THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondents***
National Union of Mineworkers	**UK Coal Kellingley Limited (In Liquidation) (First Respondent)**
	Secretary of State for Business Innovation and Skills. (Second Respondent)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at:	**Sheffield**	**On: 15, 16, 17 and 18 May 2017**
	Deliberations:	**7 July 2017**
Before:	**Employment Judge Shepherd**	**Members: Mr S Carter, Mr T Wilson**

Appearances

For the Claimant: Mr Hendy
For the First Respondent: Mr Gorasia
For the Second Respondent: Mr Crammond

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The claimant's application to amend the claim to include a claim in respect of employees for whom the claimant is recognised for collective bargaining purposes

and were dismissed by reason of redundancy between 21 May 2014 and on or around 26 December 2015 is granted without the need for further service.

2 The claimant's complaint that the first respondent failed to comply with the requirements of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded and succeeds.

3 The first respondent is ordered to pay remuneration, calculated in accordance with section 190 of the Trade Union and Labour Relations (Consolidation) Act 1992, to all employees dismissed on or after 21 May 2014 in respect of whom the claimant union was recognised by the respondent for collective bargaining for the protected periods.

4 The dismissals for which the first respondent is ordered to pay remuneration took place on a number of occasions between 21 May 2014 and 26 December 2015, and the protected periods are the period of 30 days from each of the relevant redundancy dismissals.
The Tribunal has not found it possible to specify each precise protected period. It was informed during the hearing that there were three tranches (May/June 2014, June 2015 and December 2015), and it had intended to specify a protected period in respect of each of those tranches. However, at the end of the hearing information was provided which appeared to show that the redundancies were not confined to those three tranches. The parties have liberty to apply in respect of the specific protected periods within 28 days of the promulgation of this judgment.

5 The second respondent was joined upon its own application for information purposes only and there is no order made against the second respondent.

6 The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. Regulation 6 imposes on the Respondent a duty to provide information to the Secretary of State. Regulation 7 postpones this award in order to enable the Secretary of State to serve a recoupment notice under

Regulation 8. The full effect of Regulation 6, 7 and 8 is set out in the annex to this judgment.

REASONS

Introduction, Hearing and Issues

1 This is a case concerning the events in respect of the closure of Kellingley colliery, the last deep mine in the UK. Dismissals for redundancy took place between May 2014 and 26 December 2015 when the pit finally closed.

2 The complaint brought is that the first respondent failed to comply with the requirements of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. The claim form presented by the National Union of Mineworkers provided details of the claim stating “The union is recognised for collective-bargaining purposes and represents approximately 500 manual workers in various grades who were dismissed by reason of redundancy on or around 18 December 2015.”

3 At a Preliminary Hearing on 21 September 2016 Employment Judge Reed indicated that

> “In issue is whether there was, on the part of the first respondent, a failure to consult at all with the claimant the appropriate representative for those employees (in respect of whom the claimant was recognised) who were dismissed by reason of redundancy in the 90 day period expiring on 25 December 2015, contrary to the provisions of section 188 (1), (1A) and (1B) (a) of the Trade Union and Labour Relations (Consolidation) Act 1992.”

4 It was only after the hearing of the evidence and at the start of submissions that an application to amend the claim was made by Mr Hendy on behalf of the claimant. It was indicated that the relevant section on the claim form should have been completed to read those ”who were dismissed by reason of redundancy between 21 May 2014 and on or around 18 December 2015.” The question of a proposed amendment was raised at the outset of this hearing. At that stage the respondent had not provided full details of

the dates and numbers of redundancies that actually took place. Mr Hendy considered it appropriate to leave any application until after the evidence had been heard.

5 An agreed list of issues was provided at the commencement of the hearing which was as follows:

5.1. When did the first respondent commence consultation?

5.2. Did the first respondent commence consultation pursuant to s188(1A) TULR(C)A 1992 in good time and in any event at least 45 days before the first of any dismissals took effect?

5.3. Did the first respondent commence consultation pursuant to s.188(1) of the Act when it was proposing to dismiss the workers?

5.4. Did the first respondent commence consultation pursuant to Art.2(1) of the CRD when it contemplated dismissing the workers?

5.5. In this case is there a material difference between (3) and (4) above which would affect the outcome of this case?

5.6. If there is a material difference which would affect the outcome of this case, should the Tribunal refer the matter to the CJEU?

5.7. Did the first respondent consult with the Claimant as appropriate representatives pursuant to s188(1B) TULR(C)A 1992?

5.8. Has the claimant demonstrated that the consultation process embarked upon by the first respondent was inadequate for the following purported reasons:

a. The existence of an alleged irrevocable agreement between the first respondent and Government concerning the closure of Kellingley Colliery prior to 1st April 2014?

b. The first respondent's purported absence of consultation prior to the securing of the assurance that the government would fund the managed closure plan?

c. The first respondent's purported unreasonable refusal, in time, properly or at all, to consult over EU State Closure Aid as an alternative to closure?

d. The first respondent's purported failure, in time, properly or at all to consult with the claimant over alternatives to closure?

e. Was such consultation as there was restricted only to implementation of the managed closure plan?

5.9. In the event that the claimant can demonstrate that the consultation process was flawed for all or any of the reasons indicated in para 3 above, can the first or second respondent demonstrate that there were special circumstances which rendered it not reasonably practicable for compliance with that requirement pursuant to s188(7) TULR(C)A 1992?

5.10. In the event that the Tribunal finds that there has been a breach of s188(1A) and/or s188(1B) TULR(C)A 1992, what should the length (if any) of the protected period be pursuant to s189(4) TULR(C)A 1992?

5.11. In the event that the Tribunal finds that there has been a breach of s188(1A) and/or s188(1B) TULR(C)A 1992 and/or the CRD, what should be the appropriate compensation pursuant to the CRD?

5.12. If the measure of compensation is different under 10 and 11 above, should the Tribunal refer the matter to the CJEU?

6 The Tribunal heard evidence from:

Christian Kitchen, General Secretary of the claimant union;

Stephen Hutchinson, former Group Finance Director;

Heather Roberts, former Group HR Director.

7 The Tribunal had sight of a bundle of documents consisting of 6 lever arch files numbered up to page 2088. The Tribunal considered those documents to which it was referred by the parties.

8 The Tribunal was provided with skeleton arguments on behalf of each of the parties. The Tribunal also received written submissions and heard oral submissions from each of the representatives. Both the claimant and the first respondent provided chronologies which were helpful. It was not possible for a joint chronology to be agreed but the Tribunal has considered the contents of the chronologies together with the oral and documentary evidence. The Tribunal has not set out the submissions in detail but it has given careful consideration to all of the submissions in reaching its conclusions.

9 Findings of fact

Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions.

9.1 In December 2012 a corporate restructure of the then UK Coal group took place. Two separate divisions of UK Coal plc were created, a property company and a mining company. The employees' pension schemes (PPF) invested £30 million into the operation of the three collieries at that time, Daw Mill, Kellingley and Thoresby and owned 75% of the shares in the property company.

9.2 UK Coal Operations Ltd (UKCOL) owned and operated the three deep coal mines and had a number of subsidiaries which included UK Coal Kellingley Ltd.

9.3 On 22 February 2013 a serious underground fire broke out at Daw Mill colliery and caused that colliery to close.

9.4 UKCOL was placed into administration on 9 July 2013. The surface mines business was transferred to a new surface mines company (UK Coal Surface Mines Ltd) and the deep mines business of Kellingley and Thoresby to UK Coal

Kellingley Ltd and UK Coal Thoresby Limited. UK Coal Production Ltd was the parent company and UK Coal Mining Holdings Limited was the holding company.

9.5 In October 2013 a five-year plan was drawn up by the board of UK Coal Production for the operation of its deep mines and surface mines business.

9.6 In November 2013 first respondent continued to suffer financial difficulties. A fault at Kellingley colliery which had taken longer to clear than had been forecast in the five-year plan resulted in disruption. There was reduced production and sales. There was an operating loss of £7.2 million and the capital expenditure costs were higher than expected. Also, future revenue levels were threatened as a result of the exchange rate between sterling and the US dollar.

9.7 Stephen Hutchinson, the Group Financial Director said that, in early December 2013 there was a real concern that the business would run out of cash by mid-2014. He contacted Rob Hebenton of PricewaterhouseCoopers to assist him in the development of rescue scenarios known as "Project Ashley" prior to a meeting with the PPF to discuss the situation.

9.8 On 4 December 2013 Stephen Hutchinson sent an email to Derek Parkin, Chief Operating Officer and other members of the management team. In that email he stated:

> "CONFIDENTIAL
>
> Rob and I are putting together 4 or 5 scenarios for further discussion:
>
> > 1. Continue as is, highlighting the risk based on current prices and exchange rate and explaining this scenario might never happen but we have to consider it.
> >
> > 2. Scenario based on failing to salvage 502s in the time in the forecast – further risk to No. 1 – may or may not use this.

> 3. Run K until the end of Beeston and close, no more capex after 50B.
>
> 4. Run K as No. 3 plus close Thoresby after DS5 so stop developments now.
>
> 5. Sale of all or part of the business.
>
> No.5 is very much linked to No.1 in that the safest way to ensure the business returns maximum cash is an investment but that still needs coal prices to recover in 2015 and beyond. Scenario 4 is probably the least risk though incentivising the men to mine to an end date gives me pause!
>
> Will work these through this pm with Derek and these are paper exercises at this moment, we will need to agree how much we tell the PPF in the morning/tonight."

9.9 Stephen Hutchinson said that the scenarios set out in the email included a "run for cash plan" in respect of the deep mine business which would have meant an early managed closure of Kellingley and Thoresby collieries. He made it clear in an email sent shortly afterwards that he was not advocating a run for cash plan and that it was simply one of the various scenarios to be considered.

9.10 A meeting took place with PPF on 5 December 2013. The purpose of the meeting was to give PPF, the main creditor of the first respondent, as early a warning as possible that UK Coal was in financial difficulty. A number of possible options were set out including seeking further financial support from PPF and additional funding/investment from external sources including the government.

