Appeal No. UKEAT/0057/17/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 January 2018
Judgment handed down on 21 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

KEEPING KIDS COMPANY (IN COMPULSORY LIQUIDATION) APPELLANT

(1) MISS J SMITH AND OTHERS
(2) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DAPHNE ROMNEY (One of Her Majesty's Counsel) Instructed by: TLT LLP One Redcliff Street Bristol BS1 6TP
For Miss J Smith and Others (Respondents)	MS IRIS FERBER (of Counsel) Instructed by: JMW Solicitors LLP 1 Byrom Place Spinningfields Manchester M3 3HG
For Ms I Akinola (Respondent)	MS NATASHA JOFFE (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Secretary of State for Business, Energy and Industrial Strategy (Respondent)	MS ANNA LINTNER (of Counsel) Government Legal Department Employment Group One Kemble Street London WC2B 4TS
Mr A Arian (Respondent)	MR ADAM ARIAN (In Person)
Mr A Zika, Ms H Bassnett, Ms E Baron and Ms L Weinstock (Respondents)	Neither present nor represented
Ms R Lever (Respondent)	Debarred

SUMMARY

REDUNDANCY - Collective consultation and information

REDUNDANCY - Protective award

Redundancy - Collective consultation - special circumstances defence - protective award

Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")

The Claimants had been employed by Keeping Kids Company ("KKC") in London and Bristol. During the course of late 2014 and for the first half of 2015, KKC had been in a financially precarious position and, on 12 June 2015, an application was made to the government for a one-off grant, made on the basis KKC would then secure matching funds from private donors. The grant application included a plan for the restructuring of KKC, under which over half of the employees would be made redundant by mid September 2015 in any event. Failing receipt of funds from the government, the alternative was that KKC would become insolvent. On 29 July 2015, the government agreed the grant application and released funds to KKC. The next day, however, there was publicity regarding a police investigation into safeguarding issues, which meant KKC could not secure matching funds from private donors and had to pay back the money to the government. Within a matter of days thereafter, KKC closed down and all employees were dismissed by reason of redundancy. Although the restructure plans had envisaged a process of consultation, it was common ground that there had been no compliance with the obligations under section 188 **TULRCA**. The Claimants duly made claims for protective awards.

In determining the claims, the ET unanimously held that the 12 June grant application had contained a relevant proposal for particular categories of KKC employees. The ET minority (the Employment Judge) did not, however, consider this extended further. The ET majority (the Lay Members) disagreed, holding that by 12 June 2015 there was a relevant proposal affecting all KKC employees. Furthermore, the ET majority found that the obligation to

consult in good time meant that KKC was bound to start consulting promptly after 12 June and had failed to do so. It further rejected KKC's contention that it was entitled to wait until it had received the government's response to its grant application. Although the ET majority allowed that the events of 30 July might have prevented consultation thereafter, that was not relevant to the existing breach. Moreover, the ET majority considered that KKC had failed to show why a full 90-day protective award should not be granted. KKC appealed.

Held: allowing the appeal in part.

The ET majority had permissibly concluded that by 12 June 2015 KKC was proposing redundancy dismissals that might affect all its employees, thus triggering its obligation to consult under section 188 **TULRCA**. In holding that the consultation needed to commence "promptly", the ET majority did not err in its approach but was stating what it considered necessary for meaningful consultation to commence in good time for the purposes of section 188(1A). In that regard, it had been entitled to find that KKC could not rely on the fact that it was waiting for a response to its grant application from the government: in the circumstances, it had not demonstrated that it had taken all such steps towards compliance as were reasonably practicable. Moreover, the ET majority had been entitled to reject the submission that there was a relevant distinction between the dismissals that had taken place in early August 2015 and those that had originally been proposed in the grant application. As for KKC's reliance on the events of 30 July 2015 as a special circumstance, the ET majority had effectively acknowledged that, allowing that it might have prevented further consultation taking place thereafter. In failing, however, to further allow that this might be a relevant matter when considering the period covered by any protective award, the ET majority had erred in its approach and the appeal on this last ground would therefore be allowed.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter gives rise to questions relating to the obligation to consult regarding collective redundancies under section 188 **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"), as to when the "special circumstances" defence might be relied on for the purposes of section 188(7), and as to the approach to be taken to the making of a protective award under section 189.

2. This is the Full Hearing of the appeal of Keeping Kids Company (in liquidation) against the majority Judgment of the Employment Tribunal sitting at London South ("the ET"); the majority being the Lay Members, Ms Leverton and Ms Knight; Employment Judge Baron being in the minority. Keeping Kids Company ("KKC") was the First Respondent to ET claims brought by a number of its former employees ("the Claimants"), which were heard by the ET on 4 and 5 August 2016, with a further day in chambers on 31 August. The ET heard and otherwise received evidence from a number of the Claimants, all having worked for KKC in either London or Bristol; no evidence was adduced from any senior employee, trustee or director of KKC. The ET's Reserved Judgment was sent out on 21 November 2016. By a majority, it was held that (unless otherwise stayed or withdrawn) the Claimants' claims for protective awards were well-founded and KKC was ordered to pay remuneration for a period of 90 days from 5 August 2015. That Judgment is challenged by KKC on this appeal.

3. The employees of KKC were dismissed on 5 August 2015 and, on 20 August 2015 an order was made for the compulsory winding up of the company. The Official Receiver was appointed as liquidator and has instructed Ms Romney QC in these proceedings. The Secretary

of State for Business, Energy and Industrial Strategy ("the SoS") was joined as a party as there is a potential for any award made to fall to be paid from the national insurance fund and Ms Lintner thus represents the SoS as custodian of the fund. Ms Ferber represented the majority of the Claimants below, as she does on this appeal. The Claimant Ms Akinola was separately represented by counsel before the ET, as she is today, albeit Ms Joffe did not appear below. The other Claimants are self-represented. Mr Zika has lodged a Respondent's Answer settled by counsel on which he relies for the purposes of this hearing (for personal reasons he has been unable to attend today); otherwise, the self-represented Claimants (save for Ms Lever, who failed to lodge a Respondent's Answer and has been debarred from taking further part in the appeal) have also resisted the appeal, relying on the reasons of the ET majority.

