RESERVED JUDGMENT
MS

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	***AND***	***Respondents***
(1) USDAW (2) Unite the Union (3) Ms B Wilson		WW Realisation 1 Limited (in Liquidation) (1) Secretary of State for Business, Innovation and Skills (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 28 and 29 November 2011 and in chambers on 30 November 2011

EMPLOYMENT JUDGE: Dr S J Auerbach **MEMBERS:** Mr N Brockmann, Ms E Macey

Appearances

For the Claimants: Dr S Hardy, Counsel for USDAW and Ms Wilson
Mr M MacNaughton, Solicitor for UNITE the Union

For the Respondents: Did not attend, and were not represented at, the hearing

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1 The claims of all of the Claimants that the First Respondent failed to comply with all the requirements of section 188 Trade Union and Labour Relations (Consolidation) Act 1992 are well founded.

2 The Tribunal makes protective awards which order the First Respondent to pay remuneration for a protected period which begins on 27 December 2008 and is sixty days in length. The protective awards relate to employees formerly employed by the First Respondent in England, Wales or Scotland, falling into any of the descriptions set out at paragraph 3 below, who were dismissed as redundant on or after 27 December 2008.

3 On the complaints of USDAW the protective award is, subject to paragraph 4 below, in respect of (a) all employees at retail stores who fell within grades A – E of the stores grading structure; (b) all office and clerical staff within grades A – F at the Castleton and Swindon offices; and (c) all warehouse supervision staff at the Castleton Distribution Centre. On the complaint of Unite the Union the protective award is in respect of staff in all operational grades at the Castleton Distribution Centre. On the complaints of Ms Wilson the award is, subject to paragraph 4 below, in respect of all supervisory, technical and managerial staff falling outside of the scope of the recognition of USDAW and Unite the Union and who were represented by Colleague Circle representatives.

4 The protective awards on the complaints of USDAW and Ms Wilson do not apply to any employee who was employed at a store at which there were fewer than 20 employees. The stores concerned are listed in an Appendix to the Tribunal's written reasons.

5 The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply.

RESERVED REASONS
18 January 2012 London Central
Date and place of signing

Simon J Auerbach
EMPLOYMENT JUDGE

19 January 2012
REASONS SENT TO THE PARTIES ON

19 January 2012
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS

RESERVED REASONS
MS

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	***AND***	***Respondents***
(1) USDAW (2) Unite the Union (3) Ms B Wilson		(1) WW Realisation 1 Limited (in liquidation) (2) Secretary of State for Business, Innovation and Skills

Date of Hearing: 28 and 29 November 2011 and in chambers on 30 November 2011

REASONS OF THE EMPLOYMENT TRIBUNAL

Introduction

1 This matter arises from the demise of Woolworths. There are claims for protective awards in respect of employees who worked in England, Wales and Scotland. A claim for a protective award brought by USDAW in relation to employees who worked in Northern Ireland was determined by an Industrial Tribunal sitting at Belfast on 18 January 2010 under case number 1898/09.

2 Woolworths Plc, as it was then called, went into administration on 27 November 2008 and subsequently into liquidation by virtue of a winding up order made on 12 November 2010. The joint administrators were Neville Kahn, Daniel Butters and Nicholas Dargan, all of Messrs Deloitte LLP. The liquidators were Messrs Kahn and Butters. The company changed its name along the way, and is now properly referred to as WW Realisation 1 Limited (in liquidation).

3 As a result of the closure of Woolworths' operations in Great Britain, all of its employees lost their jobs. This gave rise to multiple claims being presented to Employment Tribunals in both England & Wales and Scotland. In due course all of these were transferred to the London Central Employment Tribunal.

4 When a company is in administration, provisions of the **Insolvency Act 1986** have the effect that no claim may be pursued without the consent of either the administrators or the court. Following an extended period of correspondence, some limited consent was given by the administrators in respect of certain claims seeking protective awards.

5 However, matters were then overtaken by the company being placed in liquidation, as the relevant provisions of the 1986 Act provide that where there is a

compulsory liquidation no such claim may proceed without the consent of the court. Applications were thereafter made to the High Court by USDAW, Unite the Union and Ms Wilson. That led to orders by the High Court consenting to their claims for protective awards proceeding.

6 Following that a Case Management Discussion took place on 7 June 2011 at which those protective award claims to which the High Court's consent applied were listed for hearing (although in subsequent correspondence the hearing dates were revised) and further directions were given.

7 The matter accordingly came before the present Tribunal for a Full Merits Hearing listed for 28 – 30 November 2011. The purpose of the hearing was therefore to hear and determine the protective award claims that had been brought by USDAW, Unite the Union and Ms Wilson, being those listed in Appendix 1 to this decision. Between them they were seeking an award or awards in respect of all the former Woolworths employees in England, Wales and Scotland.

8 The First Respondent had entered response forms indicating that the claims were defended, but in correspondence its solicitors, Messrs Linklaters, had indicated that it would not be represented at, or otherwise participate in, our hearing.

9 The Secretary of State for Business, Innovation and Skills had been joined as a Second Respondent. This is because, in view of the insolvency of the First Respondent, the Secretary of State has a potential liability in respect of any protective awards we might make and is therefore an interested party. The Secretary of State had also entered response forms indicating that the claims were resisted and making certain general submissions. Once again, however, the Insolvency Service, on the Secretary of State's behalf, had indicated in correspondence that he would not be represented at, or otherwise participate in, our hearing.

10 We had to decide whether there had been a failure by the First Respondent to comply with its section 188 duties, taking into account whether a special circumstances defence was made out. If there had been such a failure, we had to decide what protective award or awards to make. As we will describe there were particular issues in relation to the position of employees at Woolworths stores with fewer than twenty employees, in respect of which Dr Hardy invited us to consider making a reference to the Court of Justice of the European Union.

11 In making our findings of fact and coming to our conclusions, we have had regard to all relevant material available to the Tribunal, including the contents of the responses entered by the two Respondents and other relevant correspondence containing submissions on their behalf.

12 We heard evidence in person from four witnesses. John Gorle is a National Officer of USDAW. Ms Wilson, the third Claimant, was employed at the Woolworths store in St Ives, Cornwall and was also, as we will describe, a Colleague Circle representative. Neil Clarke is a Regional Organiser employed by Unite the Union. Fred Freeman was employed by Woolworths as a Warehouse Operative/Warehouse

Administrator at the Castleton Distribution Centre and was a UNITE senior shop steward.

13 Each of the witnesses gave evidence by reading out a witness statement and answered questions from members of the Tribunal. We were referred to particular documents contained in a two-volume paginated bundle including the decision of the Belfast Industrial Tribunal. We had the benefit of written submissions from Dr Hardy of Counsel who appeared for USDAW and Ms Wilson, and from Mr MacNaughton, a solicitor who appeared for Unite the Union, and were referred to a number of authorities. We heard extensive oral closing submissions from Dr Hardy with which Mr MacNaughton generally concurred and to which he added some points. We were provided with a draft (and, subsequently, a revised draft) of the proposed form of wording for the protective award sought.

14 Finally, by way of introductory remarks, we note that the representatives of the two Respondents had been copied in on the minute of Case Management Discussion of 7 June 2011, participated in subsequent correspondence and were, it was confirmed to us by the Claimants' representatives, also copied in on the written submissions that they had prepared and tabled in advance of our hearing.