9.11 At a board meeting on 9 December 2013 the possibility of running the mine for cash was considered if prices did not improve.

9.12 On 11 December 2013 a meeting took place between the first respondent's managers and the NUM in which pay negotiations took place including consideration of the Enhanced Redundancy Scheme.

9.13 Discussions were taking place in respect of a proposed sale of all or part of UK Coal with an American company, Coronado Coal.

9.14 A meeting took place with Price Waterhouse Coopers on 16 December 2013. Heather Roberts took notes of that meeting in which there is reference to layoff arrangements and it is stated "Trade union dialogue! Hold them at Bay…"

9.15 On 17 December 2013 there was a Board discussion which included various options such as additional funding from PPF, sale of UK Coal, financial support from the government and a run for cash which would involve the completion of mining of the developed coal seams and the cessation of further investment in the development of further seams. Within the handwritten notes of the meeting there was a reference to "letters to all employees". There was also a note which referred to "cost and timing of closure at Kellingley" "can get away with laying off immediately?" "At what point can we say that Kellingley is insolvent? – At point that can't see a reasonable alternative?"

9.16 Detailed plans were drawn up providing dates and numbers of proposed redundancies. At a board meeting on 3 January 2014 discussions took place with regard to the financial position of the company. The minutes show:

> "The Directors present noted that the Company had sufficient working capital to continue to trade and to meet all of its ongoing liabilities for at least the next three months. However, absent external investment in this period, the new Kellingley face developments in the current Five Year Plan could not be undertaken and revised options based on possible external investment, sale and or stopping face development and closing out the deep mines would need to be modelled. The Directors present

noted that this information would need to be presented to the PPF for discussion and approval."

"The Directors present agreed that on the basis of the reduced production at Kellingley careful consideration of the Company's financial position was needed on a regular basis. The Directors present agreed to continue to monitor the position of the Company and noted that the Directors should account of their duty to act in the best interests of the company's creditors."

"To continue to engage PwC, which is providing ongoing advice on the various options available to reduce expenditure and stabilise the cash flow situation including:

(a) the financial modelling of stopping face development work at Kellingley and/or Thoresby deep mines early and effect an orderly closure out of mining operations over a shorter period than in the Current Five Year Plan."

9.17 On 6 January 2014 the minutes of a Board meeting show that there was further discussion of the financial position of the company. Within that discussion, it is stated:

"The Directors present discussed the option of ceasing development works early at either or both of Kellingley and Thoresby and the likely costs and revenue generation of such actions. The Financial Director advised the Board that much work still needs to be done to establish the cash impact of such decisions and any discussions with the PPF will need to reflect that the Company is not yet in a position to truly model such scenarios. The Directors present noted the importance of obtaining legal advice on the union consultation procedures and the requirements and the criticality of the timing of this."

There was further reference to various options including stopping face development and closing out the deep mines which would need to be 'modelled' and that this information would need to be presented to PPF for discussion and approval.

9.18 Handwritten notes of the meeting on 8 January 2014 referred to discussions with PPF. It is stated that run-off was most realistic and with regard to notes in respect of Coronado Coal it is noted that it was highly likely that they would need to make the decision to put into run-off prior to the deal being transacted.

9.19 On 8 January 2014 UK Coal gave a presentation to PPF which set out a number of options which included:

> "We are also reviewing if an alternative "run for cash" strategy is viable. This would involve the deep mines closing over the next c.18 months as future investment expenditure is stopped.
>
> Given cash constraints and the order deadline for equipment at Kellingley a decision is being targeted by the end of Jan -14"

9.20 On 13 January 2014 a conference call took place with PPF. Within the notes it is stated

> "TU/Trustees – what do they know? Nothing yet Can we treat PPF same manner – Fund available to support closure costs – would materially affect if we 'ran for cash'"

9.21 On 15 January 2014 a confidential note was provided to Heather Roberts and others in respect of redundancy consultation. This note indicated that there were no proposals to dismiss staff because of redundancy at the time of writing but that one scenario could lead to the closure of the business and consequent redundancies. There was detailed advice with regard to consultation requirements which included that there was no need for selection pools or process as everyone would leave at some stage.

9.22 On 21 January 2014 a board discussion/meeting took place. There is reference to having heard nothing from Coronado and asking support from DECC

for the soft landing of both collieries and "if the answer is 'no' then go to a straight closure of K"

9.23 On 23 January 2014 a presentation was made to DECC in which it was indicated that no offers had been received and that the remaining options were:

> "1) Managed closure of the deep mines; or
>
> 2) Immediate insolvency and closure"

The presentation included reference to the immediate loss of circa 2000 direct jobs and a similar number in the supply chain.

The conclusion was that:

> "Closure is inevitable, either managed or an immediate insolvency
>
> Immediate insolvency would cost Government in excess of £50m
>
> Managed closure would significantly reduce and could eliminate the net cost to the government."

9.24 On 27th January 2014 a presentation was made to PPF in similar terms to that made to DECC.

9.25 On 30 January 2014 a Board meeting took place it was stated in the minutes that interest had been shown by Hargreaves Services plc in relation to a potential sale. The company had entered into a non-disclosure agreement with Hargreaves and Coronado had been involved in further discussions:

> "The Directors concluded that the options for sale and/or government support was still open to them and, in light of the positive developments, that they remained credible with a reasonable chance of success. They therefore concluded that the company had a reasonable prospect of avoiding insolvency and that they could continue to trade. This position will be reassessed on a daily basis."

9.26 On 7 February 2014 the NUM wrote to the respondent indicating that there were rumours circulating throughout the workforce that the future of UK Coal was in jeopardy and asking that the union be updated in respect of the financial position and outcome of discussions with PPF.

9.27 On 11 February 2014 the minutes of the Board of Directors show:

> "The rumours within the workforce were discussed. It was agreed that as a result of the state of knowledge of the workforce anyhow, the risks in engaging with the trade unions were largely no longer relevant. The potential benefits of early engagement with them, so as not to present them with a "fait accompli" and a short space of time to consider any proposed deal were considered."

9.28 On 12 February 2014 the NUM was provided with a briefing by the first respondent. Information was provided with regard to negotiations taking place for the purchase of the deep mines and surface mines.

9.29 The trade unions were asked to sign a non-disclosure agreement (NDA) before full details of the potential sale were provided. The NUM signed the NDA, after some negotiation on 17 February 2014.

9.30 On 28 February 2014 the trade unions were briefed by the first respondent in a telephone call in which they are informed that PPF had indicated that they had produced a paper recommending that all cash be withdrawn from the UKCL business and that that would mean either an immediate and uncontrolled insolvency or, if government support could be found, a managed closure of all parts of the business.

9.31 On 5 March 2014 a meeting took place with the trade unions. It was indicated that further discussions had taken place and that discussions had taken

place with the Minister in respect of government assistance in respect of "Plan B", a managed rundown with government assistance to help fund redundancies.

9.32 In an email dated 5 March 2014 Kevin McCullough made note of a discussion with the Minister, Michael Fallon. In that email it is stated:

> "I said this was crucially important for the board to have that confidence but that we still felt as a board we needed to be pushing for the closure aid application with the EU. He acknowledged that there may well be a time (soon if a deal fails) to press this button but urged us not to push too hard for this just yet as the package of measures in his view should be capable of kicking in very quickly with any EU assistance formally being triggered at that point."

9.33 On 11 March 2014 a conference call took place with the NUM. It was indicated that the bidder was likely to withdraw and, if that was the case, the first respondent would have to move quickly in order to further their cause for the government support for a run-off scenario.

9.34 Coronado formally withdrew from the process and, at a board meeting on 12 March 2014, it was indicated that the first respondent would be telling the trade unions that there was no other option than closure. A telephone call took place with the trade unions on 12 March 2014. Questions were raised by the trade unions with regard to state aid and that the first respondent was awaiting a response to a request from DECC. It was stated that "the legal rep insists that if haven't applied prior to 2010, not entitled." Mr Kitchen, on behalf of the NUM is noted as stating:

> "Yes we need to get involved then because that is not acceptable to us. We know what the agreement is with Europe, we know what happened in Germany and Spain."

9.35 On 12 March 2014 an email was sent from Michael Fallon, Energy Minister, four possible options were mentioned as having been described by UK Coal

> "1) Immediate insolvency
>
> 2) Run-off over a month – this would mean that the deep mines could be closed in an orderly and safe way, and would leave potential for the surface mining business to be sold by an administrator.
>
> 3) This would be the plan previously presented when UKC first approached HMG, with Kellingley closing in around October 2014, and Thoresby closing in the second half of 2015. This would be dependent on funding from HMG.
>
> 4) UKCL are presenting a new plan, which would mean that both mines would run until around the second half of 2015. This would also be dependent on funding from HMG, presumably more than option 3."

9.36 In the notes in respect of a meeting with the Trade Unions on 17 March 2014 it is indicated that there had been discussions with PPF's advisors, the shareholder executive and DECC's advisors, the NACODS representative is shown as stating:

> "I would like to see a revised document. Where I struggle is that, to us, it's a fait accompli. I'm not saying that you are not doing your best, but we're not even on the bus, let alone driving it. This is the bit that is doing it for us"

Mr Kitchen, on behalf of the NUM stated:

> "I won't pretend to talk for the other unions, but is it possible to get a financial and manpower graph? i.e. to see whether someone is out of a job in 2 months or 18 months. What you are talking about now doesn't cover what was in place. We need to see how many people are going and when, our backs are against the wall and DECC would like to see UKC close. The company need to hold off doing anything… And I will ask about

> the Silkstone – to give us time to ask for closure aid. We need the time to go to Europe, to look at getting a subsidy and push the decisions to 2025."

There was reference to dialogue with MEPs and, also, the possibility of an employee buyout.

9.37 On 18 March 2014 Kevin McCullough sent a proposal to Michael Fallon, Minister of state for Energy, in which there is an executive summary as follows:

> "1. The UK Coal board request support for a closure of the business over an 18-month period as per the plans outlined below and previously discussed.
>
> 2. The plan mitigates the current real risks faced by Government agencies and other stakeholders as well as UK Coal.
>
> 3. The plan has reduced the mining risk as the coalface developments are largely completed.
>
> 4. The plan provides for a safe, managed and controlled end for the business which could be beneficial to all stakeholders."

