Appeal No. UKEAT/0058/15/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 10 June 2015
Judgment handed down on 19th June 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

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(1) DR JASON MOYER LEE — APPELLANTS

(2) MR HENRY CHANGO LOPEZ & OTHERS

COFELY WORKPLACE LTD — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS SCHONA JOLLY (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St Johns Land London EC1M 4LB
For the Respondent	MR ANDREW EDGE (of Counsel) Instructed by: TLT LLP 20 Gresham Street London EC2V 7JE

SUMMARY

CENTRAL ARBITRATION COMMITTEE (CAC)

The Information and Consultation of Employees Regulations 2004 implement Council Directive 2002/14/EC which established a general framework for informing and consulting employees in the European Community in domestic law. The Directive requires Member States to provide that requests made by a sufficient proportion of employees that their employer should negotiate an agreement with them about consulting them and providing information must be honoured. It provided Member states with a choice, which provided for different numbers of employees to make a valid request, dependent upon whether they were employed in an "establishment" or an "undertaking". The UK opted for the latter. The appellant employees (who were assigned to work a contract for services at sites in the University of London which had been agreed by their employer, Cofely) challenged a decision by the Central Arbitration Committee that "undertaking" in this context meant a legal entity, and as such the employer of the employees concerned, and argued that they were a sufficient grouping to come within the definition in the Directive and hence the Regulations, and that the CAC panel had erred in its approach in requiring an undertaking to be such.

It was **held** that both upon a proper construction of the Regulations the CAC was correct to decide as it did, but that in any event the Panel found the facts to be such that even on the appellants' own case as to the meaning of "undertaking" the employees concerned in the present matter could not have succeeded.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Employees are entitled by the Information and Consultation of Employees Regulations 2004 ("the Regulations") to request that their employer negotiate an agreement in respect of information and consultation of employees. The employer is entitled to object to the request if it is not valid. To be valid it must be made by at least 10% of the employees in the undertaking (Regulation 7(2)(a) of the Regulations).

2. The employer here, Cofely Workplace ("Cofely") has 210 employees working to fulfil a contract made with the University of London to provide various facilities management services. 28 of those employees combined to make a request under the Regulations. They amounted to 13% of the number of those employed to service the University of London contract, but a tiny percentage of the total workforce of Cofely, which consisted of some 9,200 employees working on some 600 different sites. Since Cofely took the view that the "undertaking" referred to by the Regulations was the legal entity employing the workers making the request – here, Cofely itself – it argued that the request did not and could not comply with Regulation 7(2)(a): those who made it constituted just 0.3% of the workforce. It therefore submitted an application to the Central Arbitration Committee ("CAC") under Regulation 13 of the Regulations for a declaration as to whether the employee request was valid. A panel of the CAC (consisting of Mr Chris Chapman as Chairman, and Mr Arthur Lodge and Ms Judy McKnight CBE as members) ruled on 21st July 2014 that it was not. The question on this appeal is whether in doing so it erred in law.

3. The central question is one of interpretation: what is meant by "undertaking" within the meaning of the Regulations.

The Decision of the CAC

4. The CAC looked first to determine the meaning of the Regulations. Recognising that the Regulations themselves were made in order to implement Council Directive 2002/14/EC which established a general framework for informing and consulting employees in the European Community in domestic law (the "ICE Directive") it then looked to see if its interpretation was in conformity with the underlying directive.

5. It found little help from Regulation 2 of the Regulations, which defined various terms used within them. In that regulation, it is defined thus:

> **" 'undertaking' means a public or private undertaking carrying out an economic activity whether or not operating for gain; …"**

This was a circular definition: it defined "undertaking" as "undertaking". Appreciating that the Regulations implemented into UK Law Provisions of the EU Directive, the CAC looked next to see whether there was help within the Directive as to the meaning to be given to "undertaking". In Article 2 "undertaking" was defined, together with two other relevant words, as:

> **"(a)…a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located in the territory of the Member States; (b) "establishment" means a unit of business defined in accordance with National Law and Practice, and located within the territory of a Member State where an economic activity is carried out on an on-going basis with human and material resources; (c) "employer" means the natural or legal person party to employment contracts or employment relationships with employees, in accordance with national law and practice. "**