The Law – the Statutory Regime

15 The first Community Directive relating to collective redundancies or dismissals was Directive 75/129/EEC of 17 February 1975. The United Kingdom took steps to implement that Directive in Great Britain by way of the provisions of section 99 Employment Protection Act 1975. Since then there have been various revisions to and/or consolidations of both the Directive and the domestic legislation, the full chronology of which we do not need to trace here. However, by the time of the events with which we were concerned, the relevant consolidated Directive was **98/59/EC**, of 20 July 1998, and the relevant domestic provisions were those of Section 188 and following of the **Trade Union and Labour Relations (Consolidation) Act 1992**, which had been amended by statutory instrument in 1995 and then again in 1999.

16 As to the Directive, it is sufficient to set out here Article 1(1), which is as follows:

> **Article 1**
>
> 1 For the purposes of this Directive:
>
> (*a*) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:
>
> (i) either, over a period of 30 days:
>
> — at least 10 in establishments normally employing more than 20 and less than 100 workers,

— at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,

— at least 30 in establishments normally employing 300 workers or more,

(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

(*b*) 'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States.

For the purpose of calculating the number of redundancies provided for in the first subparagraph of point (a), terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual workers concerned shall be assimilated to redundancies, provided that there are at least five redundancies.

17 The relevant provisions of the 1992 Act are as follows:

188 Duty of employer to consult . . . representatives

(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 90 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

(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and

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

(5) That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

(5A) The employer shall allow the appropriate representatives access to [the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(6) . . .

(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.

Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7A) Where—

(a) the employer has invited any of the affected employees to elect employee representatives, and

(b) the invitation was issued long enough before the time when the consultation is required by subsection (1A)(a) or (b) to begin to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(7B) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a reasonable time, he shall give to each affected employee the information set out in subsection (4).

(8) This section does not confer any rights on a trade union, a representative or an employee except as provided by sections 189 to 192 below.

188A

(1) The requirements for the election of employee representatives under section 188(1B)(b)(ii) are that—

(a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;

(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;

(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 188 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that—

(i) so far as is reasonably practicable, those voting do so in secret, and

(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

189 Complaint . . . and protective award

(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,

(c) in the case of failure relating to representatives of a trade union, by the trade union, and

(d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

(1A) If on a complaint under subsection (1) a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 188, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.

(1B) On a complaint under subsection (1)(a) it shall be for the employer to show that the requirements in section 188A have been satisfied.

(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 . . ..

(5) 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 the that date, or

(c) 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 further period as it considers reasonable.

(6) 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.

The Facts

18 The First Respondent ran the well-known Woolworths chain of stores in the UK. As to Great Britain, in 2008 there were some 814 shops trading in England, Wales and Scotland of which 705 were in England or Wales. There was a parent company, Woolworths Group plc, and a Head Office in London. The retail operation was split into regions with a Regional Manager responsible for each one. Each retail store had a Store Manager. There were also two Distribution Centres, being at Castleton and at Swindon, and administrative offices at each of those two locations. The shops employed some 27,218 employees. In addition there were a further 984 employees who were categorised, in data provided by the company, as “regional itinerants” and a further group categorised as having no store name or store location allocated. That last group largely consisted of staff working at the Distribution Centres.

19 The First Respondent recognised the trade union USDAW. Collective agreements conferred recognition on it in relation to: (a) at Woolworths stores in the UK and any other stores directly owned and controlled by it, all employees within grades A – E of the stores grading structure; (b) at the Castleton Distribution Centre and offices, respectively, the warehouse supervision staff and all office staff graded A –

F; and (c) at the Swindon Distribution Centre and offices respectively, all staff in operational grades A – E and office clerical staff graded A – F. The First Respondent also recognised the trade union TGWU (which subsequently, as a result of a merger, became part of Unite the Union). A collective agreement conferred recognition on it in respect of all the operational grades at the Castleton Distribution Centre.

20 Under the collective bargaining arrangements there was a national joint consultation committee (JCC). On that committee sat one representative from each of USDAW's six geographical divisions. Ms Wilson, who worked at the St Ives, Cornwall store, was the USDAW representative in her store and the member of the JCC representing USDAW's South Wales and Western division. John Gorle also sat on the JCC. He is an USDAW national official and had primary responsibility for the relationship with Woolworths retail on a national basis. On the JCC from Woolworths itself where Cindy Yarranton, Employee Relations Manager, together with a colleague of hers, Maria MacGowen.

21 At a JCC meeting on 23 April 2008 Ms Yarranton announced that Woolworths were introducing an Employee Forum across all areas of the business to be called Colleague Circles.

22 Terms of reference for the Colleague Circles described the roles of the first and second tier representatives and the constitution of each tier in more detail. The first tier was to have represented Circles across the offices, distribution centres and the four retail regions; and the composition in terms of employee, union and management representatives was set out. On the national Colleague Circle there were to be a total of 10 elected representatives, being four from retail, three from offices, one from each of the two distribution centres and, it was agreed, a union seat to be taken by an USDAW representative. First and second tier meetings were both to take place quarterly with the aim that each second tier meeting would follow four weeks after the first tier meetings. In the terms of reference, under the heading "Topics for Discussion", a number of topics were listed as being either in scope or out of scope. Topics listed as being in scope included: "Formal consultation requirement (e.g. TUPE or redundancy)". There was provision for elections and ballots where nominations were contested.

23 Ms Wilson became both a first tier and a second tier Colleague Circle representative and subsequently attended two second tier meetings in London.

24 Sometime in mid-November 2008 Mr Gorle was contacted by a lay representative on the JCC who told him that he understood that Woolworths' credit insurance had been withdrawn or that they were unable to find renewed cover. Mr Gorle was concerned that this meant that Woolworths would be required to pay for the goods which it ordered in advance, which would in his view inevitably cause business problems. He telephoned Ms Yarranton to raise his concerns. She was unable to confirm whether the rumour was true or to give him any other assurances.

25 On 19 November 2008 reports appeared in the media – in particular we were taken to a piece on *The Guardian*'s website – to the effect that shares in Woolworths

had been suspended that morning and that according to reports Woolworths was in discussions with a restructuring firm, Hilco, to sell its 800 store chain for a nominal £1. On reading this news, Mr Gorle telephoned Ms Yarranton who indicated that she was not fully aware of all the facts and would get back to him.

26 On 26 November 2008 it was reported in the media, including on the BBC's website, that the shares remained suspended and the company continued to be in talks with a view to rescuing the business. The BBC reported that agreement had not so far been reached with Hilco and commented that without some form of a deal analysts were saying that the company faced the real risk of going into administration. As the situation developed Mr Gorle attempted to contact Ms Yarranton by telephone and left voicemails for her but did not manage to speak to her in person.

27 On 27 November 2008 Messrs Kahn, Dargan and Butters of Deloitte Plc were appointed joint administrators of Woolworths Plc as well as of Entertainment UK Ltd, the wholesale arm of Woolworths Group. A press release quoted Mr Kahn as saying that the companies would continue to trade and that stores would remain open past Christmas and employees would be paid. The Deloitte team had hired Hilco as an agent to assist in the management of the retail business. Mr Butters was quoted as saying that they would be looking for a suitable buyer for all parts of the business and that they had received expressions of interest from a number of parties.

28 By this time Mr Gorle had been contacted by Jane Harley of Deloitte who assured him that staff would be paid as normal and sent him a copy of that press release.