The Relevant Background

4. KKC was a charity, headed up by its Chief Executive Officer, Ms Batmanghelidjh, which assisted thousands of marginalised and disadvantaged children. It operated as a limited company and a registered charity, based in London, Bristol and Liverpool. The ET claims were concerned only with employees based in London and Bristol.

5. The current claims arise out of the well-publicised demise of KKC in 2015. KKC had largely operated on the basis of substantial donations from high worth individuals and substantial corporate sponsorship, principally obtained through the efforts of Ms Batmanghelidjh. Financial difficulties became acute, however, in late 2014; on 22 September 2014, an article in the Evening Standard stated that KKC could not continue beyond the end of the year without government funding and it seems that the government went on to provide £4 million to KCC in the early part of 2015, in order to stabilise the charity. The government's grant had, however, been made subject to conditions, as referenced in a report prepared for the

Cabinet Office for the period April-May 2015; specifically, it was a condition that there would be a 10% cut in costs, the removal of services from Bristol and the closure of the KCC's Urban Academy in London. The report also referred to there having been individual conversations with staff who might want to move on, to reduce redundancy payments, observing that KKC did not have sufficient money to carry out a redundancy re-structure. It was further stated that there was a commitment to removing the education service in Bristol in July and a suggestion that the Urban Academy would become a free school. The report ended with a reference to the lack of sustainable funding, exacerbated by what were said to be false media reports and the reluctance of philanthropists to donate given the pending general election.

6. A letter of 19 May 2015 from KCC's Chairman, Mr Yentob, was described by the ET as providing an even starker picture, recording as follows:

> **"13. … KKC did not have sufficient funds to pay that month's salaries, nor pay its liabilities to HMRC. Mr Yentob said: 'We require immediate short term finding [sic], together with a firm commitment to significant statutory support going forward if we are to avoid insolvency by the end of the week.' He said that KKC had already committed to a reduction in staff by one hundred, but that it would not be possible to cut fast and deep enough without immediate financial assistance. Mr Yentob said in the conclusion to the letter that unless there was a financial commitment by the government by 22 May 2015 then KKC would have to be declared insolvent. …"**

The ET was unsure what Mr Yentob meant by his reference to a commitment to reduce staff by one hundred, although the letter referred to there being an enclosure containing details of the first set of staff releases and there was a document headed "*Bristol leavers by July 2015*".

7. In any event, it seems there was a staff meeting on 6 May 2015, at which there was some discussion concerning funding and the pending outcome of the general election. The ET accepted that there was some mention of the possibility of voluntary redundancies at this stage but did not feel able to make any more detailed findings.

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8. On 12 June 2015, KKC made an application to the government for a one-off grant of £3 million. This included a business plan, by which KKC was proposing to re-structure the company, by the third week of September 2015, to a level commensurate with a lower annual turnover. The government grant sought was to be matched by £3 million from philanthropic donors. As part of the proposed restructuring, there were general comments about reductions in staff costs and proposals for expenditure on the schools' function being reduced to zero, the "*closure of all Bristol*" and redundancy for all Adventure Playground, Urban Academy and Heart Yard staff. Under the heading "*Change Process*", it was said that staff costs were to be reduced by 58% (approximately 323 posts), although "*the legislation around redundancies requires that at this stage we cannot be specific about exactly which individual posts will be lost*". It was further stated that the redundancy process was to be completed by the third week in September, which was to allow the "*appointment of an employee consultation group, full statutory consultation period, and contingency for unexpected delays*". As the ET further observed:

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> **"19. It was proposed that a restructuring specialist be appointed to assist, and funds were included in the cash flow forecast for that purpose. We note from the forecast that just over £3M was to be incurred in September 2015 in redundancy payments, payment in lieu of notice, and accrued leave pay. …"**

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9. During July 2015, KKC's position - at least as communicated to its staff - might appropriately be described as confused, but, by letter of 29 July 2015, the government made an offer of a "one-off" grant for the purposes of transformation and reorganisation in accordance with the plans KCC had submitted. More specifically, Ms Batmanghelidjh was to hand over all control and would become President, without any power to authorise expenditure, and there would be monthly updates to the Cabinet Office, showing satisfactory progress and a cumulative positive cash flow. Following receipt of that letter, later on the same day, an email

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was sent to staff, saying discussions with the government and philanthropists had been resolved and salaries would be paid the following day, which is what happened.

10. On 30 July 2015, however, it became known that the Metropolitan Police were investigating allegations against KKC involving child safeguarding issues. Ms Batmanghelidjh emailed staff saying that she had become aware of press reports of this investigation, describing it as part of an organised campaign against KKC, which was making it increasingly difficult to raise funds as a result of the negative publicity.

11. On 3 August 2015, the Cabinet Office notified KKC that the grant agreement was terminated and made a demand for immediate repayment of the unspent grant (then £2.1 million). This was apparently sent in response to an earlier email from KKC that day, which had confirmed the grant could no longer be applied for the specified purpose, there was a substantial reduction in anticipated income as a result of the police investigation and it was likely there would be an insolvency event. On 5 August 2015, at 7.01 pm, Mr Yentob emailed KKC employees saying that all centres must stop operating and be locked and secured overnight: KKC was closing and all employees were dismissed from that date.

The ET's Decision and Reasoning

12. It was uncontroversial that each Claimant was dismissed by reason of redundancy and that KKC did not go through the consultation process envisaged by section 188 **TULRCA**. The ET was also (unanimously) satisfied that each of the Claimants had been based at an establishment employing 20 or more employees at the relevant time; there is no appeal against that finding.