6. Article 3 provided Member States with a choice when applying the terms of the Directive whether this should be done by reference to an "undertaking" or an "establishment":

> **"This Directive shall apply, according to the choice made by the Member States, to: (a) undertakings employing at least 50 employees in any one Member State or (b) establishments employing at least 20 employees in any one Member State."**

The CAC inferred from this choice that the terms "undertaking" and "establishment" were mutually exclusive: a choice had to be made between them. Parliament had chosen the former. The Regulations applied only to "undertakings", and not to "establishments", as Regulation 3 made clear:-

> **" 3. These Regulations apply to undertakings –**
> **(a) employing in the UK in accordance with the calculation and regulation for, at least the number of employees in column one of the table in Schedule 1 to these Regulations on or after the corresponding date in column 2 of that table; and**
> **(b) subject to paragraph (2), whose registered office, head office or principal place of business is situated in Great Britain**
>
> **(2) Where the registered office is situated in Great Britain and the head office or principal place of business is situated in Northern Ireland or vice versa, these Regulations shall only apply where the majority of employees are employed to work in Great Britain**
>
> **(3) In these Regulations an undertaking to which these Regulations apply is referred to, in relation to its employees, as "the employer"."**

The explanatory memorandum to the Regulations, and Guidance on the Regulations prepared by the Department of Trade and Industry, expressed the belief that "undertaking" meant a separately incorporated legal entity, as distinct from, say an organisational entity such as an establishment, division or business unit of a company. It thought that an "undertaking" might include a group of establishments.

7. Further support for Cofely's case as to the meaning of the word "undertaking" was gained from two cases decided earlier by the CAC. In **Pye** (a decision of 20th November 2007) the CAC had rejected submissions on behalf of employees that a single care home was an autonomous unit within the employing company, so as to be an undertaking, whilst the employer argued (in the event successfully) that it was simply one of its establishments. The CAC thought that there was no evidence that the home was a self-sufficient unit. In particular, accounts presented to the panel were persuasive: the employer was a company employing some 2,700 staff across several locations and there was no evidence that it comprised a "number of

separate undertakings". In **Coombs and Holder v G E Aviations Systems Ltd** (4th December 2012), the CAC rejected the contentions of the employees that different corporate entities which were part of a global company (the General Electric Company) were each separate legal entities: each was a separate "undertaking" within the Regulations.

8. These two cases might be said to show that the fault line between that which was an undertaking and that which was not would be drawn at the point where there was one legal entity responsible for employing the relevant employees.

9. The CAC summarised its view in the present case at paragraphs 89 and 93 as follows:-

> **"89. The Directive defines "undertaking" and "establishment" as do the "Regulations" and it is clear that the UK Regulations are not applicable to establishments, only to undertakings. It is also clear to the Panel that the terms "undertaking" and "establishment" are mutually exclusive and are not interchangeable. The only other view to assist the Panel on this matter is that given by the DTI in its Guidance and explanatory memorandum and we have set out our views on these documents above. In the circumstances of this case we did find the Guidance and the explanatory memorandum of assistance in resolving the issue before us. On the basis that this would lead us to conclude that the employer's interpretation of the meaning of "undertaking" is the correct one the final question is whether this leads to an interpretation that is inconsistent with the aim and intention of the directive as argued by Doctor Moyer-Lee."**

It considered it did not and then:

> **"93. Having considered the submissions both in writing and those made orally at the hearing on 15 July 2014 we cannot identify any grounds upon which we can conclude the UOL contract is an undertaking. It is not a distinct business unit within Cofely Workplace, it is not a legal entity in its own right as demonstrated by the accounts the employer put into evidence nor are we persuaded by Doctor Moyer-Lee's argument that it is a stand alone autonomous unit. In our view it is simply a sub-division of Cofely Workplace Limited and as such the employee request made on 28 March 2014 was not a valid request."**

The Appeal

10. The Notice of Appeal argues that the CAC panel erred in law in finding that the terms "establishment" and "undertaking" had to be mutually exclusive although it was not possible

entirely to exclude the possibility of some overlap in the definitions, and that it had erred in law in finding that an "undertaking" had to be a legally registered company. That had not been stated in either the Regulations or the Directive, was not established in case law and "contradicts Article 1(2) of the Directive".