9.38 On 20 March 2014 Mr Kitchen wrote to Malcolm Weir, Head of restructuring insolvency at the PPF. In that letter, Mr Kitchen asked the PPF for support of forbearance

> "To allow the proposed rescue plan to be given time to come to fruition which in our opinion will prevent danger of an unplanned managed closure of the deep and surface mines…"

9.39 At a meeting on 21 March 2014 with the trade unions Mr Kitchen stated:

> "People are asking us questions about the managed closure plan, which is why we asked earlier this week if we could see what the company proposal was."

Derek Parkin is shown to have replied:

> "We do not have a detailed plan. It is very much high-level I do have a problem and that is that there will always be conflict between being open and honest."

9.40 On 31 March 2014 an email is sent from Number 10 to various other government offices and agencies indicating:

> "Following earlier conversations and the PM and DPM bilateral, there is ministerial agreement that we can proceed with negotiations on a loan to UK Coal, on the basis that we make clear that the loan would be a one-off to support a managed wind down."

9.41 On 1 April 2014 the HR1 form was completed providing for the dismissal of 719 employees between 23 May 2014 and 4 December 2015.

9.42 Also on 1 April 2014 a presentation was made to the trade unions and in a letter that day to the NUM a proposition was put in respect of a managed closure programme in which it is stated that

> "This is the only plan available. There are no other options."

9.43 Also on 1 April 2014 a meeting took place at the TUC Congress House. There was discussion of seeking EU closure aid and exploring all other avenues.

9.44 On 2 April 2014 members of the NUM travelled to Brussels and met with the EU Commissioner. Mr Kitchen said that they had been told that there was a possibility that was open to the UK government to make the appropriate application. This contradicted the information conveyed to them by the DECC and UK Coal who had indicated that there was no entitlement to apply for state aid after 2010.

9.45 As a result of their discussions with the EU Commissioner, the NUM commissioned a report from Orion Innovations on the merits of a UK Coal State Aid application.

9.46 On 3 April 2014 Derek Parkin sent an email to all employees which was headed 'Colleague Message' in this it was stated:

> "Following various meetings this week, and a lot of media attention yesterday, I want to give you an update on our progress.
>
> Most of you will have seen that news of our situation was leaked to the media and we've had significant coverage over the last few days. I'm sorry this was the way some of you may have heard new information. This was not our intention, we had to react to some of the leaked information extremely quickly and in difficult circumstances. There is speculation in the coverage but it's true to say that due to the strong pound, low coal price, and to a lesser extent some operational issues, the Company has found itself under extreme financial pressure in recent months.
>
> We have therefore been in discussions with a number of key stakeholders to help secure the investment we need, as we look for the best possible outcome going forward.
>
> While there is general agreement on a solution that will see the gradual wind down of the deep mines, expecting to close over an approximate 18 month period, as of today we still do not have complete agreement. But we're working hard at that now.
>
> To prepare for this, we have started formal consultation with the Trade Unions on the areas of business we now know will definitely be affected. Consultation will last 45 days during which time we will consult with Trade Unions, employee representatives and employees. Potential manpower reductions, mitigation opportunities and selection criteria will be discussed during this period.

> As part of this process, we will now be seeking volunteers for redundancy, but no one will leave on compulsory redundancy before the end of the consultation period."

9.47 A consultation meeting took place with the trade unions on 8 April 2014 it was made clear that the run-off plan was the only deal on the table. It was stated by Derek Parkin that:

> "PPF and other interested parties have now agreed and signed up to the run-off plan. The run-off plan is the only deal on the table. We are still awaiting a decision from Government. A statement has been issued earlier today indicating that the Government are minded to do a deal but require another 48 hours to finalise the detail."

The notes show that Mr Wilson of the NUM indicated that they would pursue plans to secure funding to keep Kellingley open until 2018

> "… All we ask of the company is that it keeps developments going whilst other options are being explored."

Mr Parkin indicated that:

> "The run-off plan is the only plan on the table."

Heather Roberts told the Tribunal that UK Coal made it clear to the unions that it would support an application for ESCA but not at the expense of the run-down plan particularly given the message from the government that it would not support ESCA at that stage.

9.48 The mining unions and the TUC met with Michael Fallon, the Energy Minister, on 9 April 2014. The TUC briefing notes of that meeting show that the mining unions put the case to the government for a state aid application to the European Commission to secure the future of the two mines operating and producing coal to 2018, saving 2,000 jobs and more in the supply chain. There was reference to state aid providing for a longer working period to 2018 as had governments in Spain, Germany, Poland and the Czech Republic. It is stated:

"The Minister stated that he did not want there to be any doubt that the government was willing in principle to support UK Coal's plans based on managed closure in 2015, but did not see any case for extending the support beyond that. None of this would preclude any new private sector investor coming forward, nor would the documentation exclude the possibility of an approach that any future government might wish to make but £60 million of taxpayers' money is not available."

9.49 A consultation meeting took place with the NUM on 10 April 2014 Derek Parkin informed the NUM that the consultation was about the rundown plan, the desire to extend further was understood but it was indicated that it needed to be clear that the meeting was about the rundown plan.

9.50 In a written ministerial statement Michael Fallon indicated

"There is no value for money case for a level of investment that would keep the deep mines open beyond this managed wind down period to autumn 2015."

9.51 On 11 April 2014 the mining unions wrote to Michael Fallon indicating that:

"While the unions maintain their position that they will continue to argue the case for state aid and did not wish to sign any document that made us party to colliery closures, we do accept that in light of your statement to the House there is now an urgency to move forward with the plan agreed between Government, Hargreaves and Harworth Estates (and other stakeholders such as the PPF and HMRC).

To this end we confirmed that we would engage with the ongoing management of the business to ensure that Kellingley and Thoresby could deliver the plan to time and to budget.

> We also acknowledged that the current plan was preferable to the alternative of insolvency and that we have an important role to play to ensure its success.
>
> Although we may have different views about state aid we felt it important to clarify where we stood in relation to the current position."

9.52 On 30 April 2014 a report was provided by Orion Innovations in respect of the merits of UK Coal state aid application. The report was commissioned by the NUM. It was a detailed report and went through the economic, environmental, social and strategic issues and concluded:

> "The merits of an EU Closure Aid application would seem obvious, and we would recommend that this is explored immediately."

9.53 Further discussions took place with the Trade Unions with regard to voluntary redundancies, selection criteria, selection pool and incentive completion bonuses.

9.54 On 22 May 2014 Heather Roberts, HR director, wrote to Chris Kitchen, general secretary of the NUM referring to the consultation process and indicating that:

> "The company considers that it has complied fully with its consultation obligations with all recognised Trade Unions and Staff Representatives and that the consultation process has been exhausted and is now concluded.

9.55 On 23 May 2014 the first tranche of redundancies took place at Kellingley colliery.

9.56 On 16 June 2014 the NUM met with Michael Fallon who indicated:

> "Where is the five-year plan because someone would need to put one forward. As it is the only plan brought forward is the 18 month UK closure plan."

9.57 At a meeting between UK Coal and the unions on 18 June 2014 Chris Kitchen is recorded as having said:

> "There are lessons that we can learn, it needs to be different moving forward. People have been misled, when we were with Michael Fallon the big obstacle was that he stated that the only plan that he had been presented with is the 18 month plan. And because of that the investors think there is nothing other than the 18 month plan. This may still cause a problem if it affects us and we are trying to fight for the longer term. Michael Fallon has to be certain that there is value for money."

9.58 On 20 June 2014 Stephen Hutchinson, Finance Director of UK Coal wrote to Michael Fallon:

> "Previous discussions with DECC officials have left the directors of UK Coal with little doubt that European State Aid was not available as a source of support for the business. Following recent discussion we are requesting clarification if this is still the case?"

9.59 On 24 June 2014 Michael Fallon replied to Mr Hutchinson, he stated:

> "It is not possible to be definitive on whether a longer term plan involving state aid is something that could be supported. The government would first need to see a clear proposal from UK Coal.… It is difficult to provide a definitive view on timescales in the context of the commission consideration of State aid notifications… Even on an expedited basis it can take at least four months to secure a definitive response once a suitably detailed notification has been submitted although a longer process cannot be ruled out."

9.60 On 15 January 2015 UK Coal sent to Matthew Hancock, Minister of State for energy, an application for state aid under article 3 of the European directive, Requesting the government to support a plan for ongoing operations until 2018.

9.61 On 26 March 2015 Matthew Hancock wrote to Chris Kitchen indicating the Government's rejection of the State Aid application for UK Coal. It is stated:

> "Having carefully considered the case for providing significant additional support, the Government announced its decision today that committing public sector funding on the scale necessary to extend the company's plan by three years is not affordable and does not represent value for money to the taxpayer."

9.62 In July 2015 the Government was provided with European Commission approval and provided £10 million of repayable grant money which facilitated the closure of Kellingley and Thoresby collieries on 26 December 2015.

The Law

10. The consultation procedure to be followed by an employer was set out in Council Directive 75/129/EEC. This has since been replaced by Council Directive 98/59/EC

11. Article 1 sets out the concept of collective redundancies. Article 2 identified the matters over which consultation should take place and the information which needs to be provided as follows:

> "1 Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.
>
> 2 These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures

aimed, inter alia, at aid for redeploying or retraining workers made redundant. Member states may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice

.

3 To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations—

(a) supply them with all relevant information and

(b) in any event notify them in writing of—

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefore upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice. The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first sub-paragraph, point (b), sub-points (i) to (v)."

12. There is no remedy or sanction specifically provided. However, article 6 requires that administrative or judicial procedures must be made available for the enforcement of these obligations.

13. Article 10 EC requires member states to take all measures necessary to ensure that infringements of Community law are "penalised under conditions ... which, in any event, make the penalty effective, proportionate and dissuasive": *Commission of the European Communities v Hellenic Republic* (Case 68/88) [1989] ECR 2965, 2985, para 24.