13. So far as the Bristol based employees were concerned and those in London involved in the Adventure Playground, the Urban Academy and Heart Yard, the ET further unanimously accepted that there had been a "proposal to dismiss", reached, at latest, by 12 June 2015:

> **"71. … That was clearly stated in the grant application of that date. … if the grant for which application had been made, or something along similar lines had not been provided, then KKC would have had to enter into administration or some other insolvency procedure forthwith, inevitably involving the redundancy of all, or nearly all, of the staff."**

14. The ET Lay Members and the Employment Judge parted company, however, when considering when any obligation to consult arose, albeit they remained unanimous in rejecting KKC's submission that the approach should be to ascertain the date of the first proposed redundancy and then count back for 46 days:

> **"72. … If that were correct then the provisions of the statute that the consultation must 'begin in good time and in any event … at least 45 days before the first of the dismissals takes effect' would be partly deprived of effect. The phrase 'in good time' would be superfluous. On the other hand, the obligation is not that there must be consultation at the earliest opportunity."**

15. Turning then to the decision of the ET majority, the Lay Members noted that in his letter of 19 May, Mr Yentob had said that, without help, KKC would be insolvent before the end of the week; staff had not been paid on time in May, June or July and staff reduction proposals were set out as definite at least by the 12 June application to the government for funding. In the circumstances, they considered redundancies were inevitable by 12 June 2015, if not before, and felt the business plan, which accompanied the grant application, was akin to making a case to a Board to approve redundancy proposals (see **MSF v Refuge Assurance plc** [2002] IRLR 324 EAT): it amounted to a sufficiently firm proposal to satisfy section 188(1) and (4) **TULRCA** and thus triggered the obligation to consult. The proposal was that any or all of the employees may be affected (depending on whether the grant application was successful) but a minimum of 58% of employees would be made redundant in any event; by June 2015, at the latest, there was no option that did not involve significant numbers of redundancies. That KKC did not know the exact names of the 323 employees (58% of the total) who would be affected

did not mean it could avoid the obligation to consult or that the law permitted it to delay commencing consultation. Moreover, there was no guarantee KKC could remain solvent even with government funding as the plan was by no means sure to succeed; the events that precipitated the actual demise of KKC were thus irrelevant and did not form a special circumstance: those events might have prevented further consultation taking place but that did not affect the pre-existing breach. So far as any remedy was concerned, the ET majority concluded that the affected employees were entitled to a declaration and that it was also appropriate to make a protective award, which should be of 90 days' pay, following the guidance in **Susie Radin Ltd v GMB** [2004] IRLR 400 CA, no satisfactory reason having been shown as to why there should be any lesser award.

16. The Employment Judge took a different view, noting that the issues before the ET related to the dismissals effected on 5 August 2015: those were not the redundancies as had been earlier planned for September 2015, albeit the situation had to be considered as against the background of the earlier plan. In the circumstances, the Employment Judge concluded:

> **"82. … KCC could not have known with sufficient certainty what redundancies were to be proposed until the outcome of the grant application was known to enable the information required by subsection (4) to be provided. The grant may have been refused completely, or conditions as to more extensive redundancies may have been imposed, or the application may have been successful in accordance with its terms. The third event is what occurred, but it is my view that until 29 July 2015 KKC was not in a position to make a decision as to which employees it was proposing to dismiss. … In this case the condition precedent was the approval of the government to the making of the grant, and it was the government which held the purse strings. My conclusion therefore is that the obligation under subsection (1) arose on 29 July 2015 and not before that date. The obligation was then to consult in good time."**

17. The Employment Judge also differed from the ET majority on the question whether there had been special circumstances in this case:

> **"83. … In my judgment there were such circumstances. KKC had prepared in some detail for the appropriate consultation to take place if the funding were provided. The scheme set out in the grant application had been costed and a consultant had been at least provisionally engaged. What then occurred could not have been predicted and was out of the ordinary. … My view of the facts as far as we know them is that the proximate cause of the commencement of the insolvency procedure, and the dismissals, was the release of information that the police were investigating allegations of abuse. That resulted in private donors withdrawing the promised support, and thus the withdrawal also of the grant."**

18. In reaching that view, the Employment Judge accepted that the longstanding financial problems were the cause of the insolvency, not the police investigation:

> **"84. …The financial position was of course the background to what occurred, and if there had not been financial problems then there would not have been an insolvency. …"**

That said, given that the ET was concerned with the mechanics of section 188, the Employment Judge took the view that:

> **"84. … the financial problems created the necessity for the restructuring plan to be drawn up, which required funding to put into effect. If the restructuring plan had continued then all the evidence is that the Respondent would have sought to comply with its statutory obligations. The funding then failed because of the police investigation, precipitating the winding-up petition."**

19. Given that, after 31 July 2015, it became apparent that KKC was insolvent and this could not be remedied as previously planned, the Employment Judge further concluded that there were, on the particular facts, no reasonably practicable steps that KKC could have taken after 31 July 2015.

20. In the alternative, the Employment Judge stated that he would, in any event, not have made a protective award in these circumstances: whilst the Claimants would have been entitled to a declaration, a protective award was a punitive step which he did not consider appropriate:

> **"86. … There had clearly been financial difficulties for some time. It appears that there had been continuing support from the government during the first half of 2015. During that time the trustees/directors put together a proper business plan for the purpose of reorganising KKC and putting it on a more sound financial footing. The plan was costed and a timetable set out. That in my view was an entirely responsible course of action, and in particular the plan would have enabled KKC to comply with its statutory obligations. The scheme was blown off course by an entirely unforeseeable event. In those circumstances I do not consider that it would have been appropriate to make a protective award as a punishment of the employer."**

21. The Employment Judge then returned to the specific position of the KKC employees who had worked at the establishments identified for closure in the business plan (see as referenced at paragraph 8 above). The ET had unanimously concluded that by 12 June 2015 the

A "proposing to dismiss" condition in section 188(1) **TULRCA** had been satisfied in respect of these employees; the question was whether KKC was under an obligation to consult under section 188(1A) or excused from that obligation by virtue of section 188(7). The Employment Judge agreed with the ET majority that, subject to resources, it would have been practicable for consultation to commence in relation to those particular establishments during the latter half of July 2015. He concluded, however, that this was not the correct way of looking at the matter: the plan had been to effect dismissals only after consultation had taken place and there was no reason to suppose that there would not have been proper consultation concerning such dismissals. That, however, was not what had happened: what occurred was that earlier and different dismissals were forced upon KKC and it was those dismissals with which the claims were concerned, not the putative September dismissals. The employees at the particular establishments identified in the business plan therefore fell to be treated in precisely the same way as the others not so expressly identified and thus, in any event, subsection 188(7) would apply; alternatively, it would not be just and equitable to make a protective award.

The Relevant Legal Principles

22. The ET was concerned with the duty to consult on collective redundancies, as provided by section 188 **TULRCA** (relevantly) 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 45 days, and**
> >
> > **(b) otherwise, at least 30 days,**
>
> **before the first of the dismissals takes effect.**
>
> …

(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.

…

(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.