The Argument

11. Though the Grounds of Appeal are appropriately concise, the argument for the Appellant was wide ranging. Ms Jolly submitted in skilful, highly able and detailed argument that the definition of "undertaking" within the ICE Directive was vague, circular and general. So too was the definition in the Regulations. The interpretation adopted by the CAC confounded the very purpose of the Directive. An undertaking could be "a separate grouping of employees which is operationally autonomous and identifiable within the boundaries of a single employer", and did not have to be the employer as such. The workers employed on the University of London contract worked in several sets of "establishments", so that the simple dichotomy between "undertaking" on the one hand and "establishment" on the other did not work in the present case. Ms Jolly argued that a purposive, broad, flexible interpretation of "undertaking" was indicated by the Directive and that the purposes of the Directive might be prejudiced if the approach taken by the CAC were correct. To interpret it as the CAC did would be to contemplate that for a large employer, with many sites, such as Cofely, some sites and employments might be so remote from others that consultation of and information to the employees at those sites could lack meaning. The Court of Justice of the European Union had never been asked to provide a meaning of "undertaking" within the context of the ICE Directive: but the Directive envisaged, in the words of Recital 23, achieving its objective:

> **"…through the establishment of a general framework comprising the principles, definitions and arrangements for information and consultation, which it will be for the Member States to comply with and adapt to their own national situation, ensuring, where appropriate, that management and labour have a leading role by allowing them to define freely, by agreement, the**

arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes."

This was repeated in Article (1). It was only the practical arrangements for information and consultation which therefore were left to Member States. The effect of her submissions was that the concept of an "undertaking" was part of the general framework. In this respect, it was similar to the approach which the Court of Justice had taken, first in the **Rockfon** case (**Rockfon A/S v Specialarbejderforbundet I Danmark** [1996] ICR 673), and most recently in **Usdaw v WW Realisation 1 Ltd in liquidation** (Case C-80/14), a decision of 30th April 2015, echoed in **Little v Bluebird UK Bidco 2 Ltd** (C-182/13), a decision of 13th May 2015, in both of which the Court had accepted that in respect of Directive 98/59/EC on the Approximation of the Laws of Member States relating to Collective Redundancies ("the Collective Redundancies Directive"), when applying what amounted to an "establishment" by reference to which rights to consultation in advance of impending redundancy were to be determined, the Member States should adopt an interpretation of that word which was autonomous to the jurisprudence of the EU (see e.g. paragraph 45 of **Usdaw**). "Undertaking" and "establishment" could overlap, or coincide: they could not be said to be mutually exclusive The dichotomy between "undertaking" and "establishment" was not exact: where there was a number of sites on which employees had operated, as there was in the present case – 4 academic sites, 5 halls of residence and 17 academic flats – the work of those employees assigned to the University of London contract and its organisation would not fit the autonomous definition of "establishment" identified in **Rockfon** and **Usdaw**. If not an "establishment", why was it not an "undertaking"? The definition must be sufficiently flexible to ensure a meaningful application to satisfy the purpose of the ICE Directive. The fact that Member States have an option as to which scheme to implement ("undertaking" on the one hand; "establishment" on the other) should not mean that different domestic regimes should have dramatically different results when it came to the protection of workers. The extent of flexibility which should be accorded in European law was