14. Section 188(1) and (1A) of the Trade Union and Labour Relations (Consolidation) Act (as amended by regulation 2 of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925)) provides:

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be [affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event--

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least [45] days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are--

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or

(b) in any other case, whichever of the following employee representatives the employer chooses:--

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

(ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1).

(2) The consultation shall include consultation about ways of--

(a) avoiding the dismissals,

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

(c) mitigating the consequences of the dismissals,

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

(3) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

(4) 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 enactment) to employees who may be dismissed],

...

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

15. There are two elements that must be satisfied before this provision applies. Not only must it be not practicable to comply fully with the obligations, but in addition it is necessary for the employer to take all reasonably practicable steps towards compliance. Section 189(6) puts the burden of establishing both these issues on the employer:

> "If on a complaint under this section a question arises—(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or (b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances, it is for the employer to show that there were and that he did."

16. The obligation to consult under the statute arises only once there is a proposal to dismiss. This does not reflect the language of the Directive which requires consultation when dismissals are "contemplated". It has been held that, notwithstanding the obligation to seek to interpret domestic law consistently with European Community law, it is not possible to construe "proposed" as the equivalent of "contemplated": see the observations of Glidewell LJ in *R v British Coal Corpn, Ex p Vardy* [1993] ICR 720,753, followed by Lindsay J, giving the judgment of the Employment Appeal Tribunal in *MSF v Refuge Assurance plc* [2002] ICR 1365, para 42; and to similar effect the judgment of

the Employment Appeal Tribunal in *Scotch Premier Meat Ltd v Burns* [2000] IRLR 369. As Lindsay J said in *MSF* ,

> "The obligation to consult when redundancies are contemplated means when they are envisaged as a possibility; it is a more amorphous and earlier state than the point in time when they are proposed; the proposed redundancies occur at a later stage when the state of mind is more certain. His Lordship cited a definition of "to propose" from the *Shorter Oxford English Dictionary*, namely "to lay before another or others as something which one offers to do or wishes to be done".

17. However, following the decision of the Court of Justice in *Junk v Kühnel* (Case C-188/03) [2005] ECR I-885, even if the obligation does not arise until there is a proposal, that must be prior to any formal decision to dismiss being taken. In *Junk* the court observed:

> " The case in which the employer 'is contemplating' collective redundancies and has drawn up a 'project' to that end corresponds to a situation in which no decision has yet been taken. By contrast, the notification to a worker that his or her contract of employment has been terminated is the expression of a decision to sever the employment relationship, and the actual cessation of that relationship on the expiry of the period of notice is no more than the effect of that decision.
>
> Thus, the terms used by the Community legislature indicate that the obligations to consult and to notify arise prior to any decision by the employer to terminate contracts of employment.
>
> Finally, this interpretation is confirmed, in regard to the procedure for consultation of workers' representatives, by the purpose of the Directive, as set out in article 2(2), which is to avoid terminations of contracts of employment or to reduce the number of such terminations. The achievement of that purpose would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision.
>
> The answer to the first question must therefore be that articles 2 to 4 of the Directive must be construed as meaning that the event constituting redundancy

consists in the declaration by an employer of his intention to terminate the contract of employment."

18. In *Leicestershire County Council v Unison* [2005] IRLR 920, para 35, the Employment Appeal Tribunal held that "proposing to dismiss" in section 188(1) must be interpreted as "proposing to give notice of dismissal", and that accordingly consultation must be completed before notices of dismissal are given to the workforce.

19. In Atavan Erityisdojen AEK v Fujitsu Siemens Computers C-44/08 [2009] IRLR 944 The ECJ addressed the issue of the meaning of 'contemplating' in the CRD (Directive 98/59/EC), and affirmed the approach taken in Junk v Kuhnel that consultation must start early enough to be effective, but then went on to warn against a premature triggering of the obligation:

> ''...where a decision deemed likely to lead to collective redundancies is merely contemplated and where, accordingly, such collective redundancies are only a probability and the relevant factors for the consultations are not known, those objectives cannot be achieved."
>
> "'It must therefore be held that, in circumstances such as those of the case in the main proceedings, the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or plan for collective redundancies has been taken.''

20. In USA v Nolan [2010] EWCA Civ 1223 The Court of Appeal said:

> "The essence of the decision was, therefore, that there is no doubt that – as was said in *Vardy* — the Directive required consultation over the formation of a clear, albeit provisional, intention to close a plant, at any rate when such closure was contemplated as giving rise to collective redundancies; and so now does section 188, whose current form differs materially from its form at the time of the decision in *Vardy."*

21. The Court of Appeal found the reasoning in Akavan ‘difficult to follow' and referred the case to the CJEU since it was not clear whether the CJEU had held that the consultation obligation arises:

(i) when an employer proposes, but has not yet made, a decision that will foreseeably or inevitably lead to collective redundancies; or

(ii) only when such a decision has actually been made and the employer is proposing consequential redundancies.

22. These were the questions posed by the CA to the CJEU. The Court of Appeal cited parts of the ECJ's judgment supporting each of these constructions.

23. On 22 March 2012, Advocate General Mengozzi delivered his opinion that the obligation to consult is triggered, within a group structure, when a body or entity that controls the employer makes a strategic or commercial decision which compels the employer to contemplate or to plan for collective redundancies. The Advocate General considered that this analysis, derived from *Akavan*, could apply to the closure of a military base, entailing collective redundancies of civilian staff, where the strategic decision had been taken at a much higher level in another country. However, when the ECJ came to give its ruling [2013] ICR 193, ECJ, it held that it had no jurisdiction to decide the matter because, unlike s.188 Trade Union and Labour Relations (Consolidation) Act 1992, Article 1(2)(b) of the Directive excludes from its scope ‘workers employed by public administrative bodies or by establishments governed by public law'.

24. When the case returned to the Court of Appeal, the Court ordered a further hearing on the question of when the consultation obligation arose by reference purely to the domestic provisions. The USA then appealed against that decision to the Supreme Court.

25. The Supreme Court dismissed the appeal [2015] ICR1347. The Supreme Court remitted to the Court of Appeal the determination of whether UK Coal was rightly decided on the point that consultation about the reasons for closure must take place before the decision to close. This decision is still awaited.

26. In the case of UK Coal Mining Ltd v National Union of Mineworkers [2008]163 it was said that since *Vardy* [1993] ICR 720, the assumption has been that there was no obligation to consult over the reason for the redundancies themselves. The judgment of Elias J stated:

> "We prefer the submissions of the two unions. We have no doubt that the court in Vardy was correct in saying that under European law the obligation under article 2 (2) of Directive 75/129 does require consultation over a decision to close a plant. Moreover, as counsel for the unions point out, given the very broad obligation to consult over all sorts of economic decisions under the Information and Consultation of Employees regulations 2004, including consultation over the undertaking's economic situation, it would be strange if this did not apply to that situation at the very point where loss of jobs was envisaged. It is true that under those regulations where there are collective redundancies these duties cease to apply once section 188 is triggered, but it would be bizarre if the scope of the latter duty were more limited. That would mean that there was no such duty at the very point where the interests of the employees are most crucially engaged.
>
> The issue, however, is whether it is possible to give effect to section 118 so as to achieve that result. One way potentially would be to read "proposed" so that it means "contemplated". That would bring domestic law wholly in line with the Directive. However, as we have indicated above, both the Divisional Court in Vardy and the Employment Appeal Tribunal in MSF v Refuge Assurance Plc [2002] ICR 1365 have expressed the view that, even given the generous scope for interpreting rules compatibly with European law, this would be a step beyond the legal parameters. We have some reservations about that conclusion, but in an area where that assessment is very much a matter of impression, we feel that it would be wrong for a court at this level to depart from those established decisions.
>
> The question is, therefore, whether the limitation imposed by the word "proposed", when contrasted with "contemplated", prevents the consultation obligation extending to consultations over closures leading to redundancies. We do not think that it does. In our judgment, in a closure context where it is

recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point where the closure is proposed. The difference between proposed and contemplated will still impact on the point at which the duty to consult arises – it will not be when the closure is mooted as a possibility but only when it is fixed is a clear, albeit provisional, intention.

But the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure. Strictly, of course, it is the proposed dismissals that are the subject of consultation, and not the closure itself. Accordingly, if an employer planned closure but believed that redundancies would nonetheless be avoided, there would be no need to consult over the closure decision itself, at least not pursuant to the obligations under the 1992 Act. In the context of a closure, that is likely to be a very exceptional case. Where closure and dismissals are inextricably interlinked, the duty to consult over the reasons arises."

27. In the case of *Scotch Premier Meat Ltd v Burns* [2000] IRLR 369 an Employment Tribunal found that the respondent was proposing to dismiss as redundant 20 or more employees even though it had not reached a final decision as to whether that was a course of action it would take. The respondent had decided to sell the business as a going concern or as a development site. The latter would mean that some 155 employees would lose their jobs. The Tribunal found that once the company had determined on a plan of action which had two alternative scenarios, one of which included dismissals, then that constituted a proposal within the meaning of section 188. The EAT held that the Employment Tribunal had not erred and was entitled to conclude that by the board meeting at which it was decided to sell the business as a going concern or as a development site, the employers were embarked upon a closure policy relating to redundancies which met the general notion of a proposal. It could not be accepted that so long as the sale of the business as a going concern was being considered, redundancies were not proposed.

28. In Lord Johnston's judgment it was stated:

"We have some difficulty with the reasoning of the tribunal in this respect, since to our minds the word 'contemplate', by definition, is far wider than the more

precise word ‘propose’. It seems to us by definition that ‘contemplation’ enjoins a larger number of options or at least more than one, while ‘propose’ enjoins a specific proposal. We therefore incline to the view that it is extremely difficult if not impossible to construe ‘propose’ as wide enough to cover ‘contemplation’, although we recognise that upon one view, ‘proposal’ indicates a state of mind and so does ‘contemplation’. What concerns us is whether the less can include the greater while the opposite is certainly the case.