…"

23. Where an ET finds that there has been a breach of the consultation obligations under section 188, section 189 **TULRCA** (relevantly) provides:

"189. *Complaint … and protective award*

…

(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 …

(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."

24. The duty to consult under section 188(1) **TULRCA** arises when an employer is "proposing to dismiss" the requisite number of employees. In thus implementing Article 2(1) **Council Directive 98/59/EC** ("the Collective Redundancies Directive"), the UK has thus focussed on the point at which the employer is *proposing* the dismissals rather than adopting the language of Article 2(1), which imposes the requirement to consult at the point when the employer "is *contemplating* collective redundancies".

25. That difference in language has led to a degree of debate in domestic law (and commentary) as to how "proposing" is to be interpreted for these purposes. In **USA v Nolan**

[2011] IRLR 40, the Court of Appeal identified the possible nuances of approach by posing the following question:

> **"57. … whether the consultation obligation arises (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?"**

26. In **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Vardy** [1993] IRLR 104 Div Ct and **MSF v Refuge Assurance plc** [2002] IRLR 324 EAT (followed in **UK Coal Mining Ltd v NUM (Northumberland Area)** [2008] IRLR 4 EAT and **Kelly v The Hesley Group Ltd** [2013] IRLR 514 EAT), it was concluded that the obligation does not arise simply when the employer first thinks about or contemplates redundancies; it means something more than that, albeit something less than a final decision. Notwithstanding the potential debate as to this approach, all parties to this appeal have proceeded on the basis that this is correct and that (see **MSF v Refuge** at paragraph 42):

> **"42. … 'proposes' relates to a state of mind which is much more certain and further along the decision-making process than the verb 'contemplate' …"**

For the avoidance of doubt, although not an argument with which I have had to engage on this appeal, for the reasons given in **Kelly**, I would, in any event, consider that, at EAT level, it would be inappropriate to adopt any different position (see **Kelly** at paragraphs 15 to 16)

27. The obligation is, further, to consult "in good time" (section 188(1A)). Specific time periods are then set out (section 188(1A)(a) and (b)) but, at a more basic level, it is common ground that this must mean it starts in good time to allow meaningful consultations to take place, see **TGWU v Ledbury Preserves (1928) Ltd** [1985] IRLR 412 EAT and **R v British Coal Corporation, ex parte Price** [1994] IRLR 72 Div Ct. As the ET recognised (see paragraph 72), the obligation is not that there must be consultation at the earliest opportunity

but the employer does need to project forward, to assess when consultation must start to ensure it is "in good time" for meaningful consultations to take place, which may require that the process start before all the information specified at section 188(4) is available (see **MSF v Refuge** at paragraph 39).

28. Where an obligation to consult has arisen under section 188, subsection 188(7) allows for a "special circumstances" defence for an employer, albeit that it will still be required to show that it took "*all such steps towards compliance*" with the duty to consult as were "*reasonably practicable in those circumstances*" (the burden of proof in this regard being firmly on the employer, see section 189(6)).

29. Again much is common ground in terms of the approach to be adopted to this defence. First, the circumstances must be special to the particular case - there are no special categories of employer or special categories of circumstance. Moreover, the event in question must be "*something out of the ordinary, uncommon*", for example, "*where sudden disaster strikes the company making it necessary to close the concern*", see **The Bakers' Union v Clarks of Hove Ltd** [1978] IRLR 366 CA, in particular at paragraph 16:

> **"16. What, then is meant by 'special circumstances'? … it seems to me that the way in which the phrase was interpreted by the Industrial Tribunal is correct. What they said, in effect, was this, that insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be 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."**

30. And, thus, what will constitute special circumstances will depend upon the facts of the case; what might be special circumstances in one case might not be in another if the employer

could, or should, have seen what was to come, see further **GMB v Rankin** [1992] IRLR 514 EAT. Moreover, whether the employer has shown special circumstances will be for the ET to assess on the evidence in the particular case, bearing in mind that the burden lies on the employer in this regard (see **UK Coal Mining v NUM** at paragraphs 62 to 64 and **E Ivor Hughes Educational Foundation v Morris** [2015] IRLR 696 EAT at paragraph 28).

31. In the present case, KKC seeks to draw an analogy with observations made in the case of **Hamish Armour v ASTMS** [1979] IRLR 24 EAT, in which it was held that an application for government financial aid by a company in difficulties might constitute special circumstances (although on the facts of that case the company had not discharged the burden of showing that it had taken all reasonable steps to comply with its consultation obligations); specifically (see paragraph 10), it was observed that it was unnecessary for the employer to lead evidence as to the likelihood of the success of the application in order to satisfy the burden of proof:

> **"10. … Decisions by governments to finance ailing concerns are made for a variety of reasons, political and otherwise. It is not for a Tribunal to assess the prospects of a loan being granted."**

32. As for the amount of any protective award, section 189(4) **TULRCA** provides for a protective period of up to 90 days, starting from the date of the first of the dismissals to which the complaint relates. As section 189(4)(b) makes clear, a protective award should be "*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*". The sanction under section 189 is intended to be penal and the approach of the ET will be to start with 90 days; see the principles laid down by the Court of Appeal in **Susie Radin Ltd v GMB** [2004] IRLR 400, per Peter Gibson LJ, at paragraph 45:

> **"(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.**
>
> **(2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.**
>
> **(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.**
>
> **(4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188.**
>
> **(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate."**

And see, further, **Haine and Another v Day** [2008] IRLR 642 CA.

The Appeal

33. KKC's appeal has been pursued on the following grounds:

(1) That the ET majority erred in holding that KKC's obligation to consult pursuant to section 188(1A) **TULRCA** was triggered by no later than 12 June 2015.

(2) That the ET majority further erred in holding there were no special circumstances preventing compliance with section 188(1A), pursuant to section 188(7) **TULRCA**.

(3) Additionally, the ET majority erred in holding there were no mitigating circumstances preventing the full 90 days protective award pursuant to section 189(4) **TULRCA**.

34. The Claimants resist the appeal, largely seeking to rely on the reasoning of the ET majority. The SoS adopts a neutral position on the appeal, consistent with his stance throughout these proceedings.