indicated by the approach taken to the concept of "undertakings" in the jurisdiction which had developed in respect of the Acquired Rights Directive (initially 77/187/EEC, followed by 2001/23/EC in relation to the safeguarding of employees' rights in the event of transfers of undertakings. So flexible was the concept of what was capable of being the subject of a relevant transfer that individuals might on their own constitute economic entities for the purposes of the application of the Directive (**Schmidt v Spar** [1995] 2 CMLR331; **Hernandez Vidal SA v Perez** (case C-127/96, a decision of 10th December 1998)). Flexibility was indicated by comparing this approach on the one hand with limitations indicated by cases such as **Rygard** [1996] ICR333, and those cases which had involved such a transfer of asset-heavy undertakings, with relatively few employees, where the Court had declined to find that there had been a transfer). These cases indicated a determination to ensure that aims of the Directive were met by adopting a multi-factorial factual analysis. The list of factors set out in **Spijkers v Gebroeders Benedik Abattoir CV and Another** (C-24/85; [1986] ECR 1119) and in **Ayse Suzen v Zehnacker** [1997] 1CMLR 768 did not include the legal status of the employer: it was substance not form which dictated the decision. What led it was an avowedly purposive approach. The decision in **Allen and others v Amalgamated Construction Co Ltd** [2000] ICR 436 further demonstrated the flexible and purposive approach taken in respect of this Directive.

12. There was a lack of clarity as to the meaning of "undertaking" in Member States which made it appropriate that there should be a reference to the Court of Justice in the current case. A report published by Professor Edoardo Ales of the University of Cassino as to Directive 2002/14 noted that in only a few cases – those of Belgium, France, Latvia and the Netherlands – had "undertaking" been defined further than it had in the Directive. There the concept was primarily conceived as a social, economic and organisational unit operating in an independent way, in which work was performed. Other Member States defined the scope of application by

reference to the employer. Ms Jolly argued that the Regulations did not have the effect of equating "undertaking" with "employer": it was only in the DTI Guidance that there was a clear statement that an "undertaking" had to be the employer of the relevant employees. To approach it in that way would be to frustrate the fundamental object of the Regulations, and be contrary to a purposive approach. In **Association de Mediation** (C176/12) [2014] 2CMLR 41 the Court held that Member States were not able to exclude a class of persons, which had initially been included, when finally calculating the number of employees in an undertaking. To do so would frustrate the fundamental object of the Directive in conferring rights upon them. In conclusion, she invited me to refer the preliminary issue to the Court of Justice as to the proper meaning of "undertaking".

Discussion

12. I have had the benefit of an equally impressive and able argument from Mr Edge on behalf of Cofely.

13. The first task for the Court is to consider the meaning of the Regulations as appears from the text, taken in context. It is only if the European legislation and case law requires a different conclusion to be reached that I need to consider whether, adopting the interpretative principle expressed in **Marrleasing SA v La Comercial Internacional de Alimentación SA** (Case C-106/89) [1990] ECR I-4135, ECJ and **Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV**, [2005] I.C.R. 1307 ECJ I should read the Regulations in a different sense from that which might seem appropriate adopting normal domestic canons of construction.

14. Ms Jolly's arguments must be rejected, for two broad but separate reasons.

15. The first is that it is clear, in my view, from the Regulations as they stand that they are to be interpreted to the same effect as the CAC held. There are several reasons and other pointers in favour of the definition of "undertaking" the CAC adopted, and very little if anything which counterbalances it. The second is that, in any event, the CAC found facts, which were not challenged upon the appeal, which could not be brought within the definition of "undertaking" which Ms Jolly advanced (set out above).

16. The first question is the appropriate interpretation of the Regulations. Though "undertaking" contains a definition lifted from the Directive, which does not state in terms that the "undertaking is to be the employer of the employees concerned, Regulation 3 talks of undertakings "..employing in the United Kingdom..". I accept entirely Ms Jolly's point that the word "employing" may here be no more than a carrying phrase – it is, for instance, used in that way in the Collective Redundancies Directive in Article 1(A)(i), where the reference is to establishments "employing", when it is plain that the establishment is not the overall employer since in the 19th Recital to the ICE Directive the reference is to "undertakings" or "establishments" "employing… employees". There is room for such an approach here too: but in Regulation 3(3) an "undertaking" to which these Regulations apply is referred to, expressly in relation to "its" employees, as "the employer". This is not a carrying phrase. Ms Jolly's argument is that this is to be seen as a description of convenience. It is not, after all, in the definition regulation immediately above. However, the words refer to an undertaking being referred by such a term "in relation to ***its*** employees". The word "its" is specific: it is not, for instance, simply omitted as it might be if no relationship of employer-employee were to be intended. "Employee" is defined in the Regulations as: "…an individual who has entered into a contract of employment…". Regulation 3(3) thus envisages that the undertaking is an employer.