In these circumstances we expressly reserve our position in this matter, save again to express the view that we have some difficulty in applying the *Webb* doctrine to the two sets of terminology. This is perhaps all the more reason for taking a fairly broad view of the facts as the tribunal have done and which we have supported in determining that there was a proposal to dismiss.”

29. In the case of Bakers’ Union v Clarks of Hove [1978] IRLR 366 the Court of Appeal provided that in the circumstances where an insolvency arises from a gradual run-down of business, it is not a special circumstance:

> “It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance; and that is so whether the disaster is physical or financial. If the insolvency, however, was merely due to a gradual run-down of the company, as it was in this case, then those are facts on which the Industrial Tribunal can come to the conclusion that the circumstances were not special. In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word 'special' in the context of this Act.”

> “The hope that money will be raised by sale of assets or loans on the security of the assets to meet high overheads and wages, and to reduce a

large indebtedness, is not a "special circumstance" any more than is the failure of that hope to materialise."

30. Section 189 sets out the position in respect of complaints and the appropriate sanction. It is provided:

"(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.
"(3) A protective award is an award in respect of one or more descriptions of employees—(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188, ordering the employer to pay remuneration for the protected period.
"(4) The protected period—(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and (b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188; but shall not exceed 90 days ..."

31. The Court of Appeal has held that this is a penal provision. In *Susie Radin Ltd v GMB* [2004] ICR 893 it is stated:

"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"

32. Also it was made clear in the same case, at para 43, that 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.

With regard to the amount of any protective award:

"(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in section 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.

(2) The 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 failure 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 section 188.

(5) How the tribunal assess the length of the protective period 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 reduction to an extent which the tribunal considers appropriate".

33. The Tribunal was provided with detailed written closing submissions from Mr Hendy, Mr Gorasia and Mr Crammond. They also provided oral submissions. These submissions are not set out in detail in these reasons. However, the parties should be aware that the Tribunal has given careful consideration to all the submissions made in reaching its conclusions. The submissions made by Mr Crammond on behalf of the Secretary of State made it clear that the second respondent took a neutral position in respect of most of the issues to be determined by the Tribunal.

<u>Conclusions</u>

34. The Tribunal has considered the application to amend. At the outset of the hearing Mr Hendy did not agree that an application to amend was necessary. He submitted that the argument appeared to be that under s.189 (5) a complaint may only be made to the Tribunal within three months of the last of the dismissals to which the complaint relates and it was said that the complaint relates only to the last tranche of dismissals and

includes only those dismissed within 90 days of those dismissals. He submitted that the argument was fallacious and that the dismissals to which the complaint related were all those specified in the HR1. There was a single proposal on 1 April 2014 in respect of all the dismissals and that met the criteria of section 188(1).

35. The ET1 had been completed and submitted by the NUM. It referred to the union representing approximately 500 manual workers in various grades who were dismissed by reason of redundancy on or around 18 December 2015. It was alleged that the respondents failed to consult with the appropriate representatives of any of the affected employees prior to the first of the dismissals taking effect contrary to section 188.

36. At a Preliminary Hearing on 21 September 2016 Employment Judge Reed indicated that:

> "In issue is whether there was, on the part of the first respondent, a failure to consult at all with the claimant is the appropriate representative for those employees (in respect of whom the claimant was recognised) who were dismissed by reason of redundancy in the 90 day period expiring on 25 December 2015, contrary to the provisions of section 188 (1), (1A) and (1B) (a) of the Trade Union and Labour Relations (Consolidation) Act 1992."

37. Mr Gorasia submitted that there were to be three batches of redundancies envisaged by the respondent, in July 2014, July 2015 and December 2015. The first respondent contended that each of these batches of redundancies entailed the obligation to consult under section 188 separately. It is accepted by the first respondent that there was a proposal to dismiss 100 or more employees as redundant during the 90 day period expiring from 25/26 December 2015, the date of the last dismissals. Any claim for a protective award for the earlier batches of redundancies were not pursued in the ET1 and were in any event out of time pursuant to section 189 (5) which provides:

> "An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-

(a) before the date on which the last of the dismissals to which the complaint relates takes effect, or

(b) during the period of three months beginning with that date, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the period of three months, within such period as it considers reasonable."

38. Mr Cramond, on behalf of the second respondent also opposed the application to amend.

39. Mr Hendy conceded that the claimant's pleading as it stood was defective. They should have made clear they were looking at all dismissals as a result of the HR1 completed on 1 April 2014. It was overlooked but it was understood by all parties what was being claimed and it was set out in the list of issues.

40. The evidence had been heard and it was clear that the claim that had been brought and contested was in respect of the consultation in respect of all the proposed redundancies related to the closure of the colliery and not just limited to the final tranche.

41. The Tribunal is satisfied that it has to consider the application to amend and the principles set out in the leading authority on the question of amendment Selkent Bus Co Limited v Moore 1996 ICR 836 in which it was stated:

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is important and undesirable to attempt to list them exhaustively, but the following are certainly relevant:-

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action;

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal (section 111 of the 1996 Act);

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for the making of amendments. The amendments may be made at any time, at even after the hearing of the case. Delay in making the application is however a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision".

42. The Tribunal has considered these aspects. The nature of the amendment is to include all the redundancies that were set out in the HR1 notice. It is clear that the pleading was in error and the application to amend should have been made considerably earlier. However, the evidence to be heard was on the basis of

consultation, or lack of consultation, in respect of the closure of the colliery which inevitably involved the loss of all the jobs as set out in the HR1. It is notable that the point was not taken in the first respondent's grounds of resistance and it was stated that

> "The respondent accepts that as part of the proposed rundown plan, it proposed to dismiss 100 more employees within periods of 90 days or less phased over a 15 – 18 month period. The last of those 90 day periods expired on 25 December 2015. The respondent accepts that this triggered an obligation to inform and consult with the claimant, in particular as the "appropriate" representative of the relevant employees. As the proposed rundown plan involved a proposal to dismiss the entire workforce of the respondent by reason of redundancy in four phases the respondent embarked upon an information consultation process in respect of the entire workforce before deciding whether to proceed with the proposed rundown plan."

43. The claim has been defended on the basis of the closure of the colliery entailing redundancy of all the employees at the colliery in accordance with the rundown plan. The response refers to the first respondent consulting in respect of those employees dismissed by reason of redundancy in all the phases of the compulsory redundancy process.
The amendment was a substantial amendment. However it reflected the case as set out in the witness statements and the evidence provided to the Tribunal.

44. The amendment was in respect of the inclusion of claims which were substantially out of time and the application was made very late in the case.
It is notable that the claimant sought leave to amend the claim form and this was granted by Employment Judge Buchanan on 26 October 2016. The amendment was as follows:

> "Furthermore the claimant alleges that prior to the issue of the form HR1 on 1 April 2014 the first respondent entered into an irrevocable agreement with the government to implement a "rundown plan" leading to the inevitable closure of Kellingley Colliery by December 2015 as a result of which any purported consultation between the parties thereafter was in any event a sham"

45. The Tribunal finds that this amendment and its reference to the inevitable closure of the colliery is a clear indication to the respondents that the claimant was seeking to claim a failure to consult in respect of the closure of the whole colliery with the resulting redundancy of all the relevant employees. The application to amend is in respect of claims that were substantially out of time. However, the respondents were aware of the intended claims and the error was in respect of the wording of the original ET1. The amendment was, in essence, setting out the claim as it had been understood by the parties It was clear that the claim was in respect of the redundancies of the entire workforce consequent upon the decision to close the colliery.

46. In the circumstances, the Tribunal is satisfied that the respondents were aware of the case they faced and the evidence that had been provided to the Tribunal was on the basis of a claim in respect of all the redundancies consequent upon the completion of the form HR1. The balance of prejudice is that rejecting the amendment would lead to the claimant being unable to pursue the claim in respect of a substantial number of its members. The respondents still have to face the potential liability but it does not prejudice their ability to defend the claim.

47. The application to amend the claim is granted so that the ET1 form presented by the claimant is to read:

> "The claimant is the National Union of Mineworkers, the recognised trade union at Kellingley colliery in South Yorkshire. The union is recognised for collective bargaining purposes and represents approximately 500 manual workers in various grades who were dismissed by reason of redundancy between 21 May 2014 and on or around 26 December 2015.
>
> The claimant alleges that the respondents failed to consult with the appropriate representatives of any of the affected employees prior to the first of the dismissals taking effect contrary to the provisions of Trade Union and Labour Relations (Consolidation) act 1992 s.188(1)(1A) and 1(B)(a). "

48. No point was taken by the respondents in respect of the reference to "approximately 500 manual workers" having been dismissed by reason of redundancy. The final figure was in respect of a considerably higher number of employees having been made redundant.

49. Conclusions in respect of the agreed issues.

1 When did the first respondent commence consultations?

50. Mr Hendy, on behalf of the claimant, submitted that there was never any consultation about "ways and means of avoiding collective redundancies or reducing the number of workers affected" as required by the directive or "(a) avoiding the dismissals, (b) reducing the numbers of employees to be dismissed" pursuant to section 188. He referred to "Mr Soar's (NACODS representative) heartfelt plea: "where I struggle is that, it's a fait accompli… We're not even on the bus let alone driving it" at the meeting on 17 March 2014.

51. It was accepted that there was, at a very late stage, some consultation about "mitigating the consequences by recourse to accompanying social measures aimed, inter-alia, at aid for redeploying or retraining workers made redundant" pursuant to the directive and "mitigating the consequences of dismissal" pursuant to section 188.

52. Mr Gorasia, on behalf of the first respondent contended that it formally commenced consultation pursuant to section 188(1A) from 1 April 2014 which was in good time and least 45 days before the dismissals which took effect from 18/25 December 2015. It was also submitted that it commenced consultation with the claimant, albeit without complying with section 188 (4), from 13 December 2013 and/or 12 February 2014. If the Tribunal determined that the first respondent should have commenced consultations any earlier it was contended that there were special circumstances which prevented this and rendered it not reasonably practicable for consultations to commence any earlier than 1 April 2014. It was also submitted that there were ongoing consultations for a

period of approximately 20 months prior to the final dismissals encompassing a period whereby three batches of redundancies took place in June and November 2014 and July 2015.