Submissions

KKC's Case

35. Starting with the first ground, and accepting that KKC's business plan/grant application of 12 June included proposals for some redundancies, the question was whether there was any obligation to consult pursuant to section 188(1A) **TULRCA**. It was KKC's case at its highest that the ET majority had confused the redundancies that were *intended* to be made in September 2015 with the redundancies that were *in fact* made in August 2015, following the closure of KKC: "the dismissals" for the purposes of section 188(1) and 188(2) applied to the dismissals of the Claimants in August 2015, thus the issue was the applicability of section 188 to the latter, not to the former intended redundancies.

36. More particularly, the ET majority had erred in rejecting KKC's submission that consultation could not be commenced as the names of the employees affected were not known (see paragraph 75): given that the employees concerned could not be identified, the requirements of section 188(4) could not be satisfied (allowing that it was not actually a requirement to provide the employees' names).

37. Further, KKC contended that the consultation process could not start until it had government funding in place (triggering sponsors to pay matched funding thereafter); it was only then that KKC could embark upon implementation of the restructuring, including the consultation process. This was not akin to obtaining Board approval for a proposal (see **MSF v Refuge**): the restructuring plan was subject to a condition precedent, namely government approval of the one-off funding, without which the plan could not have been implemented. The ET majority had thus erred in holding that the obligation to consult pursuant to section 188(1A) crystallised the moment any redundancies became inevitable, notwithstanding that at that point

it was not known how many redundancies were needed or which roles were at risk, including whether it was inevitable that there would be at least 20 redundancies at any given location. The content of the business plan/grant application showed a degree of vagueness, evidencing that there was nothing KKC could do (in terms of consultation) until it got a response from the government (which might have said that KKC needed to make greater/fewer cuts). If the ET majority was saying the obligation to consult arose when the trustees approved the plan, that had to be wrong because the trustees could not put the plan into effect or do anything until they heard from the government. The ET majority was effectively saying that if there was a proposal for *some* redundancies, KKC was obliged to start the statutory consultation with *everyone*, although there was no proposal for everyone to be made redundant - at most, only a contemplation (if anything, there was a proposal that they should not be made redundant) - yet the Claimants' case had not been put on the basis that different groups could or should be separated. That raised the question, who should KKC have consulted with in respect of the dismissals? Again, KKC made the point that under section 189, claims could only be brought by those who were dismissed.

38. Even to the extent there was an obligation to consult those listed in the grant application/business plan as at 12 June (and accepting in oral argument that there had been "a proposal" in this respect), that did not mean the obligation inevitably arose on 12 June; it was still an obligation to consult *in good time* and that did not mean the obligation was immediate (KKC had, for example, been entitled to wait for the government's response). It was thus an error for the ET majority to find that everything had to happen on 12 June (as it apparently had at paragraph 75, see the use of the word "promptly"): although it did not matter if consultation would not have made any difference, in this case it could not have been *meaningful* until KKC had received the government's response (until then, it was not even possible to identify the

A extent of the redundancies or from where the redundancies were going to come). It was this error in approach that had similarly informed the majority's approach to the special circumstances defence and to the question of mitigation.

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39. Turning then to the second ground, and the contention that the ET majority had erred in holding there were no special circumstances preventing compliance with section 188(1A), pursuant to section 188(7), it was KKC's case that the ET majority had failed to properly consider the suggested circumstance in paragraph 16 of **Bakers' Union v Clarks**: "*where sudden disaster strikes a company, making it necessary to close the concern.*". Here, the police investigation - made public without warning - was such a disaster as it (i) triggered the government's demand for repayment, and (ii) made attracting further funding impossible. The ET majority had ignored the announcement of the police investigation. Although it might have been difficult for KKC to get the matching funding, there was no reason to think it was impossible and it was wrong for the majority to doubt this and thus see no relevance in the announcement of the police investigation.

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40. More generally, the majority had failed properly to consider or apply **Hamish Armour** and the dictum that a government grant could constitute a special circumstance. Acknowledging that the majority was not strictly saying that waiting for a government grant could *not* be a special circumstance, or that it was irrelevant, the requirement that consultation should have started "promptly" - at the latest, in July - show the majority was in fact rejecting the possibility of this being a special circumstance.

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41. As for the third ground, the ET majority had additionally erred in holding (see paragraph 78) that there were no mitigating circumstances meaning it was not equitable to make

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A the full 90 days' protective award pursuant to section 189(4). The award made ignored the fact that a structured programme was ready to be put into place once the government had approved the one-off grant payment and failed to consider that the trustees and directors had not acted deliberately in not consulting earlier but had instead sought to pursue a funding option aimed at saving KKC as an entity. This was not being put as a perversity appeal but as a failure to consider relevant factors (the ET majority here saying there were no mitigating circumstances) - the ET majority's reasoning was expressed very shortly and indicated no consideration of the police investigation (which was obviously relevant and needed to be considered; see the Employment Judge's reasoning at paragraph 86) or of the steps KKC had intended to take, which would be relevant for **Susie Radin** purposes.

The Claimants' Cases

42. In presenting her clients' arguments, Ms Ferber urged that KKC was really seeking to re-argue the case below. On the first ground, the wording of section 188(1) - the requirement to consult - was broad, it did not require there to be a decided course of action but fell somewhere on the spectrum between vague hopes and plans and something which was pretty firm (and see **UK Coal Mining v NUM**). More than that, the requirement under section 188(1A) - that consultation begin "in good time" - had to be a decision on the facts for the ET. And the obligation did not require the ET to find bad faith on the part of the employer; it needed to assess the position as a matter of fact. Here, Mr Yentob had said (in May 2015) that the financial problems were sufficiently serious that KKC might be insolvent by the end of the week; accepting this was insufficient to trigger the consultation obligation, by the time the position was considered as at 12 June, it was sufficiently precise to entitle the ET majority to find there was a "proposal", and the case law did not support an argument that there could only be a "proposal" once grant money had been agreed.

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43. In truth, KKC (and the Employment Judge) had made an erroneous distinction between the intended redundancies in September 2015 and those that took place in August 2015. The consultation requirement in section 188(1) was expressed to apply where an employer was proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. September 2015 was the latest date by which redundancies were proposed to take place but it was entirely within KKC's plans that redundancies might have to take effect earlier than that. There was, further, no requirement under section 188(4) that the information to be provided had to include the employees' names, only the number and descriptions of employees proposed to be dismissed as redundant, and it was apparent that parts of the grant application of 12 June 2015 had indeed identified the numbers and descriptions of the employees who were proposed to be dismissed.