17. Similarly, in Regulation 5 the reference is to "…the number of people employed by the employer's undertaking in the United Kingdom." The word used is "by", not "in" as might have been expected had Parliament not intended to draw the link between the undertaking and the employer. Mr Edge points out that in Regulation 9 there is a similar indication. This deals with pre-existing agreements covering groups of undertakings. Regulation 2 of it reads:-

> **"Where this regulation applies the employers may hold a combined ballet for endorsement of the employee request in accordance with this regulation and in that event regulation 8 shall apply to the ballot with the modification that references to employees shall be treated as referring to the employees employed in all of the undertakings referred to in paragraph 1A and B"**

(Paragraph 1B refers to a situation in which a pre-existing agreement covers employees in one or more undertakings other than the undertaking which has received a valid employee request to endorse a pre-existing agreement). This envisages a clear link between the undertaking and the employee concerned, such that the former is the employer of the latter.

18. The Regulations throughout seem to be drafted upon the assumption that relevant employees are employees employed by the undertaking itself. If that is so, then the Regulations themselves are indicating a necessary characteristic of the undertaking: that it is capable of entering into a contract of employment. "Employees" are defined as such because they have entered into a contract with their "employer". For them to do so, it must be a legal entity – whether a natural or legal person – capable of entering into a contract (the "contract" referred to can only mean one which is valid and binding in law). It cannot simply be an organisation of workers, albeit dedicated to working on the same contract, which though recognisable as such (as, for instance, in the department or division of an employer) has no separate legal personality, for such a grouping could not enter into a valid contract as one entity.

19. Regulation 7(4) echoes Regulation 3(1)(b) in making reference to "registered office, head office, or principal place of business". That indicates that the concept of "undertaking" is also

of a body which is capable of having a registered office, or head office, and recognises that it could be one which may have a number of different places of business. Both the first two in this list of three suggest a legal entity, as such; and the third implies that each of the different places of business is not to constitute a undertaking separate and standing on its own, but instead that each is a separate part of one multi-headed hydra.

20. Secondly, though I accept that the DTI Guidance is not binding, in any sense upon me, since it represents a third party's view of the meaning of the Regulations, it is nonetheless worthy of respect, and of some persuasive weight.

21. Thirdly, the Directive provided Member States with a choice between "undertaking" or "establishment". I accept Mr Edge's submission that the distinction must be a meaningful one. To adopt the Appellant's argument would have the effect that many groups of employees, to whom the definition of "establishment" could be applied (if adopting the same definition as thought appropriate in **Rockfon** and **Usdaw**) could be regarded as undertakings. This would defeat the object of distinguishing between the two.

22. This ties in with the fourth point that the scheme provided for by the Directive is one in which "undertakings" and "establishments" must be seen to be different. As the Court of Justice said in **Usdaw**, at paragraph 50:

> **"By the use of the words "distinct entity" and "in the context of an undertaking" the Court clarified that the terms "undertaking" and "establishment" are different and that an "establishment" normally forms part of an "undertaking". That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units."**

To this extent I accept Ms Jolly's submission that the CAC here overstated the degree of separation between the two. They are not mutually exclusive concepts. However, the scheme

of the Directive is such that an undertaking may include a number of establishments. Alternatively, the establishment may be the same as the undertaking. It is not that there is any wider overlap. "Undertaking" is wider than "establishment". The genus "undertaking" includes the species "establishment", but not vice versa.

23. Toward the end of submissions, Ms Jolly was concerned that the question might be where the borderline lay between what was to be regarded as an undertaking, and what was to be regarded as an establishment. This question is strictly unnecessary to resolve for present purposes, since all I am required to resolve is whether the employees assigned to the University of London contract formed an undertaking within the meaning of the Regulations. I do not need to go further and hold that they formed an establishment or for that matter establishments.