53. Clearly, the formal consultation commenced at the time of the completion of the form HR1 on 1 April 2014. There was some information provided before that with regard to the position of the respondent. This was in the form of briefings and from 12 March 2014 the Trade Unions were informed that there would be consultation but not when it would take place. Issues in respect of the adequacy of the consultation and whether the special circumstances exception applies are considered pursuant to the other issues identified within the agreed list.

> 2. Did the First Respondent commence consultation pursuant to s188(1A) TULR(C)A 1992 in good time and in any event at least 45 days before the first of any dismissals took effect?

54. It is clear that, in order to consider whether consultation took place in good time then the form of the consultation becomes relevant and the identified issues and submissions merge into each other which necessitates an element of repetition.

55. It was submitted, on behalf of the claimant, that consultation in the form of 'negotiation' could and should have begun before or soon after 4 December 2013 and at least by 4 January 2014. Heather Roberts' evidence shows that the first respondent had a team working over Christmas 2013 to produce the figures of proposed redundancies in each category of employee at specified dates together with the costings thereof ready for the first working day after New Year's Day, 4 January 2014. It was submitted that the scenarios had, by the end of the month, developed into costed proposals for specific numbers of dismissals on specified dates. The schedule of dates, categories and numbers of dismissal was a forerunner of the document disclosed to the trade unions on 1 April 2014. Although it was subsequently modified, there was no reason why they should not disclose it in January, when meaningful consultation might still have taken

place. The futility of consultations is no defence (Susie Radin) but earlier consultation might have enabled the ESCA option to be pursued before it became futile. It might have enabled fuller consideration of an employee buyout.

56. Mr Hendy also submitted that the emails of 4 December 2013 show that the first respondent was “contemplating” (in accordance with the Directive) or “considering” closure and dismissal. The 3 January 2014 minutes show that the first respondent had a proposal to close and dismiss which was still in the formative stage (Vardy). The fact that it was not the sole proposal (nor the most desired) is immaterial (Scotch Premier Beef). There should have been negotiations which should have covered the reasons for closure (UK Coal Mining) in good time to reach agreement (Directive) with a view to reaching agreement (S. 188). Instead, the unions, including the claimant were kept in the dark and excluded from assisting in the struggle to maintain jobs. As Mr Kitchen said on 1 April 2014, he did not accept that unions ‘should sit on their hands and do nothing for 19 months.’

57. At this point, the Tribunal finds that it is appropriate to set out the written submissions provided by Mr Gorasia on behalf of the first respondent in which it is contended that the consultation process was adequate and in particular:

> The First Respondent contends that the consultation process which it embarked upon was adequate and, in particular:
>
> a. “Denies the existence of any irrevocable agreement between the First Respondent and Government concerning the closure of Kellingley Colliery prior to 1st April 2014 and avers that the claimant has not established any evidential basis for such an assertion at all. Contrary to this assertion Mr Kitchen appears to have accepted during his evidence that the Respondent did pursue alternatives to the closure of Kellingley Colliery where possible. This assertion is simply without any evidential foundation and is against the weight of the claimant’s own evidence let alone the voluminous documentation in this case – furthermore, the Tribunal is invited to consider Mr Hutchinson’s trenchant rejection of any allegation of

bad faith on the part of the respondent in this regard during his evidence. Fundamentally, it was in no-one's interest for the first respondent to close. In the event that the Tribunal finds this issue to be well founded, the first respondent will contend that there were special circumstances which rendered it not reasonably practicable to comply with s188 TULR(C)A, namely the real risk of immediate insolvency as well as the agreed position between the claimant and respondent to secure funding for a managed wind down before exploring other avenues;

b. Denies that any consultation was restricted only to the implementation of the managed closure plan. In light of the evidence given by the claimant, this contention, it is averred cannot seriously be argued. It is abundantly clear that the claimant agreed to the implementation of the managed closure plan, furthermore it is abundantly clear that alternatives to the managed closure plan were in fact pursued and considered and the subject of consultation between the claimant and respondent. In the event that the Tribunal find this issue to be well founded, the first respondent will contend that there were special circumstances which rendered it not reasonably practicable to consult over this matter, namely the real risk of immediate insolvency, the wish of both parties to avoid this and the agreement between the claimant and respondent to secure the funding required for the managed wind down before pursuing any other options;

c. Denies that there was any lack of consultation prior to the securing of an assurance that the government would fund the managed closure plan. It is self-evident that the first respondent did consult over the proposed managed run down plan prior to 1 April 2014 and indeed there was agreement reached as to the pursuance of this approach subject to the claimant pursuing other viable alternatives [1025]. The managed closure plan was only a provisional proposal put to the claimant [1018] and subject to consultation by the claimant, the mere fact that no other viable alternative arose prior to closure is not indicative that the respondent were closed off to any other alternative. In the event that the Tribunal find this to

be the case, the first respondent will contend that there were special circumstances which rendered it not reasonably practicable to consult over this matter, namely the real risk of immediate insolvency as well as the agreed position between the claimant and respondent to secure funding for a managed wind down before exploring other avenues;

d. Denies that the first respondent unreasonably refused to consult over EU State Closure Aid as an alternative to closure in time, properly or at all. It is a fact that an unsuccessful application for EU State Closure Aid was made on 15 January 2015 [1741 and 1869]. It was agreed between the respondent and the claimant through consultations that the funding to secure the managed run down would be obtained first and that parallel efforts would continue to secure EU state closure aid. There was no divergence in approach between the claimant and the respondent and the issue of state aid was subject to proper and full, timely consultation. In the event that the Tribunal find this issue to be well founded, the first respondent will contend that there were special circumstances which rendered it not reasonably practicable to consult over this matter namely the real risk of immediate insolvency as well as the agreed position between the claimant and respondent to secure funding for a managed wind down before exploring other avenues; and

e. Denies that the first respondent failed, in time, properly or at all to consult with the claimant over alternatives to closure. The first respondent contends that, in light of the evidence that the Tribunal has heard, this allegation can not properly be maintained. It is self-evident (even from the evidence of Mr Kitchen) that the first respondent did consult (and pursue) alternative to closure. Mr Hutchinson during his evidence (as well as Ms Roberts) made clear that they had no interest in the closure of Kellingley and were looking for any alternative option to extend the life of Kellingley. Furthermore, the documentation in the bundle indicates that the first respondent's stance in relation to alternatives to closure was entirely in congruence with the claimant. In the event that the Tribunal find this issue

to be well founded, the first respondent will contend that there were special circumstances which rendered it not reasonably practicable to consult over this matter, namely the real risk of immediate insolvency as well as the agreed position between the claimant and respondent to secure funding for a managed wind down before exploring other avenues.

58. The submissions provided by Mr Crammond on behalf of the second respondent were, essentially, neutral in this regard. They were helpful with regard to a number of issues, in particular, in respect of the transposition of the European Directive into domestic law. These submissions have been taken into account but are not set out in these reasons.

59. The Tribunal is satisfied that the first respondent did undertake some consultation at least 45 days before the first dismissals. However, this consultation was not in good time as it was not entered into at a formative stage when meaningful consultation could have taken place. This was a proposal to close the complete colliery and detailed information in respect of the numbers, and categories of employees to be made redundant and the cost of those redundancies had been drawn up in December 2013. The Tribunal is satisfied that, at this stage, this was a proposal, albeit not the only proposal. It is acknowledged that the respondent would still have preferred the sale to Coronado to proceed. However, this was the point at which meaningful consultation could have taken place. In accordance with the Scotch Premier Beef case, in which an Employment Tribunal determined that, once the company had determined on a plan of action which had two alternative scenarios, one of which included dismissals, then that constituted a proposal within the meaning of s.188.

60. In this case there was a clear proposal for a managed rundown of the colliery and the consequent redundancies had been planned. The number of redundancies in each tranche had been identified together with the categories of workers to be made redundant. This was a firm proposal, albeit, subject to the prospect of the business being sold. It was known that it was a possible outcome and the only way there could be meaningful consultation was with regard to discussing this with the NUM. This would

have allowed the NUM to press for an application to the EU to authorise the provision of state aid with the possibility of extending the life of the pit by three years. The NUM had proposed this previously and it had been rejected. However, they had actually met with the EU Commissioner and they were aware of what had happened in such countries as Spain, Germany, The Czech Republic and Poland.

61. If there had been consultation at a formative stage, that is, before the plans had been set in stone – a fait accompli on 1 April 2014 when the NACODS representative indicated that "they were not even on the bus, let alone driving it" there would have been an opportunity for the claimant to be involved in discussions with regard to avoiding or delaying the closure. However, by that stage there was little or no chance that the NUM could persuade UK Coal Ltd and attempt to influence the Government with regard to applying for EU assistance with regard to state aid. The union should have been given that opportunity when there was a clear proposal for a managed closure of the pit. They could have been involved at that stage.

62. There was a prospect that the claimant could have mobilised their MPs and carried out some lobbying in an attempt to influence the decision and in order to put back the timing of the pit closure and save in the region of 2000 jobs for a period of three years. In around 2012 the NUM had urged UK Coal to apply for state aid but this had been rejected on the basis that there was a lack of eligibility.

63. The Tribunal was informed that NUM had sent a delegation to Brussels in April 2014 which had met with Commissioner Manuel Martinez.

64. Limited state aid was eventually obtained to enable the managed closedown to take place in December 2015 provided with the approval of the EU*.*

65. It was indicated that consultation would no longer be delayed on 10 February 2014 as the risk had previously outweighed the benefit. The first respondent had discussed matters with creditors and PPF*.* However, there was an apparent distrust of the union

and that appears to have led to a reluctance to consult at a formative stage. That is when the consultation could have been meaningful and the NUM may have been able to have attempted to some exert influence with regard to an application for EU support for the provision of state aid. It may have been futile but that is not the point. Christian Kitchen also made reference to a previous position with regard to concessionary coal which the government had refused to support. However, with some effort, the NUM had managed to change the position. This was indicative of the fact that the NUM did have some ability to influence government decisions.