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44. As for the second ground and the special circumstances defence, KKC's reliance on **Bakers' Union v Clarks** wrongly characterised this as suggesting that special circumstances might arise in one type of case or another; the Court of Appeal was just giving examples of two extremes of cases, the reality was that there will be a whole spectrum of possible cases. In the present case, it might have been open to an ET to find that the police investigation amounted to a special circumstance but it was also permissible that it would find (as the majority did) that this case fitted into neither possibility identified in **Bakers' Union** and that the matter relied on did not in fact amount to a special circumstance on the facts of this case. In particular, the facts here were complicated by the ET majority's permissible finding that the obligation to consult had already arisen around two months before the announcement of the police investigation.

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45. A similar point could be made in respect of KKC's reliance on **Hamish Armour**. That case was not authority for the proposition that an ET was bound to find a special circumstance arising from the employer's application for a grant.

46. It was, further, all the more difficult for KKC to suggest the ET had to make finding of special circumstance in this case, given it had adduced no witness evidence; there was, thus, no evidence to support a suggestion that starting consultation earlier would (for example) have caused panic amongst employees.

47. Finally, on mitigation, the reasoning at paragraph 78 of the ET's decision was short but it had already fully set out the submissions of KKC and of the SoS on **Susie Radin** and there was no appeal from the ET's direction on the law on this issue. It was also apparent that the Employment Judge had in mind the guidance from **Susie Radin** (see paragraph 86) and it could be taken that would also have reflected the majority's understanding as all three Members were party to the discussion on approach. In any event, given the starting point was the maximum award (see **Susie Radin**), absent any evidence (and KKC had none), it was unsurprising the ET majority had found KKC had failed to discharge the burden in this respect.

48. For Ms Akinola, Ms Joffe also stressed the point that KKC had adduced no oral evidence. From the documentary evidence, it was apparent that KKC was already in contact with insolvency advisers as at 19 May 2015 and the ET had also been entitled to take into account the language of the grant application/business plan on 12 June, which seemed to tie in with the statutory language and supported the ET majority finding that the duty to consult was triggered at least by the time of this document.

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49. More generally, on the approach to section 188(1A), it was important to acknowledge that all employees were likely to be affected by the 12 June proposal, so the ET majority was entitled to find the obligation to consult arose for all (for completeness, it had not said that a proposal to make some employees redundant gave rise to an obligation to consult all). It was further apparent that the ET had carefully considered the guidance in **MSF v Refuge** and there was sufficient in the 12 June grant application/business plan to enable the majority to conclude that this amounted to a proposal such as to trigger the obligation to consult for all employees, not least as this required only that KKC had a clear - even if still "provisional" - intention (see **UK Coal Mining v NUM**), thus allowing there might still be a conditional element (see **E Ivor Hughes v Morris**). Here the proposal (as the ET found) was either for specific large-scale redundancies or for insolvency, which would then place everyone at risk. The ET majority was thus entitled to find the latter was a proposal, albeit provisional or conditional and thus redundancies of either 58% or 100% of the staff were proposed; if the latter, that plainly included all the dismissals that in fact occurred. And, as for KKC's suggestion (made in oral submissions on appeal) that the government might have responded, saying there should be greater or fewer redundancies: (i) that was not what the business plan/grant proposal said; (ii) the ET was entitled not to find that; and (iii) that had not really been KKC's case below. The ET majority had been entitled to see this case as analogous to **MSF**. Moreover, in terms of the consultation requirements, it was hard to see what could not have been done as from 12 June: the fact that more (all) employees might be made redundant if KKC was unsuccessful did not mean it was bound to wait until starting consultation.

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50. As for the special circumstances defence, it was clear that the burden of proof was on KKC (see **UK Coal Mining** at paragraphs 63 to 65). KKC was seeking to argue that waiting for a government grant: (i) provided a reason for not starting consultation; (ii) amounted to a

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special circumstance; and/or (iii) provided mitigation, but **Hamish Armour** (which was not authority for the proposition that waiting for a grant will always amount to a special circumstance) did not assist on any basis: it was not unusual for an employer to be seeking funds from other sources, indeed that could be seen as an ordinary part of a developing insolvency situation (and see **E Ivor Hughes v Morris**). Moreover, once the ET majority had found that a duty to consult had already arisen, then the police investigation was irrelevant: it could have had no causal impact upon the failure to consult which had already occurred.

51. Lastly, on the question of mitigation, in so far as the ET was required to set out its reasoning, it had done so (having referred to the guidance in **Susie Radin**, which made clear it was relevant to look at default (not intention), and see the similar point taken in **E Ivor Hughes** at paragraphs 31 and 37).

52. The other Claimants did not add anything further to the submissions made by Ms Ferber and Ms Joffe and, as already recorded, the SoS maintained a strictly neutral position.

Discussion and Conclusions

53. In approaching the Judgment under challenge in this appeal, I remind myself that where Parliament has left a matter for the assessment of the ET, the Employment Appeal Tribunal should not interfere with the decision reached unless it reveals an error in approach, is properly to be described as perverse or made absent evidential basis, or was founded upon consideration of irrelevant factors or failed to take account of that which was relevant. That is so even where, as here, the decision in question is that of a majority of the ET Members, including where it is that of the Lay Members alone; that the Employment Judge did not arrive at the same result

may simply reflect the fact that different conclusions might be permissible, not that the assessment was necessarily wrong.

54. The first issue raised by the appeal is whether the ET majority erred in holding that KKC's obligation to consult pursuant to section 188(1A) **TULRCA** was triggered by no later than 12 June 2015. This gives rise to a number of subsidiary questions. Allowing that the ET unanimously found that, by 12 June 2015, there was a relevant proposal impacting on those employees falling within the specified groups in the grant application of that date, (i) did the majority reach a permissible conclusion that the proposal may have affected "any or all" KKC's employees (not simply those within the specified groups)? (ii) In any event, did the ET majority err in finding that consultation needed to start "promptly" after 12 June 2015 so as to comply with the obligation that it "begin in good time"? (iii) Was it, nevertheless, an answer to the claims that they concerned earlier and different redundancy dismissals to those proposed as at 12 June 2015?

