parte Price & Others (1994) IRLR 72
7. R -v- British Coal Corporation, ex parte Vardy (1993) IRLR 104
8. Amicus -v- Nissan Motor Manufacturing (UK) Ltd UKEAT/0184/05
9. GMB -v- Susie Radin Limited (2004) IRLR 400

CLAIMANT: **University and College Union**

RESPONDENT: **University of Ulster**

ANNEX TO THE DECISION OF THE TRIBUNAL

Recoupment Notice

[1] In the context of this Notice, "the relevant benefits" are jobseeker's allowance, income support and income-related employment and support allowance.

[2] Until a protective award is actually made, an employee who is out of work may legitimately claim relevant benefits because, at that time, he or she is not (yet) entitled to a protective award under an award of an industrial tribunal. However, if and when the tribunal makes a protective award, the Department for Communities ("the Department") can claim back from the employee the amount of any relevant benefit already paid to him or her; and it can do so by requiring the employer to pay that amount to the Department out of any money which would otherwise be due to be paid, to that employee, under the protective award, for the same period.

[3] When an industrial tribunal makes a protective award, the employer must send to the Department (within 10 days) full details of any employee involved (name, address, insurance number and the date, or proposed date, of dismissal). That is a requirement of regulation 6 of the Regulations which are mentioned below.

[4] The employer must not pay anything at all (under the protective award) to any such employee unless and until the Department has served on the employer a recoupment notice, or unless or until the Department has told the employer that it is not going to serve any such notice.

[5] When the employer receives a recoupment notice, the employer must pay the amount of that recoupment notice to the Department; and must then pay the balance (the remainder of the money due under the protective award) to the employee.

[6] Any such notice will tell the employer how much the Department is claiming from the protective award. The notice will claim, by way of total or partial recoupment of relevant benefits, the "appropriate amount"; which will be computed under paragraph (3) of regulation 8 of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 (" the Regulations").

[7] In the present context, “the appropriate amount” is the lesser of the following two sums:

(a) The amount (less any tax or social security contributions which fall to be deducted from it by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Department receives from the employer the information required under regulation 6 of the Regulations, or

(b) The amount paid by way of, or paid on account of, relevant benefits to the employee for any period which coincides with any part of the protected period falling before the date described in sub-paragraph (a) above.

[8] The Department must serve a recoupment notice on the employer, or notify the employer that it does not intend to serve such a notice, within “the period applicable” or as soon as practicable thereafter. (The period applicable is the period ending 21 days after the Department has received from the employer the information required under regulation 6).

[9] A recoupment notice served on an employer has the following legal effects. First, it operates as an instruction to the employer to pay (by way of deduction out of the sum due under the award) the recoupable amount to the Department; and it is the legal duty of the employer to comply with the notice. Secondly, the employer’s duty to comply with the notice does not affect the employer’s obligation to pay any balance (any amount which may be due to the claimant, under the protective award, after the employer has complied with its duties to account to the Department pursuant to the recoupment notice).

[10] Paragraph (9) of regulation 8 of the 1996 Regulations explicitly provides that the duty imposed on the employer by service of the recoupment notice will not be discharged if the employer pays the recoupable amount to the employee, during the “postponement period” (see regulation 7 of the Regulations) or thereafter, if a recoupment notice is served on the employer during that postponement period.

[11] Paragraph (10) of regulation 8 of the 1996 Regulations provides that payment by the employer to the Department under Regulation 8 is to be a complete discharge, in favour of the employer as against the employee, in respect of any sum so paid, but “without prejudice to any rights of the employee under regulation 10 [of the Regulations]”.

[12] Paragraph (11) of regulation 8 provides that the recoupable amount is to be recoverable by the Department from the employer as a debt.