24. Fifth, Mr Edge argued that it was implicit in the Regulations that an undertaking was the legal entity employing the employees concerned. Regulation 7(2) requires at least 10% of the employees in the undertaking to make a request. Some idea of the concept of the size "undertakings" might have is provided by Regulation 7(3):

> "**Where the figure of 10%... would result in less than 15 or more than 2,500 employees being required in order for a valid request to be made, that paragraph shall have effect as if, for the figure of 10%, there were substituted the figure of 15, or as the case may be, 2,500."**

2,500 being 10% of 25,000, the draftsman is contemplating that an undertaking could have more than that number of employees. It is highly unlikely on any practical view that any one workplace would contain as many. 25,000, or any higher number of, employees would in the real world work in a number of different locations, connected by chains of management to a central organising body. Yet the Regulations envisage them as one undertaking, and not as several.

25. The decisions in **Pye**, and **Coombs** are persuasive to the same result. There is no case which I have been shown which argues for the opposite conclusion. References were made to **Brown v G4S Security**, a case which when it was decided by the CAC came before the same Chairman, Mr Chapman, as here. In that case, a unit of one employer's workforce was taken as the undertaking. However, the point as to whether a business unit, which was part only of an employer, could be an undertaking was never argued because, as I understand it, the employer did not challenge the validity of the request on the basis that the percentage of employees was too small. I did not understand either party to be asserting the case to be of any significant assistance, and it follows from my understanding that they were right not to do so.

26. Next, there seems to be no sense in construing "undertaking" as referring to any grouping smaller than that which is the legal employer of the employees concerned. Although the purpose of the Regulations must be taken to be to implement the Directive, which in turn has the purpose of ensuring information and consultation of employees on matters of deep concern to them at the workplace, I cannot see why this purpose is better achieved by adopting a smaller rather than a larger unit. If a smaller unit is adopted, then that, for the purposes of obtaining information and consultation, constitutes the undertaking. The Directive expresses its objective as being to promote social dialogue between management and labourer (Recital 1), and in Recitals 6-8 says this:

> **"(6) The existence of legal frameworks at national and community level intended to ensure that employees are involved in the affairs of the undertaking employing them and in decisions which affect them has not always prevented serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them.**
>
> **(7) There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs,**

increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future undertaking and increase its competitiveness.

(8) There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.

(9) Timely information and consultation is a pre-requisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work."

27. These words do not suggest matters of merely parochial interest. They are wide and broad in their expression. To adopt an interpretation of "undertaking" that might restrict the information and consultation to that provided by a department or division of a larger undertaking (for example) might leave out of account decisions at a higher level effecting all very considerably, which if they were to be grappled with by employees might need to be addressed at the earliest opportunity. Mr Edge in his submissions argued that the choice afforded by the Directive was between undertakings employing at least 50 employees or establishments employing at least 20: though the former was a more demanding threshold to achieve, the fruit to be picked from the tree was heavier, hence the choice. I simply do not accept that regarding the 210 employees working on the University of London contract as an undertaking better achieves the purpose of the Directive than regarding Cofely as a whole as the relevant undertaking. Though I accept entirely that a purposive approach must be taken, care must be taken in the identification of the purpose.

28. I note, in passing, that the employees' argument before the CAC in **Coombs** was that the employees' interests in information and consultation would better be protected if a number of undertakings were together regarded as the undertaking for the purpose: a practical

demonstration, when compared to the present case, that employees may take different views in different situations as to the significance of that which is identified as the undertaking to which they belong.

29. Accordingly, I have come to the clear view that on the interpretation of the statute, applying domestic canons of construction, it envisages as "the undertaking" a legal entity capable of being the employer of employees serving it under a contract of employment, and that there is no principled basis for suggesting from within those Regulations that the undertaking should be construed as merely a division or department of that single employer.

30. In coming to this conclusion I have only touched lightly on European authority. I have now to ask whether this initial domestic construction is inconsistent with the European Directive and the case law of the European Court of Justice. Given the view I have taken of the purpose of the Directive I cannot see that it is. Moreover, the very existence of the choice within the Directive demonstrates that to take such a choice would not be inconsistent with its aims.