55. The first two questions can usefully be considered together. For KKC it is urged that the ET majority erred in assuming that consultation had to commence immediately ("promptly") rather than "in good time" and in failing to allow that this might mean it was appropriate to wait until a response to the grant application had been received. More specifically, it was only when KKC had received a response to that application that it would be in a position to consult meaningfully: other than those falling within the groups specified in the grant application, it was hard to see how KKC could comply with the requirements of section 188(4) until after it had received the government's response. For the Claimants, however, it is said that this is an attempt to re-argue the case below: the ET majority had permissibly assessed the proposal as at 12 June as likely to affect *all* KKC's employees and as sufficiently advanced

in that regard to trigger the obligation to consult, even if there might still be a conditional element to the proposal.

56. In large part, I agree with the Claimants. Inevitably the assessment required under section 188 will require the ET to form a view as to where the case falls on the spectrum between contemplation and proposal. Here, the ET had unanimously found that the grant application of 12 June 2015 contained a proposal for redundancy dismissals; the majority took the view that this was such as might affect any or all of KKC's employees. KKC now accepts that there was a relevant proposal affecting certain categories of employees but argues that the ET majority wrongly conflated any obligation arising in this regard with a requirement to consult with all employees. If that were right, I could see KKC's point that this would reveal an error of approach. I am satisfied, however, that it was not an error made by the ET majority. Rather, the majority permissibly had regard to the history and concluded that, by 12 June 2015, there was a proposal that might affect all KKC's employees, not simply those specifically identified.

57. I am, further, satisfied that this was a conclusion that was open to the ET majority given that, on the ET's unanimous findings (see paragraph 71), the proposal allowed for only two outcomes: an immediate insolvency, in which everyone was put at risk, or for large-scale redundancies where over half the staff were dismissed. As the ET had found, for the preceding nine months, KKC's future had been precarious; the 12 June grant application was a last ditch attempt to save some part of the charity's work, absent which KKC would cease to operate. As at 12 June 2015, KKC was thus proposing closure (and redundancy for all) as the outcome should it not receive the funds it sought in the grant application. This may not have been precisely the same as putting a proposal to the Board as in **MSF v Refuge Assurance** (indeed,

A it rather seems that the KKC's Board had already signed off on the proposal within the 12 June application), but it remained open to the ET majority to conclude that plans were sufficiently advanced - there was a clear, albeit provisional, intention (see **UK Coal v NUM**) - to mean that KKC's consultation obligations were engaged and, given the potential impact upon *all* staff, that this was not limited to particular categories of employee.

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58. It was, further, no answer for KKC to say that it did not have sufficient information to comply with its section 188(4) obligations or to engage in "meaningful" consultation until it had received the government's response to its grant application. As Ms Romney QC accepted in oral argument, there was no obligation to provide the actual names of employees that were proposed to be made redundant, but KKC had, in any event, already made redundancy calculations for all members of staff. Moreover, as acknowledged in **MSF v Refuge**, the on-going consultation envisaged under section 188 allows for the possibility that information will become available during the process. As for the suggestion that the government's response might have allowed for fewer redundancy dismissals than the minimum envisaged, that was not something suggested in the 12 June grant application/business plan (or, it seems, by KKC before ET) and the ET majority had been entitled to find that did not impact upon its assessment.

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59. I turn next to the question of the ET majority's approach as to *when* the obligation to consult arose. In this regard, the statutory obligation is to consult "in good time" (section 188(1A)), so as to allow for the consultation to be "meaningful" (**Price**), and it will, again, inevitably be a matter of assessment for the ET to determine when the duty crystallises in any particular case. In carrying out that assessment in the present case, the ET majority considered that the obligation had arisen by 12 June 2015; in so concluding, it (permissibly) had regard to

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A the events of the preceding months and held that - to be "meaningful" - consultation had to start without further delay ("promptly").

B 60. For KKC, it is argued that the introduction of the requirement that the consultation be undertaken "promptly" demonstrates an error of approach on the part of the ET majority. If that term was intended to import a requirement of immediacy, then I would agree: the requirement to consult "in good time" does not oblige an employer to start the process C immediately when it has formulated the relevant proposal; rather, the obligation requires the employer to look ahead and realistically assess the time-scale required to ensure meaningful consultations can be held (having particular regard to the minimum time periods set out under D section 188(1A)), see **MSF v Refuge**. That, in my judgment, is, however, what the ET majority had in mind in its assessment: its concern was not that KKC was required to start the consultation process immediately, but that the delay that had occurred before KKC had formulated its proposal in the 12 June documentation meant that "*for consultation to meet the* E *requirement to be 'meaningful' this was already too late*" (ET paragraph 75). Given that the precariousness of KKC's position had been known for some months and imminent insolvency predicted in Mr Yentob's letter of 19 May, the ET majority - appropriately projecting forward F and considering what had to be achieved in order for consultation to be "meaningful" - was entitled to conclude that, in these circumstances, "in good time" meant "promptly".

G 61. That brings me to the third question under the first head of appeal; specifically, as to whether (echoing the approach of the Employment Judge, in the minority) any proposal for redundancy dismissals as at 12 June 2016 was irrelevant, given KKC's contention that the H dismissals of August 2015 (with which the ET was concerned) were not the same as those proposed for September 2015.

62. There are a number of objections that can be taken to KKC's case in this regard. As a matter of principle, it might be said to encourage a false distinction between that which is proposed and that which takes place, in what will often be a dynamic course of events. More particularly, however, whether it will be an appropriate distinction in any given case must be a question for the ET: inevitably it will involve a highly fact and context specific assessment that the ET is best placed to make.

63. In the present case, as at 12 June 2016, there was, as the ET majority (permissibly) held, a proposal to make collective redundancies that might affect any or all of KKC's employees, thus triggering the obligation to consult under section 188. The proposed restructure and redundancy process was intended to be completed by the third week of September 2016 but that did not mean redundancies might not take place earlier. Indeed, there was nothing in the proposal that guaranteed against earlier redundancies: inevitably, given the precariousness of its position, KKC could not rule out something happening that would mean its plans would need to be implemented earlier than originally proposed. Allowing, as I have said, that the point will always be case-specific, again I consider that the ET majority reached a permissible conclusion that the dismissals to which the claims related still fell within the original proposals and thus that there was no knock-out point of distinction. In the circumstances, the ET majority was entitled to conclude that an obligation to consult had arisen as at 12 June 2015 and thus that KKC's failure to comply with its duty in that regard gave rise to a breach of section 188(1A).