29 Also on 27 November 2008 Mr Gorle received an e-mail from an USDAW lay representative attaching a copy of a newsflash about the administration that had been placed on the Woolworths intranet for the attention of employees. The newsflash included confirmation that wages and salaries due on 28 November 2008 would be paid.

30 On 28 November 2008 Mr Gorle learned that the lottery operator, Camelot, had decided to stop selling National Lottery tickets in Woolworths' stores. Mr Gorle was concerned about the general impact of this on the stores' trading. He attempted to contact Ms Harley to discuss this development. He did not manage to speak to her, although she sent him an e-mail on 29 November that she had "nothing much to update you with at all".

31 On 2 December 2008 Mr Gorle e-mailed Ms Harley seeking an update on various questions. He observed that it was being suggested in the media that the stores would continue to trade through the Christmas period. In her reply that day she commented that store trading would be dependent in part upon what happened with any sale of the business and she could not give a definitive answer at that point. On the question of potential purchasers she replied that talks were continuing with interested parties and commented that such discussions were "necessarily held on a confidential basis and I am unable to comment further save that offers are being sought on an early basis".

32 On 5 December 2008 one of Mr Gorle's colleagues forwarded to him a newsflash that had been placed on the Woolworths intranet the previous evening for the benefit of employees with "top 10 questions and answers". This included the information that wages and salary payments would be paid in the normal manner for work done for Woolworths during the administration.

33 On 5 December 2008 rumours began circulating about redundancies. Mr Gorle was contacted by Ms Harley who told him that 350 redundancies were being made at Head office in London, 70 support jobs were to be made redundant at the Distribution Depot in Castleton and 33 field staff were also being made redundant. She said those employees were being notified as the two of them were speaking. Mr Gorle indicated that this way of handling matters did not amount to meaningful consultation. Ms Harley said she could not control what was being reported in the press.

34 A further letter from Mr Kahn was circulated via the newsflash to all employees on 9 December 2008. This clarified that the appointment of the administrators did not change the identity of the employer and that the company would continue to pay staff their wages until notice was given otherwise. This communication also commented:

> We are doing everything we can to arrange for the company's business to continue and hopefully sold as a going concern. It is however only fair to advise you that if the company is unable to continue your contract of employment it will probably not be possible to give you your full contractual or statutory period of notice.

That letter also went on to canvass the possibility of a transfer of employment should a buyer for the business be found.

35 On 10 December 2008 there was speculation that the administrators would hold a closing down sale. This was confirmed in a message put out by the administrators to staff that day, which, again, Mr Gorle had sight of by it being forwarded to him from one of his lay colleagues. In that announcement the administrators said they would continue to use their best efforts to get a firm offer for the business but if none was forthcoming then in those circumstances some stores may close before the end of December 2008. It continued:

> Following this announcement an employee consultation process will commence throughout the company as we will be notifying all staff that they will be "Potentially at Risk of Redundancy."

A further circular gave information about the potential implications should a given store close.

36 On the evening of 10 December 2008, Mr Gorle saw on television the Chief Executive of Iceland Group of stores announcing that they had bought 51 stores from Woolworths. Mr Gorle was angry and frustrated at what he viewed as the lack of direct communication with him about these unfolding developments.

37 On Thursday 11 December 2008, Ms Harley e-mailed Mr Gorle, writing: "We are hoping to hold an information and consultation meeting on Tuesday 16 December at Head Office in London at 3.00pm with others joining by conference call facilities". She wrote that confirmation of the details would follow.

38 Mr Gorle telephoned Ms Harley to express his continuing concerns about what he regarded as the lack of consultation and his feeling that he had been given false assurances, given the news item regarding Iceland. He left a voicemail and she subsequently called him back informing him that she had been unaware previously of the potential purchase by Iceland and that she would in any event have been unable to discuss details of such purchases, as contracts had not yet been exchanged.

39 Subsequently Mr Gorle received a call from Mr Dargan. Mr Gorle informed Mr Dargan that if Mr Dargan had concerns in relation to confidentiality Mr Gorle would be happy to enter into a confidentiality agreement. Mr Gorle considered that he would be entirely able to do that as an experienced and senior USDAW official. Mr Dargan indicated that he would consider matters further over the weekend including how consultation could be improved and come back to him.

40 Mr Gorle contacted Ms Harley again on Monday 15 December 2008 and obtained confirmation that the meeting was going ahead in London at 3.00pm the following day. During that discussion she informed him that the administrators had allocated one hour for the meeting. He made clear that he did not regard that as sufficient for a meaningful consultation process. He also registered his dissatisfaction that Mr Dargan had not come back to him following the weekend. Mr Gorle subsequently received a call from Mr Dargan, who promised to speak to him further, following the meeting the next day.

41 Mr Clarke is a Regional Organiser for Unite the Union based in Salford. At the time of these events he had not been the officer dealing with the Castleton Depot but the previous officer had retired and on about 3 December 2008 Mr Clarke was asked to deal with the Woolworths matter. Having been so appointed, he contacted union representatives on site, including Fred Freeman, who was the Senior Steward and a Warehouse Operative/Administrator.

42 Mr Clarke made contact with Ms Harley and, on 11 December 2008, was invited to take part in the information and consultation meeting on 16 December.

43 Ms Wilson, based at the St Ives, Cornwall store, learnt of the unfolding events through media reports and having sight of employee announcements issued by Woolworths periodically on the intranet as we have described. She was also in contact with Mr Gorle. In due course she and other colleagues on the JCC, as well as other Colleague Circle members, were all asked to take part in the meeting scheduled to take place in London on Tuesday 16 December 2008. In her case, and those of other such Colleague Circle colleagues, the invitation was to participate by telephone conference link, rather than by attendance in person.

44 The meeting in London went ahead at 3.00pm on 16 December 2008. Mr Kahn hosted it and he was accompanied by Ms Harley and Ms Yarranton and two of her colleagues from Woolworths HR. It appears that people from Hilco were also present. On the union or worker representative side Mr Gorle attended in person. His colleague, Irene Radigan, the USDAW National Officer with particular responsibility for the Woolworths distribution centres, participated by telephone. Ms Wilson, Mr Clarke, Mr Freeman and another shop steward from the Castleton Distribution Centre were among those who participated by telephone. It appears that there had been an attempt to arrange for all of the Colleague Circle members at both first and second tiers to participate by telephone and that about 40 – 50 people were, in the event, on the line.

45 At the meeting Mr Kahn delivered a prepared statement. He indicated that as no buyer for the stores had been found, and unless one was found, it was envisaged that all of the 807 stores would close in four phases with about 207 ceasing trading on or around 27 December 2008 and 200 further stores on each of 30 December 2008, 2 January 2009 and 4 January 2009. Further information was provided. Employees' wages would be paid for the whole of December and any days worked in January. It was also stated that efforts were still being made to find a buyer for the stores and if a buyer for any part of the business was found then the employees concerned would transfer with any parts sold as going concerns. It was also indicated that some store leases might be sold as leases alone, but in those cases the employees concerned would not transfer. It was also explained that, if the staged closures programme did proceed as envisaged, it was not yet known which particular stores would close on which of the four dates. Information was given about what employees, if made redundant, would be entitled to by way of statutory payments, and what they would need to do to claim their entitlements.