3. Did the first respondent commence consultation pursuant to s.188(1) of the Act when it was proposing to dismiss the workers?

66. The submissions and conclusions in respect of this issue are within the considerations in respect of issue 2.

4. Did the first respondent commence consultation pursuant to Art.2(1) of the CRD when it contemplated dismissing the workers?

67. The Tribunal has set out its conclusions in respect of s.188 of the 1992 Act and has found that there was a proposal. With regard to contemplation pursuant to the Directive, it is clear that contemplation does encompass proposals. In the circumstances, the Tribunal finds that the first respondent did not commence consultation pursuant to the directive.

5. In this case is there a material difference between (3) and (4) above which would affect the outcome of this case?

68. For the reasons set out above, if there is a material difference between the European Directive and the domestic legislation, it does not have a material affect on the outcome of this case.

6. If there is a material difference which would affect the outcome of this case, should the Tribunal refer the matter to the CJEU?

69. As the Tribunal has found that there is no material difference that affects the outcome of this case, there is no need to consider a reference to the CJEU.

7. Did the first respondent consult with the claimant as appropriate representatives pursuant to s188(1B) TULR(C)A 1992?

70. There is no issue between the parties with regard to whether the claimant was the appropriate representative.

8. Has the claimant demonstrated that the consultation process embarked upon by the first respondent was inadequate for the following purported reasons:

a. The existence of an alleged irrevocable agreement between the first respondent and Government concerning the closure of Kellingley Colliery prior to 1st April 2014?

71. It was submitted by Mr Hendy that the existence of an agreement between the first respondent and the Government was a matter of inference. It was accepted that no formalised agreement was reached until 25 February 2014 but that, because directors must not permit their company to trade whilst insolvent, they must have been sure that the Government had agreed to provide the finance necessary to cover the managed rundown. It was also submitted that it was significant that the only proposal which the first respondent put to the Government was to support a managed rundown and this is what the Government gave to the first respondent.

72. Mr Gorasia, on behalf of the first respondent, denied the existence of any irrevocable agreement with the Government and said that the claimant had not established any evidential basis for such an assertion. It was in no one's interest for the

first respondent to close and Mr Hutchinson had given a trenchant rejection of any allegation of bad faith.

73. The Tribunal is not satisfied that it was established that there was an irrevocable agreement between the first respondent and the Government prior to 1 April 2014. There had been discussions and the only proposal on the table was that of the managed rundown but that did not raise sufficient inference to establish that there was an irrevocable agreement.

b. <u>The first respondent's purported absence of consultation prior to the securing of the assurance that the government would fund the managed closure plan?</u>

74. It was submitted by Mr Hendy it was not open to doubt that the first respondent delayed consultation until they had secured the assurance from Government and that assurance was gained long before 1 April 2014 when consultation purportedly began. There was no reason not to begin consultation before the Government had given that assurance, receipt of the assurance may have meant that managed closure then became the most likely outcome.

75. Mr Gorasia submitted that it was denied that any consultation was restricted to the implementation of the managed closure plan and it was abundantly clear that the claimant agreed to the implementation of the managed closure plan and alternatives were in fact pursued. It was also submitted that it was self-evident that the first respondent did consult over the proposed managed rundown plan prior to 1 April 2014. The managed closure plan was only a provisional proposal and subject to consultation with the NUM. The mere fact that no other viable alternative arose prior to closure was not indicative that the respondent was closed to any other alternative.

76. The handwritten notes of a board meeting on 12 March 2014 indicated that consultation would not start until the first respondent knew what support was to be

provided. Also, it was indicated that they would be telling the Trade Union that day that there was no other option than closure.

77. The Tribunal is satisfied that the consultation process was inadequate partly as a result of the first respondent's failure to consult prior to obtaining an indication there would be funds for the managed closure plan.

c. The first respondent's purported unreasonable refusal, in time, properly or at all, to consult over EU State Closure Aid as an alternative to closure?

78. In his written submissions Mr Hendy provided that the claimant had raised this possibility in 2012 and 2013 but the first respondent refused to support such an application until it had secured Government funding for a rundown. The application was not made until 16 January 2015 and there was no justification for such delay. Mr Kitchen had raised the possibility again as soon as the first respondent announced to the unions that there would be closure on 12 March 2014. Mr Kitchen was of the view that the Government could be persuaded, as it had been in the past, with regard to the issue of concessionary coal. The first respondent should be judged not on its supportive words put on its unsupportive actions.

79. Mr Gorasia's written submissions were that it was denied that the first respondent unreasonably refused to consult over EU State Closure Aid as an alternative to closure. It was a fact that an unsuccessful application was made on 15 January 2015. It was agreed between the respondent and the claimant throughout consultations that the funding to secure the managed rundown would be obtained first and that parallel efforts would continue to secure EU State Closure Aid. This issue was the subject of proper and full timely consultation.

80. The Tribunal is satisfied that if consultation had commenced at the time when the redundancies were proposed in January 2014 then the claimant would have had the opportunity to lobby the Government and to mobilise its MPs to assist in this regard.

Whether or not this would have been successful is not the point as futility is no defence. The consultation should have taken place at the appropriate time.

d. The first respondent's purported failure, in time, properly or at all to consult with the claimant over alternatives to closure?

81. Mr Hendy's written submissions were to the effect that only the proposal for an employee buyout was given serious consideration and that was too late. The timescale for making a proper proposal was truncated by the first respondent's failure to consult earlier. In particular, the proposal to maintain the developments (the viable coal faces) In order to preserve the ESCA option was rejected with the result that the option ceased to be viable by the time it was made.

82. Mr Gorasia submitted that it was self-evident that the first respondent did consult over possible alternatives to closure and the first respondent stance in relation to alternatives to closure was entirely in congruence with the claimant's.

83. The Tribunal is satisfied that the failure to consult in time meant that there were little prospects of any possible alternative to closure. It was indicated on numerous occasions that the only proposal was that of a managed closure. It is accepted that everyone involved would have welcomed some other outcome but by the time consultation took place there was no other likely option.

e. Was such consultation as there was restricted only to implementation of the managed closure plan?

84. It was submitted by Mr Hendy that Mr Parkin had made it clear that "the rundown plan is the only plan on the table" and that

> "the consultation is about the rundown plan. We understand the desire to extend further but we need to be clear, this meeting is about the rundown plan".

It was not denied by the claimant that there were consultations about selection criteria for the respective tranches and temporary redeployment of workers within the colliery. There was also consultation over closure bonus and some measures of mitigation.

85. Mr Gorasia submitted that, as at 1 April 2014, there was no firm proposal to go ahead with the managed closure plan. It was important to note that the proposed closure was not to take place until December 2015. No managed closure could proceed without the cooperation of the workforce. The claimant was consulted. There was a joint approach to apply for state aid and consideration was given to an employee buyout. Coronado came back into the picture again and the Trade Unions were consulted with regard to any interest from others at all times.

86. The Tribunal accepts that there was some consultation and that the claimant was involved in consideration of possible alternatives after 1 April 2014 and this was genuine consultation. However, it was always likely to prove too late and in the event it was too late. Meaningful consultation did not take place at a formative stage. The only realistic outcome at the time the consultation commenced was that of the managed rundown.

9. In the event that the claimant can demonstrate that the consultation process was flawed for all or any of the reasons indicated in para 3 above, can the first or second respondent demonstrate that there were special circumstances which rendered it not reasonably practicable for compliance with that requirement pursuant to s188(7) TULR(C)A 1992?

87. The Tribunal is satisfied that there was a breach of section 188 and the burden Of proof shifts to the respondent to demonstrate any special circumstance defence pursuant to section 189(6).

88. The written submissions in respect of the special circumstances defence are relatively succinct and it is appropriate to set them out in full as follows:

89. Mr Gorasia's written submissions were:

"Section 188(7) TURL(C)A allows an employer a defence of special circumstances if it has not been reasonably practicable to comply with s188(1A), (2) or (4) TURL(C)A. If this is the case the employer is obligated to take such steps towards compliance as are reasonably practicable in the circumstances. The Act offers no general definition of special circumstances. The Court of Appeal has held that the circumstances must be special to the particular case and that insolvency of itself is not a special circumstance (see *Clarks of Hove Ltd v Bakers' Union* [1978] IRLR 366).

In a case where it is in issue whether the insolvency was a sudden disaster (so potentially constituting special circumstances) or was merely a disaster waiting to happen, the tribunal is not entitled (with the advantage of hindsight) to substitute its own commercial judgment for that of the employer. The question is whether the employer's belief was genuine and reasonable as per *Hamish Armour v Association of Scientific, Technical and Managerial Staffs* [1979] IRLR 24, at para 9:

> "There are other findings, however, which we do not consider the Tribunal were entitled to make. These were that it should have been apparent to the company that the scales were weighted against a second loan being granted; that it should also have been apparent to them that even if granted it would afford only temporary relief to be replaced shortly by a further crisis; and that from the autumn of 1977 onwards the company was not entitled to indulge itself in hopes that it could survive. In reaching these conclusions the Tribunal have, with benefit of hindsight, substituted their own business and commercial judgment for that of the company and in effect decided for it when it should have gone into liquidation. It is not the function of a Tribunal to do this, and we do not consider that the present Tribunal were entitled to make these findings."

The EAT in *MSF v Refuge Assurance PLC* [2002] IRLR 324 considered the scope of the special circumstances defence where a merger between two insurance companies was taking place. The employer contended that secrecy demanded by the City's Takeover Code amounted to special circumstances which prevented it disclosing any details of the proposed merger until it was announced publicly. The EAT in obiter terms stated the following at paragraph 55:

> "…In these circumstances we express no view on either part of s.188(7) save to say that in our view it cannot be simply assumed that disclosure to, say, a senior union official on the like terms of confidence as would be applicable to the companies' directors would necessarily be so restrictive that it would be completely useless to him and that it would therefore represent a step that need not be taken by the employer, or that such an official would necessarily decline to accept information on such terms. It is to be noted that Hamish Armour v ASTMS [1979] IRLR 24, at paragraph 11, contemplates (without proposing) disclosure to responsible union officials on a confidential basis."