64. That being so, pursuant to the second ground of appeal, the question arises as to whether the ET majority then erred in holding there were no special circumstances rendering it not reasonably practicable for KKC to comply with its section 188(1A) obligations, pursuant to section 188(7).

65. On this point, it is common ground that the burden of proof was on KKC. That presented a particular problem in this case, given that KKC was not in a position to call live evidence; its case had to be made out on the basis of the documentary material before the ET and upon such facts as were not in dispute. That said, there was, in reality, little dispute on the facts relevant for KKC's case on this issue. It was apparent that, on 12 June 2015, it had made an application for one-off grant funding from the government and was then left waiting for a response until 29 July 2015. During the intervening weeks, there were various confusing communications to employees but KKC's financial position remained precarious and a failure to secure government funds would effectively mean immediate closure. Equally, it was not in dispute that, on 29 July 2015, the government did respond positively to the grant application, releasing the funds required so as to mean KKC could proceed with the restructuring option outlined in the business plan that had accompanied its application. The restructuring option was, further, intended to include steps that would ensure compliance with section 188 consultation requirements. As was also not in dispute, on 30 July 2015, there were, however, unexpected public reports of a police investigation into child safeguarding issues at KKC, which immediately led to the withdrawal of government funding and rendered impossible the plan to obtain matching funds from private donors.

66. On the basis of this essentially agreed factual matrix, KKC argues that the ET majority erred in failing to find that there were special circumstances that rendered it not reasonably practicable to comply with the requirements of section 188(1A). The first circumstance in time relied on by KKC was the fact of the outstanding grant application: KKC argues the ET ought properly to have found that this was, of itself, a special circumstance, as was allowed by the EAT in **Hamish Armour**.

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67. Although KKC's appeal in this regard is characterised as being against the ruling of the ET majority, it is only right to note that this was also not a matter found to amount to a special circumstance for section 188(7) purposes by the Employment Judge. That said, KKC correctly points to the fact that this was a possibility allowed by the EAT in **Hamish Armour**, albeit in that case it was held the employer had failed to show it had taken all reasonably practicable steps to comply with the consultation requirements given that "*a substantial measure of consultation could have occurred before the redundancies were declared*" (**Hamish Armour** at paragraph 11).

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68. Again, it seems to me this was a fact and case specific matter for the assessment of the ET. There is some difficulty in analysing the argument in this instance given that it appears that KKC's case in this regard was understood by the ET to be directed at the question *when* consultation should have begun (for section 188(1A) purposes), rather than as a *special circumstances* defence (under section 188(7)). Whilst the Employment Judge essentially accepted that case, the ET majority did not, holding that sufficient was already known to KKC for it to make a start on the consultation process - that being required if consultation was to be "meaningful". Although the reasoning was thus described in terms of the requirement under section 188(1A) - which seems to have arisen from the way in which KKC's case had been focussed - the ET majority can be seen as having reached the same conclusion as had the EAT in **Hamish Armour**: KKC had been unable to show that, faced with the circumstances existing as at 12 June 2015, it had taken all such steps towards compliance with its consultation obligations as were reasonable practicable.

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69. The second special circumstance relied on by KKC was that of 30 July 2015. On its face, this might seem to have amounted to an example of a "sudden disaster" as envisaged in

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Bakers' Union v Clarks and, thus, a *special circumstance*. The ET majority, however, considered that this was irrelevant because the obligation to consult had already crystallised as at 12 June 2015. It allowed that the events at the end of July "*may have prevented further consultation taking place*" (see ET paragraph 77) but that did not impact on the preceding breach.

70. If the ET majority was seeking to suggest that the events of 30 July 2015 did not constitute a special circumstance for the purposes of section 188(7), I would disagree. It was plainly an unexpected and sudden disaster for KKC, which entirely derailed its plans and meant that the operation had to close down pretty much immediately. I think, however, that would be an unfair reading of the majority's actual conclusion in this respect, which was rather more limited: stating simply that there was no special circumstance prior to 30 July. As a matter of chronology, in terms of this event, that was plainly correct. Moreover, the ET majority expressly allowed that, when the story broke on 30 July, the position changed; the implication seeming to be (albeit that the reasoning does not spell this out in terms) that it was open to KKC to employ the special circumstances defence in respect of any continuing obligation from that date.

71. To the extent that KKC was relying on the events of 30 July 2015 as a special circumstance, rendering further compliance with section 188(1A) not reasonably practicable, I would therefore agree but am not convinced that the ET majority actually found otherwise.

72. That takes me to the third ground of appeal, and the question whether the ET majority erred in holding there were no mitigating circumstances preventing the full 90 days' protective award pursuant to section 189(4) **TULRCA**.

73. In this regard, the ET majority had (in my judgment, permissibly) found that there had been a breach of KKC's obligations under section 188. When considering the question of any protective award under section 189, therefore, the starting point was the maximum period of 90 days, allowing that the ET might consider it just and equitable to reduce that period where there were mitigating circumstances and having due regard to the seriousness of the employer's default. In this case, the ET majority determined that the full award should be made. Its reasoning on this point is short; effectively it held that KKC had failed to show any satisfactory reason as to why there should be any lesser award.

74. In my judgment that finding cannot stand. First, because it is simply inconsistent with the ET majority's prior acknowledgement of the fact that events of 30 July 2015 might have prevented further consultation taking place. Second, because it fails to have regard to the obviously relevant circumstance that events of 30 July 2015 simply meant that everything came to an end: within a matter of days, KKC had closed and all the employees were dismissed. Allowing that it would still be for the ET to assess what was just and equitable in these circumstances - having due regard to KKC's default - it is hard to see any sensible basis for concluding that there was any continuing obligation to consult after 30 July: if it was not a complete defence in the form of a special circumstance arising at that point, it was a matter that was plainly relevant to the ET's assessment of the appropriate award, to which the ET majority apparently failed to have regard.

75. I therefore allow the appeal on this third ground. Given that the assessment under section 189 **TULRCA** is a matter for the ET, I consider this is a matter that will need to be remitted unless the parties are able to reach agreement on the point. Should agreement not be possible, the parties should lodge written representations with the EAT on the question of

disposal of the appeal and any other consequential matters within 14 days of the handing down of this Judgment.