46 There was, then, some further discussion and questions raised and answered, in particular some matters were raised by Mr Gorle. However, we found that, because of the nature of the statement and the way it was communicated, and because of the very large number of people taking part by telephone link, there was no significant dialogue between the general body of representatives and those speaking on behalf of the company. We accepted from Ms Wilson in particular that it was not really possible for her – or, to the extent that she could hear, others who were participating by telephone – to get their voice properly heard under such arrangements; and we also accepted from her that, at least in her case, as the meeting progressed, there was a deterioration in the quality of the line.

47 From the evidence we had it appears that the briefing lasted no more than about thirty minutes and the meeting as a whole around an hour.

48 After the meeting, as such, was over, Mr Gorle remained behind and raised a particular concern with Ms Harley and the Hilco representatives about what would happen on 27 December when the stores would be opened. He was concerned that there might be large numbers of aggrieved customers attempting to return goods to stores on that day, which could give rise to risks to employees' safety. They agreed to ensure that individual store managers were given the authority to close their stores should they take the view that this was necessary for staff safety.

49 On 17 December 2008 Mr Kahn wrote (on behalf of the First Respondent) to USDAW and Unite representatives and members of the Colleague Circle for retail, distribution centres and offices. The letter was headed: "Information and Consultation under TULRA and TUPE". It opened by stating that it was a record of the meeting the previous day and that it included the information that the company was required to provide for the purposes of section 188 of the 1992 Act and the TUPE Regulations.

50 Under a section headed "Sale Process" it stated that negotiations for the sale of the business, or parts, as a going concern were continuing, although they had not so far resulted in a buyer being found; and also referred to possible assignment of leases of about 300 stores. Under the heading of "Possible Redundancies", it indicated that the reason for proposed redundancies was that it was currently envisaged that all stores would cease trading by the beginning of the following year unless a viable buyer was found and a deal concluded. It identified that the entire workforce was therefore at risk. It indicated that the method of selecting employees would be dependent on the sale process. If there was no sale the entire workforce would be made redundant. The large number of stores, it said, would create logistical difficulties in relation to implementation of dismissals, but it was currently envisaged that this would be done via a combination of meetings with store managers and/or representatives of Deloitte/Hilco and letters.

51 The letter set out the envisaged timetable for closures in four tranches on 27 and 30 December 2008 and 2 and 4 January 2009 but said that definitive lists of which stores would cease trading on which dates could not yet be provided as this would depend on store performance and stock levels. However, the letter explained, if a buyer could not be found it was anticipated that the distribution centres would cease normal activity on 27 December 2008 and that most office staff would be made redundant in the first or second week of January 2009. Certain staff might be asked to stay through into February.

52 The letter indicated that, being in administration, the company was not in a position to provide any enhanced redundancy payments, but there would be a process for employees to claim statutory entitlements from the National Insurance Fund.

53 Under the heading "Points for Consultation", the letter stated that at the meeting there had been consultation on ways of avoiding dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. It set out that the joint administrators had tried to find a buyer for some or all parts of the business, which efforts were ongoing, and also described the work done in the direction of selling some leases. However, it said that if leases were sold staff would not pass with such assignments, although if the buyers were looking for staff it might be that they would look to employ former Woolworths employees first. The letter stated, as the final point in this section: "No further suggestions were raised at the meeting yesterday but if you do have any thoughts or proposals please let me or HR know".

54 A closing section of the letter was headed "Questions" and summarised questions raised at the meeting and the responses given, on some nine identified points. These included that concern had been expressed over leaks to the press, a

matter that the letter said was being investigated internally. It continued: "The Joint Administrators and Woolworths will continue to do what they can going forward in respect of information and consultation. However, to date, the process has been focused on achieving the sale of the business as a going concern rather than informing and consulting about possible redundancies."

55 In a concluding section the letter stated: "We will continue to provide updates in relation to the issues that were discussed at out meeting yesterday as part of the information and consultation process. In the meantime if you have any queries that you would like considered please contact Human Resources."

56 Mr Gorle sent a reply to Mr Kahn on 23 December 2008. He referred to what he described as the "complete absence of meaningful consultation". Specifically he said that the meeting on 16 December had not been a meaningful consultation, with only one hour allocated, and that it had comprised a briefing with no opportunity for the union to have any input and questions limited to 20 minutes and he referred to the logistical problems with some 50 people linked in by telephone conference. He asked for further information about sale discussions and their impact. He stated that there had been no discussion with the union for the purposes of avoiding redundancies or reducing the number of staff or mitigating the consequences. He commented that there might have been a number of ways in which the union might have used its political and commercial relationships to facilitate a sale as a going concern; but that the union had been kept "completely in the dark about the negotiations". The union had received a list of projected store closures and he raised a number of questions in relation to these, and other, matters.

57 No parts of the business were sold as going concerns. In a series of tranches all the stores were closed, the business ceased to trade and all the employees were dismissed as redundant. This process began on or around 27 December 2008 and unfolded, in stages, going into January, broadly in accordance with the timetable that had been envisaged at the 16 December 2008 meeting.

Further Findings and Conclusions

Appropriate Representatives and claimants

58 Section 188(1B) defines who are the appropriate representatives of any given group of affected employees. If those employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of that union are then the appropriate representatives of those employees. As we have recorded, USDAW and Unite were recognised in respect of a number of grades and categories of employees working at stores, offices and distribution centres.

59 The representatives of USDAW or Unite, as the case may be, were, therefore, the appropriate representatives of all the employees (whether they, as individuals, were union members or not) falling into the categories for which they respectively had such recognition. Under section 189(1)(c) USDAW and Unite were also the proper Claimants in relation to the alleged failure to comply with the duties to consult with

and/or inform them in respect of affected employees falling into the categories for which they had recognition.

60 In any other case section 188(1B)(b) postulates two possibilities. The first applies where there are employee representatives appointed or elected by the affected employees, other than for the purposes of redundancy consultation, who, having regard to the purposes for and the method by which they were appointed or elected, have authority to be informed and consulted about proposed redundancies. The second relates to employee representatives who have been specifically elected for the purposes of a redundancy consultation. Where representatives of both kinds exist the employer may choose to deal with either.

61 We found that the Colleague Circle representatives fell within section 188(1B)(b). They were elected by affected employees (although appointment would suffice) and, as we have recorded, their terms of reference included, in terms, "Formal Consultation Requirement (e.g. TUPE or redundancy)". We concluded that the Colleague Circle representatives had been elected for the purposes of redundancy consultation (albeit, among other purposes) and/or, in any event that, having regard to the purposes for which they had been appointed or elected, they had the requisite authority. There were no other representatives falling with section 188(1B) to choose from. So, for any employee falling into a category not covered by the recognition of USDAW or Unite, but covered by the Colleague Circles, Colleague Circle representatives were therefore the appropriate representatives to be informed and consulted.

62 In **Independent Assurance Co Ltd (in provisional liquidation) v Aspinall & O'Callaghan UKEAT/0051/11**, 12 April 2011, the EAT held that, where a successful section 189 complaint has been made by an individual affected employee, the protective award made can only relate to that employee. However, that applies where there is no representation at all, and the individual affected employee is bringing a complaint under section 189(1)(d) in their personal capacity. In the present case Ms Wilson brought her complaint not as an individual affected employee under section 189(1)(d) but in the capacity of being an employee representative under section 189(1)(b). In such a case, it seemed to us, **Independent Assurance Co Ltd** does not apply. Rather, section 189(1)(b) expressly provides that, in relation to a failure relating to employee representatives (other than a failure relating to their election), a proper claimant is "*any* of the representatives to whom the failure related" [emphasis added]. Ms Wilson was, as we have recorded, a Colleague Circle representative at both the first and second tiers. She was *one* of the representatives to whom the failure related and she was entitled to bring complaint (as indeed she did, in both England & Wales and Scotland) relating to the failure to comply in relation to *all* the Colleague Circle representatives, seeking a protective award in relation to *all* employees nationwide not covered by the union recognition, but covered by the Colleague Circles.