31. I accept Mr Edge's point that the distinction between undertaking and establishment in the Directive would lack meaning if the latter could just as easily constitute an undertaking.

32. There is no case law directly defining "undertaking" for the purposes of the ICE Directive and the European description is circular. It cannot, however, be said that it is necessarily inconsistent with the domestic interpretation intended to implement it. I am not required to adopt any other interpretation in the light of the European case law on the Collective Redundancies Directive, or for that matter that in respect of the Acquired Rights Directive. As to the latter, it is entirely right to note that an economic entity could consist of one person alone

fulfilling a function in a workplace: but since the Directive applies, not only to undertakings but to parts of an undertaking, it gives no assistance as to the meaning to be adopted where a court cannot play regard solely to part of an undertaking. As Advocate General Mengozzi in Case C-385/05 said at paragraphs 78-82, the Collective Redundancies Directive and the ICE Directive were founded on different legal bases. He concluded that the definition contained in the ICE Directive was not intended to extend to the Collective Redundancies Directive: it contains its own internal definitions of establishment and undertaking.

33. Though I accept that the CAC overstated the division between "undertaking" and "establishment" by suggesting they were mutually exclusive concepts when they are not (see paragraph 50 of the judgment of the Court in **Usdaw**) this was not material to its decision in the present case, and affords me no basis for upholding the appeal.

The Second Ground

34. There was no challenge to the findings of fact made by the Tribunal. In paragraph 26, the CAC recorded the submissions made by Cofely in the following terms:

> **"it was to be noted that nowhere in the employees' letters to the CAC or their Response Form was it even argued that the Company ran the University London site as an "autonomous unit" or stand alone business. In truth, there was nothing to distinguish the present case from the facts as found by the CAC in Pye and the same reasoning would apply to the UOL site on the facts of the present matter. Site/contract in question was merely one of 600 operated by the Company and each site/contract was operated by a centralised operational and management structure. None of the sites was operated with any degree of autonomy and the statutory accounts of the Company made no suggestion of any independence of UOL contract. The inevitable conclusion was that the Company employed thousands of employees across hundreds of locations and the UOL contract was nothing more than one of the Company's "establishments". It was not an undertaking pursuant to the regulations".**

This submission was that which was adopted in the words of paragraph 93 which I have cited above. The Appellant's submission that an undertaking "must be at least a separate grouping of employees which is operationally autonomous and identifiable within the boundaries of a single employer" would not be met by the facts as recorded at paragraph 93.

35. Ms Jolly argues that paragraph 93 has to be seen in the context of the decision as a whole, and as following paragraph 92 which precedes it and states:

> **"In the absence of any supporting evidence to the contrary we find that we cannot agree with Doctor Moyer-Lee's submissions, no matter how eloquently put, as to the interpretation of "undertaking". We do not believe that it was the intention of the UK Government that the word "undertaking" be so defined on such a scale. If it had so intended, it would have elected for "establishment" and not "undertaking". There is a difference between these terms and both the Directive and Regulations make this abundantly clear. Whilst we have commented on the weight to be placed on the definitions by the DTI we find that in the absence of any alternative interpretation, it is a framework within which to consider the parties submissions."**

Ms Jolly submits that those last words show the lens through which the Tribunal was viewing the facts it set out at paragraph 93. Accordingly, paragraph 93 is a product of an erroneous approach, and should not be regarded as a finding of fact which concludes the appeal.

36. I do not accept this. In my view what the CAC was considering at paragraph 93 was not affected by the approach it had indicated at paragraph 92: it was asking whether it had been persuaded by an argument that the UOL contract was "a stand alone autonomous unit". That seems to me an issue of fact, independent of the lens of the reporter who describes it. It said it was not. That is a conclusion of fact unaffected by defective vision.

37. Accordingly, even if I had accepted the Appellant's argument as to the way in which "undertaking" should be construed, the appeal could not succeed.

Conclusion

38. I consider that the law is clear in respect of both of the grounds upon which I have determined the appeal, that it is not necessary for me to obtain a preliminary ruling from the European Court of Justice, and I decline the invitation to make a reference.

39. For these reasons the appeal is dismissed.