BERR's (now BEIS) guidance on Redundancy Consultation and Notification (URN No: 06/1965Y) under the heading "Stock Exchange rules" states the following:

"Stock Exchange rules do not preclude employee representatives being informed and consulted in advance where collective redundancies are planned in connection with a restructuring (eg a plant closure or a takeover) which may involve price sensitive information. Provision can be made for employee representatives to be subject to confidentiality constraints for a specified period, but at the same time be sufficiently informed to hold meaningful consultations with the employer."

90. The written submissions of Mr Hendy in respect of special circumstances were as follows:

“Three allegedly ‘special’ circumstances are pleaded in the ET3 *Grounds of Resistance* at 1.4.1:

a. Severe financial position;

b. Need to take urgent measures to secure external investment to avoid insolvency;
c. Operating a successful run-down.

There was nothing special about these circumstances. The NUM rely on *Bakers Union v Clarks of Hove* (above).

In any event, none of them constituted a reason not to consult.

d. On any basis, the severity of the financial position was incapable of constituting a circumstance justifying non-consultation. It was certainly not a ‘special’ circumstance. The severe financial position, on the contrary, was a circumstance *compelling* consultation in order (i) to develop a plan to improve the position and avoid consequential redundancies and (ii) to seek agreement on the range of consequences (including dismissals) if the financial position could not be improved.

e. It is conceded that the need to take urgent measures to secure external investment to avoid insolvency was not a reason *for* consultation. However, it is incapable of constituting a reason for *not* consulting. It was not a ‘special’ circumstance.

f. Operating a successful run-down was one of the proposals which involved collective redundancy. It was therefore a reason obliging consultation; it was not a reason for not consulting. Neither was it a ‘special’ circumstance. In any event, in order to be successful this option required the co-operation of the trade unions.

Furthermore, the fact that UKCL admit in their HR1 that consultation could begin on 1 April 2014 is conclusive evidence that none of these reasons justified lack of consultation, since all three circumstances were present both before and after that date. If they were no bar after the 1 April, they were no bar before that date.

In the witness statements of Ms Roberts and Mr Hutchinson it is repeatedly said that confidentiality was necessary to prevent a run by creditors. Though neither pleaded or implied that this amounted to a 'special' circumstance justifying non-consultation it is convenient to rebut the implied assertion that an asserted need for confidentiality to prevent a creditor run inhibited consultation with the unions.

As the chronology shows, on 5 December 2014 UKCL had apprised their most important creditor of the dire financial situation successfully ensuring that it did not provoke a run. By late January UKCL had achieved a stand-still agreement with its major creditors (Hutchinson paragraphs 4.38-40) thus preventing a run by them. In oral evidence Mr Hutchinson said there was a threat by 2000 creditors any of whom could cause production to cease. But this is not credible. Only a tiny minority were presumably suppliers of goods or services without which production would cease, and presumably, having secured stand still with the major creditors, a financial accommodation could be reached with the minor creditors where they could not be paid in full (which must surely have been the case for most). Mr Hutchinson was pressed to elaborate on this but did not.

In any event the dire financial situation of the company *was* disclosed to the unions on 11 and 13 December 2013 with a further briefing on 12 February 2014 – all without provoking a run by the creditors. The witness statements of Ms Roberts and Mr Hutchinson make clear that thereafter the unions were kept abreast of the financial situation of UKCL until closure. The possibility of closure was evident to all (including the workforce) in the light of the financial information disclosed. The risk of a creditor run was 'fully appreciated and acknowledged' by the TUs (Hutchinson, para 4.86). This was therefore no

reason not to consult. Consulting the unions over the statutory matters cannot conceivably have magnified the risk of a creditor run beyond the risk (if any) posed by the continued disclosure of financial information to the unions. In any event, according to the Board, 'the risks of engaging with the trade unions were largely no longer relevant' by 11 February 2014 (p380).

In any event, the unions, including the NUM, signed a Non-Disclosure Agreement which they adhered to. The NUM was considered by senior management as 'well behaved'. Neither the NUM nor any other union is said to have leaked; and certainly not information which was not already in the possession of the creditors.

Furthermore, it was announced to the world that UKCL intended to consult with the unions over collective redundancies on 1 April 2014. That did not provoke a creditor run. In fact, there was no material difference between the information which the creditors had earlier from UKCL (and could have had later from the unions) and the information which the creditors had as a result of and after that announcement. The announcement did not provoke a creditor run; there is no reasonable basis for asserting that an earlier announcement would have provoked a run."

91. The Tribunal has considered these submissions and the evidence and concludes that it has not been established by the respondent that there was a special circumstance which rendered it not reasonably practicable for compliance with section 188.

92. It is not accepted that anything was established that removed the reasonable practicability of consultation. There was a substantial emphasis on confidentiality. In particular, the need to avoid a possible 'run by creditors'. There were discussions with creditors and Non-Disclosure Agreements entered into. Eventually a Non-Disclosure Agreement was entered into with the NUM and no run by creditors then occurred. It was said that the NUM had been "well-behaved". There is a clear inference that the first respondent did not trust the NUM to maintain confidentiality and that was one of the reasons that consultation did not take place at the formative stage.

93. There was no special circumstances defence established.

10. In the event that the Tribunal finds that there has been a breach of s188(1A) and/or s188(1B) TULR(C)A 1992, what should the length (if any) of the protected period be pursuant to s189(4) TULR(C)A 1992?

94. It was submitted by Mr Hendy that there was no basis to award anything but the maximum. The first respondent had experienced HR managers who well knew the duty to consult. The company flagrantly flouted the obligation to consult and there were no reasons for not doing so.

95. Mr Garcia submitted that, in cases where there has been some consultation, it is not appropriate to start with the maximum period and reduce it if there are mitigating circumstances.

96. The Tribunal accepts that there had been some genuine consultation after the completion of the HR1 form on 1 April 2014. However, this was too late to be meaningful in respect of ways of avoiding the dismissals. Accordingly, there should have been consultation with the NUM in respect of avoiding the dismissals at the time they were proposed. This would have been in December 2013 or January 2014 at the latest. The Tribunal finds that should have been consultation with regard to the possibility of applying for state aid which may have extended the life of the colliery by two or three years. Also, the possibility of an employee buyout and any other way of obtaining support for the continued operation of the colliery. These may well not have resulted in any successful avoidance of the closure of the colliery and the consequent redundancies, however, futility is no defence.

97. There was some consultation, albeit too late to be meaningful, in respect of means of avoiding redundancies. It was conceded by the claimant that there was some consultation with regard to other matters such as selection criteria, temporary redeployment of workers, closure bonus and some measures of mitigation.

98. The purpose of the protective award is to be punitive, it is not to compensate employees for loss and the focus should be on the seriousness of the respondent's default. In this case the failure to consult at the appropriate time appears to have been largely as a result of lack of trust and, possibly, a wish to seek government assistance for a managed rundown before approaching the Trade Unions.

99. The Tribunal is satisfied that this was not a malicious failure to consult, it was defensive. However, it was a clear breach of the obligation to consult and the respondent's managers and HR advisors should have complied with their duty to consult meaningfully and in good time.

100. In all the circumstances, the Tribunal finds it just and equitable to make a protective award of 30 days' pay with regard to each tranche of employees made redundant, that is in July 2014, July 2015 and December 2015. However, on the last day of the hearing the Tribunal was provided with a schedule of the actual redundancies that had eventually taken place. It was clear from this that the information that had been provided throughout the hearing, and that the evidence given that the redundancies had taken place in three tranches, was incorrect. There were many more occasions when redundancies had taken place and the Tribunal's intention to provide a protective award in respect of each tranche was not possible to fulfil. The normal judgment would be for the Tribunal to identify the precise protected period and this had been the intention. The list of the actual dates of redundancies meant that such a judgment could not be given.

101. In the circumstances the Tribunal makes a protective award of 30 days' pay but this is expressed to be in respect of each relevant redundancy within the identified period.

102. There had been one form HR1 and this was in respect of the proposal to close the colliery resulting in all the employees in that colliery being made redundant. The failure to consult was in respect of the decision to close the colliery it was one decision that

applied to all the redundancies and the protective award is in respect of the failure to consult prior to this decision being made.

11. <u>In the event that the Tribunal finds that there has been a breach of s188(1A) and/or s188(1B) TULR(C)A 1992 and/or the CRD, what should be the appropriate compensation pursuant to the CRD?</u>

103. Mr Hendy submitted that under EU law the sum payable must be effective, proportionate and dissuasive. He said that in this case there was a real possibility of securing funding for a further two years' working of the mine to 2018. That application might have failed and it was submitted that a proportionate discount should be 50% and one year's lost wages should be awarded. It was submitted that the prospect of such an award would have been very likely effective in persuading the first respondent to carry out the legal duty to consult at the first opportunity and would have deterred it from its unlawful failure to consult in time or at all.

104. Mr Hendy also indicated that two years is fortuitously the maximum award for unfair dismissal compensation [that is not the case] and the one year award for the prospect of being unemployed for two years, taking into account the possibility of not suffering the full loss, would be a reasonable assessment in a hypothetical comparable unfair dismissal situation.

105. The Tribunal does not accept these submissions. They appear to be based on considerations largely relevant to compensatory rather than punitive issues. The Tribunal is satisfied that the limits provided in respect of the amount it can make for a protective award under the 1992 Act are sufficient to provide an adequate a punitive award against the first respondent in the circumstances.

<u>12. If the measure of compensation is different under 10 and 11 above, should the Tribunal refer the matter to the CJEU?</u>

106. The Tribunal has made a protective award of 30 days' wages. This is considered to be a sufficiently punitive award in the circumstances and there is no necessity to refer the matter to the CJEU.

107. In all the circumstances, the Tribunal finds that the claim for a protective award succeeds and awards 30 days' pay to the affected employees who were made redundant following the decision to close Kellingley colliery.

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EMPLOYMENT JUDGE Shepherd

REASONS SIGNED BY EMPLOYMENT JUDGE ON 28 July 2017

2 August 2017
REASONS SENT TO THE PARTIES ON

P Trewick

FOR THE TRIBUNAL