Establishment Issue

63 We turn next to an issue concerning the concept of "establishment" which was pertinent to the scope of the claims brought by USDAW and Mrs Wilson, and, hence, of any protective award(s) arising from their claims. This arose from the fact that section

188(1) provides that the duty to consult is engaged only where an employer is proposing to dismiss as redundant "20 or more employees at one establishment within a period of 90 days or less". This gave rise to an issue as to what constituted a single or distinct establishment in this case. In particular there were a number of stores each of which had fewer than 20 employees. If the correct answer to this question was that each individual store constituted a separate and distinct establishment, then the duty would not be engaged at all, nor would any protective award lie, in respect of employees who worked at those small stores. This point did not arise in relation to the claim by Unite because, even if it fell to be viewed as its own distinct establishment, the Castleton Distribution Centre had some 301 employees.

64 Dr Hardy, who appeared for USDAW and Ms Wilson, contended that the proper interpretation and application of section 189(1) to the facts of this case should lead us to the conclusion that the individual stores were *not* each separate establishments; but rather that the whole of Woolworths' operations nationwide constituted a single establishment. In so far as he might need to rely on the argument, Dr Hardy further submitted that the framing of the domestic legislation, in relation to the 20-employee threshold, failed to comply with the requirements of the Directive. He invited us to construe the domestic legislation on that point so as to comport with the Directive, and/or, if thought necessary, to make a reference to the Court of Justice of the European Union (CJEU) seeking an interpretation of the Directive on this point.

65 The concept of "establishment" is not defined in the 1992 Act or its predecessors (nor indeed in the Directive); but there have been a number of authorities over the years that have considered it. Most relate to this jurisdiction although there is also an old tax authority and a very recent one from the field of equal pay law. The area with which we were concerned being the subject of a Community level Directive we bore in mind that, so far as we could, we should strive to construe the language of the domestic legislation so as to conform to the requirements of the Directive.

66 The ECJ has considered the concept of "establishment" more than once. In **Rockfon A/S v Specialarbejderforbundet I Danmark** [1996] ICR 673 it reviewed the meaning of the different language versions of the Directive, observing (at paragraph 27) that, according to the version in question, the terms used had different connotations, signifying "establishment, undertaking, work centre, local unit or place of work". The ECJ continued, at paragraph 28, that there must be a uniform interpretation to reflect the purpose and general scheme of the Directive and noted, at paragraph 29, that the preamble indicates that the Directive was intended to afford greater protection to workers in the event of collective redundancies. At paragraph 31 the Court noted that it had decided before (in **Botzen** [1985] ECR 519) that "an employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties".

67 The ECJ's answer, at paragraph 34, to the relevant question was that the term establishment: "must be understood as meaning, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an "establishment", for the unit in question to be endowed with a management which can independently effect collective redundancies."

68 We were also referred to the more recent decision of the ECJ in the case of **Athinaiki Chartopoiia AE v Panagiotidis** [2007] IRLR 284. The ECJ there essentially adopted the same approach as in **Rockfon**, again referring to the background purpose of the Directive, and adding, at paragraph 27, that an establishment may "consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks."

69 Some commentators have drawn attention to the fact that Article 1(1)(a) of the Directive gives Member States the choice to implement either in line with sub-paragraph (i) or in line with sub-paragraph (ii). It is suggested that which model has been adopted could, depending on the figures, have a bearing on whether a wider or narrower interpretation of the concept of establishment would serve the purpose of affording greater protection in terms of the number of workers in respect of whom the duty was, in the given case, engaged. It has also been observed that, in both the **Rockfon** and **Athinaiki** cases the Member States in question had chosen to follow option (i), whereas the United Kingdom has chosen to follow option (ii). So, this argument concludes, the application of the guidance of the ECJ in those cases, to the domestic context of the UK, may go counter to the purpose of the Directive.

70 However that may be, the guidance from the ECJ in these two cases is clear, both as to the principle that the concept of "establishment" should be uniformly understood and applied across Member States, and as to what the term in law means. It was not open to us to depart from the guidance given by the ECJ as to the meaning in law of the term, although it was of course for us to decide to what proper conclusion that guidance led, when applied to the facts of this case, taking account, in applying the guidance to the facts, of the purpose of the Directive. It is also of course potentially *possible* for primary legislation to confer a greater degree of protection than the minimum which is required by the Directive to secure compliance with Community law obligations.

71 We were referred to a number of domestic authorities, going back to **Secretary of State for Employment and Productivity v Vic Hallam Ltd** [1969] 5 ITR 108 and **The Bakers' Union v Clarks of Hove Ltd** [1978] IRLR 366, and more recent authorities, in particular **Mills & Allen Ltd v Bulwich**, UKEAT/154/99, 8 June 2000 (which itself usefully refers to some other earlier authorities, among them, **Lord Advocate v Babcock & Wilcox** [1972] 1 WLR 488 and **Barratt Developments Ltd v UCATT** [1978] ICR 319). This issue also arose for consideration in **MSF v Refuge Assurance Plc** [2002] IRLR 324.

72 **Vic Hallam** concerned legislation relating to Selective Employment Tax. The Court felt unable to give an exclusive definition of "establishment", the matter being one of fact and degree. Potential factors were: whether a given premises were a permanent establishment, with an organisation of workers working in or from them. That guidance did not seem to us to be at odds with what the ECJ had to say about the context of the Collective Redundancies Directive.

73 As to cases concerned with the domestic collective redundancies legislation, in the **Clarks of Hove** case a bakery and twenty-eight separate retail shops were held to

be a single establishment. In the **Barratt Developments** case the headquarters of a building company and fourteen separate building sites were held to constitute a single establishment. However, neither case appeared to us to establish a principle of law, to the effect that the meaning, or grasp, of the term "establishment" in the domestic legislation is different in kind, and broader in scope, than that indicated by the guidance given by the ECJ on the concept as used in the Directive. These cases appeared to us simply to be examples of Industrial Tribunals, as they then were, making findings of fact, on the facts of the particular cases before them, about the unit to which individuals were assigned, that were open to them to make, and so were not disturbed on appeal.

74 The same was true of the **Mills & Allen** case. There the EAT held that the Employment Tribunal had been entitled to find that members of a sales team were not assigned to the local offices from which they worked but rather were assigned to the whole direct sales team itself. The EAT, it seemed to us, declined to interfere with the factual finding that the Tribunal had been entitled to make; it did not enunciate any novel principle of law as to how the concept of establishment should be understood. Indeed the EAT in that case itself referred, without criticism, to a (factually) contrasting case (**Barley v Amey Roadstone Corporation Limited** (No 2) [1978] ICR 190) in which the EAT upheld a decision that individual depots were, in that case, separate establishments.

75 **MSF v Refuge Assurance** was, at first, a more striking authority because the EAT there *overturned* the decision of the Employment Tribunal. It had found that the establishment was the entire undertaking rather than the branch offices at which the field staff worked. However, the error of the Tribunal in that case appears to have been inconsistency because it had already made a specific finding that the staff were *assigned* to the branch offices. Indeed, the thread which may be said to run through all these cases, is that the key to the factual analysis will often lie in the identification of the particular organisational unit, or level, to which particular employees, or groups of them, are, in the given organisational structure, together assigned.

76 Further, in keeping with that approach, in both the **Mills & Allen** and **Refuge Assurance** cases the EAT considered **Rockfon**, and, in the latter, observed (at paragraph 54) that "we are unconvinced that these domestic authorities lead to a meaning that differs from the *Rockfon* meaning."

77 Finally, we looked for any further guidance, to the recent decision of the Court of Session in **City of Edinburgh Council v Wilkinson** [2011] CSIH 70, 15 November 2011. That arose in the equal pay context. The Court overturned a decision of the EAT that the employer's whole undertaking constituted the establishment. Lord Eassie, giving the principal judgment, agreed (at paragraph 22) with a submission that the term "establishment" is "largely directed to the place of work. By that I do not understand counsel to mean an individual's place of work in the sense that, within any factory complex, or group of buildings, an individual may have his own workplace in a particular room or building, but rather, the broader notion of a place of work consisting, for example, of a complex of the grouping of buildings as a whole." His illustrations confirm that what he had in mind, here, was a grouping of buildings forming part of a single campus or "recognisable location"; and the fact that an employer retains central

powers regarding different establishments, or the presence of mobility clauses, are not inconsistent with the existence of a plurality of establishments.

78 In summary, it seemed to us that there was a striking consistency between the old and new domestic authorities in relation to the domestic legislation, the guidance from the European Court on the Directive, and indeed the authorities in relation to the use of the term in other contexts.

79 In the present case each of the stores was plainly a physically distinct premises, or possibly, set of premises, from each of the other stores. Each had its own organisation, headed by its own Store Manager. Each had a distinct purpose – to serve the customers who visited that particular store – which it had the resources to fulfil. Each of the affected employees worked at a particular store. They were not peripatetic, nor did their day's work require them to use their store only as the geographical base or starting or returning point for their activities. We were told that they were not subject to mobility clauses, although, even if they had been, we did not think that would have made a critical difference as they were not in practice routinely mobile between stores. Mr Gorle gave evidence about the wider structure of the Woolworths organisation and particularly about the powers (in terms of decisions of any importance) exercised at Head Office and what he said were the limited powers of Regional Managers, let alone of Store Managers. However, we did not consider that this had any bearing on the question of the unit to which individual employees were, in fact, assigned. There was no basis in the case before us to conclude that the nature of the organisational structure was such that, as a matter of fact, particular employees working at particular stores were more closely assigned to, or part of, some other type of organisational unit that transcended individual stores, than they were of the stores themselves.

80 Dr Hardy referred to the fact that the redundancies came about because of the insolvency of the entire company, and they had, in fact, in their entirety, been decided upon at national level, and declared across the entire organisation nationwide. However, it did not seem to us that these aspects pointed to any change in the organisational structure, or feature of the existing structure, that had any bearing on the question of what were or were not the distinct establishments to which the various employees concerned were assigned.

81 Finally, Dr Hardy urged that we should come to the conclusion that the whole operation was a single establishment as to do so would otherwise deprive the workers in shops with less than 20 employees of the protection of the Directive and we should strain to maximise the protection which it conferred. However, the wording of the domestic provisions, the concept of establishment, and their application to the facts of this case, did not admit of an ambiguity that would be such as to enable us to lean as far as we would need to reach such a conclusion, as an ordinary act of interpretation or application of the law to the facts.

82 In conclusion, in light of the foregoing we found as fact that, for the purposes of section 188, each of the store employees concerned was assigned to the particular store at which they worked, and that each such store was a distinct establishment from each other store.

The "20 or more employees" rule and Community Law

83 We turn, however, to Dr Hardy's next line of attack, namely, the argument that domestic legislation, in introducing the "20 or more employees" threshold in the form that it had in section 188(1), had failed properly to transpose the requirements of the Directive; and, in particular, that this provision did not secure compliance with any option permitted by Article 1(1)(a). He argued that we should, if it were thought necessary to resolve this point, make a reference to the CJEU for guidance and clarification on the meaning of the Directive, and what it requires of Member States in that regard.

84 This argument turns, in part, on what may or may not be the correct interpretation of Article 1(1)(a)(ii) of the Directive in the context of Article 1(a) as a whole. Dr Hardy did not dispute that, in principle, Member States can choose whether to follow route (i) or route (ii) to implementation. The United Kingdom has (or has purported to) follow route (ii) and was, as such, free to do so. However the argument is that, to provide in domestic law for a threshold of *20 workers at each establishment* does not implement what route (ii) in fact requires. Rather it is said that, reading the text beginning with the preamble to Article 1(1)(a), and skipping over option (i) and reading on, leads to the conclusion that, if route (ii) is adopted, then the Member State should make provision for protection where the number of redundancies contemplated *overall* is, over a period of 90 days, at least 20, and not merely where the number of redundancies being contemplated at a given establishment exceeds that threshold.

85 We considered that this interpretation of the English wording of the Directive is at least arguable. It is, at least, not wholly unambiguous on this point. This does not necessarily mean that Dr Hardy's interpretation is correct. There are at least two objections to it. Firstly it leaves to be answered a question as to what the purpose is of the remaining words of (ii): "whatever the number of workers normally employed in the establishments in question", although we could see that a potential answer to *that* was that the drafter was seeking there simply to draw a contrast with the reference to the number of workers in the establishment in question where route (i) has been followed. Secondly, it might be argued that the general scheme of Article 1(1)(a) is to look at two different possible tests, either of which might be applied by reference to how many redundancies are contemplated at a given establishment; and that (ii) should be construed consistently with (i) in this regard, so that it should be inferred that the natural meaning of the reference to "at least 20" is that it, too, is a reference to "at least 20 at each establishment".

86 We were mindful that the question of whether or not the meaning of a Directive is clear can only properly be determined in an appropriate case by considering the different language versions, something that we had not done and were not enabled to do in relation to this point. However, in any event, consideration of the English language version suggested to us that it was at least arguable that there was at least some real potential ambiguity that might need to be resolved in order to determine what the Directive required or permitted, and hence whether UK law was compliant in this regard.

87 An Employment Tribunal does have the power in an appropriate case itself to make a reference rather than leaving the matter to any higher court that the litigation might reach. That is clear from rule 58 of the 2004 Rules of Procedure and was confirmed by the EAT in **Coleman v Attridge Law** [2007] IRLR 88. However, we had to consider whether this was an appropriate case for us to make a reference.

88 In this regard we had regard to the fact that this issue has in fact previously been identified by the Employment Appeal Tribunal in the **MSF v Refuge Assurance** case. Indeed in that case at paragraph 52 the EAT postulated that the domestic legislation does differ from what the Directive requires on this point. However a reference is only appropriate if, depending on the answer given by the CJEU to the question, the domestic Court or Tribunal would then be able to give that answer effect by an act of interpretation if necessary, including – if it has the scope to do so – by reading the domestic instrument in a different way than it ordinarily would or could. The EAT commented only briefly on this issue in **MSF v Refuge Assurance** but what it said was this:

> In this respect, too, [section 188] appears to us to differ from the Directive to a degree irremediable by construction. Again, given that MSF are neither able to enforce the Directive nor to disapply the section, we are left with the task of applying a straightforward construction of the language of the section to facts.

It would appear that the EAT was not asked to make a reference to the CJEU in that case, and it may therefore not have specifically considered doing so. But at any rate it appeared to take the view that the defect in the domestic legislation (as it saw it) was "irremediable by construction."

89 That guidance from the EAT therefore suggested that were we, in the present case, also involving a private employer, to make a reference to the CJEU, and even were its guidance to support the view contended for by Dr Hardy as to the meaning of the Directive, we would not be able to make use of that guidance by an act of construction of the domestic statute. We did not think we should make a reference which, in light of that guidance from the EAT, would therefore appear to be a practically idle exercise. Rather, we concluded that, if the question of a possible reference *is* to be further considered in this case, then the matter requires specific (further) consideration at least at EAT level. In particular the EAT, or possibly a higher Court, would need to consider (or reconsider) whether, if a reference were made, there would, after all, should the answer from the CJEU as to the meaning of the Directive indicate the need to do so, be potential scope for the Employment Tribunal to read the existing domestic legislation differently, so as to secure conformity with the Directive. We therefore decline Dr Hardy's invitation to us to make such a reference.

Compliance with section 188 and special circumstances

90 We turn to the question of the extent to which the First Respondent complied with its section 188 duties, including whether any special circumstances defence applied.

91 The First Respondent, as a matter of fact, carried out a single exercise in relation to both Great Britain and Northern Ireland. In particular, the meeting on 16 December 2008 was convened, and the letter of 17 December 2008 written, in relation to affected employees throughout the UK. The Belfast Tribunal had, therefore, looked at broadly the same events as we were considering. Further, the legislation that applies in Northern Ireland is identically worded to that which applies in Great Britain; and the same case-law guidance and principles apply to both. That said, while USDAW was the claimant in the Belfast claim, Unite the Union and Ms Wilson were not also claimants in that case, and we plainly had more evidence than did the Belfast Tribunal as particularly related to them and generally in relation to the Colleague Circle. We, of course, had to reach our own decision on the particular evidence and facts of the case before us. But, given this background, we make some further reference to the Belfast Tribunal's decision in what follows, and have included a full copy as Appendix 2 to our own decision.

92 Section 188(7) allows for the possibility of special circumstances existing which render it not reasonably practicable to comply with a particular requirement; but if so the employer is still required to take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. In relation to both limbs of this provision the onus to make good its case rests on the employer (see section 189(6)). In its responses the First Respondent referred to a number of factors that it relied on as special circumstances. In summary these were said to be: the First Respondent's financial circumstances, including the fact that it had insufficient financial resources to keep the stores open beyond a certain point; the proposition that consultation at an earlier stage would have been likely to make the potential insolvency a self-fulfilling prophecy; the fact that the main focus of the administrators was to find a purchaser at the start of the administration; that it was crucial for the business to cease trading as soon as possible once it became clear that no purchaser was likely to be found, so as to limit losses and maximise value for creditors; and that it was not possible to consult about all the specific details in respect of potential sales, since several potential purchasers made it a condition that negotiations be kept confidential.

93 As the Belfast Tribunal noted, it is well-established in the case law that the mere fact of insolvency will not amount to special circumstances. So the First Respondent's parlous financial situation, and the fact of the administration, did not, as such, without more, excuse any failure to comply with section 188 duties in this case.

94 When was the duty to consult and inform first triggered in this case? The effect of section 188(1) is that this occurs at the point when the employer is first proposing the redundancies in question. (The word used in the Directive is "contemplating". Just how practically significant this difference in language is, is much debated in the authorities; but it is recognised that, in a given case, "proposing" might occur later in point of time than "contemplating"). In its response forms, the First Respondent's case was that, when and immediately after, the administrators were first appointed it was not *at that stage* yet contemplating or proposing redundancies *at all* because the first, and initially entire, focus of the administrators was on seeking to find a buyer or buyers for the business. A similar submission was made in correspondence from the First Respondent's solicitors to the Tribunal of 21 June 2011.

95 On this, it does appear that, initially, the energies of the administrators and their team were, as a matter of fact, focussed wholly on trying to find buyers for some or all of the business. But the fact that they chose initially to focus exclusively on seeking to find buyers does not, by itself, answer the question of when redundancies were first proposed. Given the financial situation of the business, it seemed to us that, realistically, the administrators must have also at least *contemplated* from the outset the possibility of redundancies. That said, we could not say, on the evidence we had, that redundancies were *proposed* from the very first day of the administration. However, at least by the time of the circular of 9 December 2008, the First Respondent was acknowledging to the whole workforce the possibility that it may not be able to continue their employment beyond a certain point; and it seemed to us that, some time before *that*, once it had became apparent that there was not going to be any quick sale of the business to an interested buyer, the point had been reached where, in reality, redundancies were practically now proposed (albeit that the possibility of sales had also not been abandoned), and the duties to inform and consult were triggered.

96 Once that point was reached the process of consultation should have begun in good time, and, as the case may be, at least 90 or 30 days (depending upon the size of the particular store or other establishment) in advance of the (proposed) dismissals. Like the Belfast Tribunal, we accepted that there was force in the First Respondent's submissions about the practical financial necessity of closing the stores at a certain point, and hence of dismissals at that stage. However, like the Belfast Tribunal, while we considered that these amounted to circumstances justifying a truncated information and consultation period, that *only* justified the shorter duration of the overall period, as it turned out. It did not alleviate the duty to *begin* consulting in good time; and it did not make it not reasonably practicable to have a genuine consultation process, meeting the substantive requirements of section 188, during the period of time that was in fact available going forward from that point.

97 As the Belfast Tribunal noted, that there must be a process of genuine or meaningful consultation. That entails consultation occurring when the proposals are still at a formative stage, adequate information to which to respond, adequate time to respond, and conscientious consideration of the response. (See: **R v British Coal Corporation ex parte Price** [1994] IRLR 72.) The pure giving of information about a decision which has been taken is not consultation.

98 No consultation occurred prior to the meeting on 16 December 2008. In relation to that period, in particular, the First Respondent maintained that it could not communicate with the unions about confidential discussions with the potential buyers. We were not, of course, concerned, as such with the potential (and separate) duty to consult and inform under TUPE 2006 (had there been any sales). However, in so far as USDAW in particular was concerned that, had it been permitted to be more involved, it might have been able to contribute to a successful sale, this had a bearing on the question of consultation over ways of avoiding or reducing redundancies. In that regard, we agreed with the Belfast Tribunal that it should not have been assumed that considerations of confidentiality necessitated its total exclusion. In particular, Mr Gorle was an experienced senior official who at one point offered to give a confidentiality undertaking. Although it was not suggested that Mr Clarke of Unite made a specific offer of that sort, again the First Respondent was dealing here with a

full-time senior official of an established national trade union, and it was reasonable to expect this avenue to have been explored.

99 In any event, confidentiality affecting discussions with potential buyers did not, as such, provide a reason for not consulting with the appropriate representatives during this period about the redundancies that were proposed, should such discussions not lead to some or all of the business being sold. Further, we agreed with the Belfast Tribunal that it was not a reasonable excuse that engaging with the section 188 duties would have undermined sales discussions or made the insolvency or redundancies a self-fulfilling prophecy. The grave financial situation of the First Respondent was in the public domain, and the concept of a twin track process would not have been surprising or difficult for prospective buyers to comprehend at this stage; and indeed it was a twin track process that was, in the event, in due course pursued.

100 We agreed with the Belfast Tribunal that the letter of 17 December 2008 as such provided the required statutory written *information* (being, in Great Britain, that which is set out in section 188(4) above). However, that provision indicates that such information is to be provided for the purposes of consultation. In this case, it could and should have been provided sooner than it was. In particular, in order to enable the most meaningful consultations, this written information should have been provided once the duty first became engaged (and thereafter updated as necessary), and certainly prior to, rather than after, the meeting of 16 December 2008.

101 As to the quality of what was said to have been the consultation process in fact undertaken, we agreed with the Belfast Tribunal that in this case the administrators' approach was that of announcement of what would, or was expected to, happen, rather than of genuine and open-minded consultation. This was their approach, not only in the run up to, but crucially at, the meeting on 16 December 2008, which began with a scripted announcement of information about what had been decided and what, in view of those decisions, was expected to happen next. Although at that meeting a number of questions were also asked and answered, provision of information in response to questions is not the same as a meaningful consultation process; and the forum, manner of conduct, and overall time allowed for the meeting inhibited rather than facilitated the latter. More could and should have been done to enable a substantive process of consultation at this meeting, both with the union representatives and members of the Colleague Circle. Although the large numbers and geographical dispersal of Colleague Circle members in particular meant that the logistics were challenging, communications, by attendance or remotely, could and should have been better organised, more overall time for the meeting could and should have been allowed, and the exercise could and should have been approached in a different, and genuinely consultative, spirit.

102 The announcements made at the meeting plainly reflected the fact that the administrators had already come to the view that, in the absence of sales of any stores as going concerns, closures were inevitable. But the fact that an employer may consider consultation (or consultation on some aspects) to be futile does not, by itself, excuse a failure to consult. Further, there does not appear to have been any meaningful attempt to consult on matters such as the timing of the closures, any independent efforts, or contribution, the unions might yet have made to finding ways of

avoiding closures, or ways of ameliorating the impact of redundancies on the employees concerned. So consultation was not, as required by section 188(2), undertaken with a view to reaching agreement on ways of avoiding or reducing redundancies or mitigating their consequences.

103 In its grounds of resistance the First Respondent referred to an information cascade system established after the 16 December 2008 meeting and to other conversations with the trade unions, including Mr Gorle. As we have found, the administrators did leave the door open to the representatives putting forward suggestions for consideration following the meeting. *Information* was, as we have recorded, provided as to developments at various stages. A discussion with USDAW about health and safety concerns relating to 27 December opening did take place, but that was not related to the proposed redundancies as such. What did not happen, beyond the invitation to put forward any further suggestions, was any other proactive efforts to continue the consultation process beyond the meeting of 16 December and letter of 17 December 2008, in the period up to when final decisions on particular store closures, and their timing, were taken. No further meeting was set, and, while further information was provided, there was no attempt at consultation in respect of those final decisions.

104 We therefore concluded that, while there were particular circumstances making it not reasonably practicable to continue the process beyond the dates when stores in fact closed, and redundancies took effect, there were no other special circumstances in this case. While the written information required by section 188(4) was provided, the First Respondent failed fully to comply with its section 188 duties to consult USDAW, Unite the Union and the Colleague Circle representatives, of whom Ms Wilson was one. Accordingly we turned to consider the question of protective awards.

Protective Awards

105 Protective awards fell to be made in respect of all of those staff who had been dismissed by the First Respondent starting on 27 December 2008: (a) on the complaint by USDAW, being those falling within the grades for which it was recognised; (b) on the complaint by Unite the Union, being those falling within the grades for which it was recognised; and (c) on the complaint by Ms Wilson, being those not falling within grades for which either of the two unions were recognised, but who were covered by the Colleague Circle arrangements.

106 However, for reasons we have explained, the awards do not extend to stores with less than 20 employees. We had a list of these in our bundle, which appears as Appendix 3 to this decision. St Ives, Cornwall, has been added in manuscript to the typed list. This is because it emerged at our hearing that it had only 19 employees, but had been omitted from that typed list, because its figures had been erroneously combined with those for another store in St Ives, Cambridgeshire.

107 The protected period began with the date on which the first of the dismissals to which these complaints related took effect. Although in our bundle we had a sample letter of dismissal dated 31 December 2008, according to other evidence before us the

first relevant dismissals took place on 27 December 2008. We have therefore determined upon that date as the start of the protective award period.

108 As to the duration of the protective awards, the Belfast Tribunal considered this in particular at paragraphs 47 – 50 of its decision, including a summary of the law, with which we agree, and in particular the well-known guidance given by the Court of Appeal in **GMB v Susie Radin** [2004] IRLR 400. Specifically, in determining what is just and equitable, the Tribunal's focus should be on the seriousness of the failure to comply. In a case of total failure to comply a 90-day award is appropriate. It is no excuse or defence that the employees concerned may have suffered no loss.

109 We agreed with, and found equally applicable in our case, the Belfast Tribunal's broad assessment and description of the particular relevant considerations that it set out at paragraph 50 of its decision. Although we were looking at that process as it was applied, not only to USDAW but also to Unite and the Colleague Circle representatives, it was, in effect, a single process affecting the whole workforce, and we did not find any material differences such as to indicate that there should, in justice and equity, be different protective awards in relation to each of the groups of affected employees that they respectively covered.

110 As to the final assessment of the length of the protected period, we agreed with the Belfast Tribunal that a maximum, 90-day, protected period was not appropriate in this case because this was not a case of total non-compliance. The First Respondent *did* provide the written information required by section 188(4) in its letter of 17 December 2008, notwithstanding the criticisms we have made as the timing of when it was provided. The First Respondent *did* take the step of convening and holding the meeting of 16 December 2008. Notwithstanding the criticisms we have made of the way the meeting was conducted, there was *some* dialogue at that meeting, albeit essentially in Q & A form. The First Respondent *did* leave the door open to the recipients of the 17 December 2008 letter to come forward with any further proposals they might have thereafter, notwithstanding its failure to be more proactive in pursuing a genuine and meaningful consultation process, in particular with a view to reaching agreement on the matters required by section 188(2).

111 The foregoing were all factors that had a bearing on the seriousness and extent of the default. But the duty to conduct a genuine and meaningful consultation is central not only to the spirit of these provisions, but, as we have described, is an organic part of the legal duties. In light of all our findings there was, notwithstanding the foregoing factors, a substantial serious failure to comply with the section 188 duties. Weighing all our findings up, we came to the conclusion, in relation to each award, that, having regard to the seriousness of the default, the just and equitable protected period in all the circumstances of this case would be 60 days.

112 The Claimants' representatives submitted, as we have noted, a proposed (revised) form of wording for the protective award(s) they invited us to make. We have drawn on this, but modified it to reflect our actual findings and conclusions, to conform more precisely to the statutory language, and to identify the distinct awards made at the suit of each of the three Claimants.

RESERVED REASONS
18 January 2012 London Central
Date and place of signing

Simon J Auerbach
EMPLOYMENT JUDGE

19 January 2012
REASONS SENT TO THE PARTIES ON

19 January 2012
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS