Appeal Nos. UKEAT/0547/12/KN
UKEAT/0548/12/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 May 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MR P SMITH

MR B WARMAN

UKEAT/0547/12/KN

USDAW	APPELLANT
ETHEL AUSTIN LTD (IN ADMINISTRATION)	RESPONDENT

UKEAT/0548/12/KN

(1) USDAW (2) MRS B WILSON	APPELLANTS
(1) UNITE THE UNION (2) WW REALISATION 1 LTD (3) SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS	RESPONDENTS

Transcript of Proceedings

JUDGMENT
(corrected 2 July and 29 October 2013 Rule 33(3))

APPEARANCES

For USDAW	MS DINAH ROSE (One of Her Majesty's Counsel) & MR IAIN STEELE (of Counsel) Instructed by: Slater & Gordon Solicitors 1st Floor St James House 7 Charlotte Street Manchester M1 4DZ
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

REDUNDANCY
Collective consultation and information
Protective award

Purposive construction of **Trade Union and Labour Relations (Consolidation) Act 1992** s.188 so as to give effect to a Directive required the court to delete the words "at one establishment" thereby allowing protective awards to be made to employees whose employer was to dismiss 20 employees as redundant in 90 days. Orders by Employment Tribunals excluding those in any establishment where fewer than 20 were dismissed were set aside.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about breach of the duty to consult over mass redundancies by two businesses now insolvent. The single issue is whether the duty is owed when 20 employees are dismissed or when 20 are dismissed in any one establishment: a site-by-site atomised approach, or a holistic approach.

2. This is the Judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to Usdaw and one of its representatives, Mrs Wilson, as the Claimants, and Ethel Austin and Woolworths – successors to Woolworth PLC – and the Secretary of State for Business, Innovation and Skills as the Respondents.

Introduction

3. It is an appeal by the Claimants in two sets of proceedings. Ethel Austin is an appeal against the Judgment of an Employment Tribunal under the chairmanship of Employment Judge K Robinson in Liverpool, and a review, sent to the parties on 20 November 2011 and 8 May 2012. This is the Austin appeal. The second is against a Judgment of an Employment Tribunal chaired by Employment Judge Auerbach sitting at London Central sent to parties on 19 January 2012.

4. The Claimants were represented by solicitors, counsel or trade union officials below and today by Ms Dinah Rose QC and Mr Iain Steele of counsel. The Respondents have attended none of the proceedings nor sent in representations. They were expressly invited by the court

and by Ms Rose's team to consider and reaffirm their decisions not to attend. Both the companies are in liquidation. It was said by the Insolvency Service that the Secretary of State would not attend or comment "as he has nothing to usefully contribute about the consultation process between the parties". That was his stance at the Woolworths Employment Tribunal hearing (see para 9). It appears, sadly, to misunderstand the legal issue in these appeals, and its importance. Nevertheless, this is a full hearing. Ms Rose has been scrupulous to highlight points which could be taken against her case were the Respondents here. We are at a disadvantage in having no assistance from Respondents, and we have ourselves made points both on the grounds of appeal and on the practical reality of redundancies by an employer with multiple workplaces, drawing upon our legal and practical experience.

5. The Claimants claim breach of the duty to consult over redundancy. Austin did not present a response nor an effective Respondent's answer in the EAT. The administrators of Woolworths, Deloittes, in their response at the Employment Tribunal took the issue now in play on multiple workplaces and other defences. The Secretary of State entered a response but not on the issue live on appeal.

The Judgments

6. The Employment Tribunals decided that Usdaw's claims succeeded and made protective awards for failure to consult it in advance of redundancies. They awarded, respectively, 90 and 60 days' protective awards but excluded those made redundant in establishments where fewer than 20 workers were dismissed. The sole issue in the appeals today is whether that exclusion was correct. There has also been a decision on the same lines on identically worded Northern Ireland legislation by Judge Buggy in the Belfast Industrial Tribunal in January 2010, which is

not before us, but was followed by the Woolworths Employment Tribunal. Payments have been made of protective awards in accordance with the Judgments; that is, excluding those workers who are the subject of the problem in this case, and the Claimants therefore appeal against that exclusion.

7. It might appear insouciant of Ms Rose not to cite in her written and oral submissions any part of the judgments below. The Austin Tribunal heard arguments on the current points on review but decided in a rather summary way that it was "inappropriate" to decide differently from the orthodox view. To some extent it was justified by the Claimants apparently conceding the point earlier. The Woolworths Tribunal held the point was arguable but would follow the cases we cite below. This was a careful and comprehensive judgment on all the points then in play, of which only the current issue survives on appeal. While not being referred to any part of this, we have of course read it and pay tribute to the way all the points were decided, without appeal on them, and to the clear thinking on the sole construction point now in issue.

8. Opinions were given on the paper sift by Langstaff P rejecting the appeals. Directions sending both appeals to a full hearing were given at a rule 3 hearing by HHJ Peter Clark, attended by Ms Rose. He respectfully disagreed with Langstaff P holding that the point now raised was not raised in the leading domestic case heard by Langstaff P himself viz **Renfrewshire Council v Educational Institute of Scotland** [2013] ICR 172. In view of the difference of opinion in the EAT, Langstaff P directed this constitution for the full hearing today. In fairness, Ms Rose dealt with his opinion on the sift in the context of her duty to put points the Respondents might have made had they turned up. His opinions command our

respect but the fresh application before Judge Clark, and this hearing, are not appeals from the sift opinion. His opinions on the two Notice of Appeal were these

> **"The question is whether a court should aggregate numbers of employees over a number of establishments. To so argue requires that domestic law be interpreted such that "one establishment" means "many establishments" or "more than one establishment". Even on Marleasing principles this cannot be done. But more fundamentally, section 188 has a long and instructive history, examining its relationship with E C law: see Commission v UK [1994] ICR 664, ECJ, and ex parte Unison [1996] ICR 1003. If any question arose which was arguable as to the adoption of 20 at anyone establishment" it would have almost certainly arisen then. But it appears the Commission regarded the amendments made by the UK Regulations introduced in light of Commission v UK to meet the requirements of proper implementation."**

> **"1. S.188 is clear in its terms. Unless European law permits an interpretation of it other than a conventional domestic interpretation which is to the effect either (a) that provision must be made in similar form for those establishments where 19 or less employees are to be made redundant, or (b) "establishments" is to be read as meaning "all the establishments in which the employer employs employees at which it is proposed to make redundancies potentially affecting those employees", the appeal must fail; or (c) both.**
>
> **2. The word "establishment" in the context of Equal Pay, itself derived from fundamental European principles, has recently been conclusively interpreted by the Court of Session (Inner House) in City of Edinburgh Council v Wilkinson & Ors [2011] ScotCS CSIH 70 in a way which precludes the appellants' arguments.**
>
> **3. The directive upon which reliance is placed to justify one or other approach defines "collective redundancy". Whatever criticisms (as per the Grounds of appeal) there may be of the logic, a distinction is drawn between establishments on the basis of their size, and there is clear distinction between "establishment" and "employer". The member state has an option to choose either the definition in 1(a)(i) or that in 1(a)(ii) as a minimum (arguably it is no more prescriptive) for the protection of affected employees. The UK appears to have chosen (a)(i). This focuses upon an establishment as a separate entity, and does not aggregate one establishment with another, whatever the effect of the choice under (ii) might have been. Further, the decision of the ECJ in Rockfon A1S v Specialarbejderforbundet i Danmark (C-449/93) holds that "establishment" in Directive 75/129/EEC, the predecessor of 98/59/EC, means *the unit* to which the workers made redundant are assigned in order to carry out their duties. This suggests the meaning is acte clair.**
>
> **4. Despite the numbers of potentially affected employees, which I accept creates a significant degree of interest in the result, I see no reasonable prospect of success in arguing that the statute can be interpreted such that for "establishment" is to be read "a number of establishments pooled together" or as set out at para. 1 above. Nor do I see the result as even arguably incompatible with the Directive, given the definition it adopts. Although the purpose may be taken generally to be to ensure protection of employees in the event of redundancy, it is specifically to operate in the context of collective redundancies as defined, and I see no prospect of showing that the UK's choice of 1 (a)(i) is not properly implemented by the terms of s.188.**
>
> **5. Further, I repeat what is instructive about the history of s.188 in the light of European obligations, as set out in my rejection of permission on the unamended/original grounds of appeal.**
>
> **6. I consider the appeal is unarguable: the revised Grounds of Appeal do not in substance alter the view to which I came when I scrutinised the first Notice of Appeal."**

9. Ms Rose's points, developed below, are that the correct approach to interpretation of the Directive does permit the construction she seeks; that the definition of establishments is to be taken so as to further the core objective of the Directive, being to protect workers' rights; that the fact that the point was not argued in ***ex parte*** **Unison** does not assist here; and that the definition of establishments for equal pay is not binding for the purposes of collective redundancies.

The legislation

10. The relevant provisions of the legislation are made first by the European Union and secondly domestically.

EU provisions

11. The starting point is Directive 98/59 EC on the approximation of laws of the member states relating to collective redundancies. In the preamble there are, so far as is relevant, the following provisions:

> **"(1) Whereas for reasons of clarity and rationality Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies should be consolidated;**
>
> **(2) Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community;**
>
> **(6) Whereas the Community Charter of the fundamental social rights of workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989 by the Heads of State or Government of 11 Member States, states, inter alia, in point 7, first paragraph, first sentence, and second paragraph; in point 17, first paragraph; and in point 18, third indent:**
>
> > **'7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community (…).**
> >
> > **The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.**
> >
> > **(…)**

17. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

(…)

18. Such information, consultation and participation must be implemented in due time, particularly in the following cases.

(-…)

(-…)

- in cases of collective redundancy procedures;

(-…)'

(8) Whereas, in order to calculate the number of redundancies provided for in the definition of collective redundancies within the meaning of this Directive, other forms of termination of employment contracts on the initiative of the employer should be equated to redundancies, provided that there are at least five redundancies;

(9) Whereas it should be stipulated that this Directive applies in principle also to collective redundancies resulting where the establishment's activities are terminated as a result of a judicial decision."

12. The core of the Directive imposes obligations on employers proposing to make redundancies, and it is this:

"Section II Information and consultation

Article 2

1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

4. The obligations laid down in paragraphs 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.

Section IV Final provisions

Article 5

This Directive shall not affect the right of Member States to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers.

Article 6

Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to the workers' representatives and/or workers."

13. A definition is provided as to the issue in this case:

"Section I Definitions and scope

Article 1

1. For the purposes of this Directive:

(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:

(i) either, over a period of 30 days:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,

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

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

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

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

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

14. The appeal concerns what we will call option (ii) above.

15. Reference is made (in the preamble) to the Charter of Fundamental Rights of the European Union, which provides in relevant part as follows:

"Chapter IV Solidarity

Article 27 Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Chapter VII General provisions

Article 51 Scope

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

16. The treaty of the European Union as now in force contains the following:

"Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

Domestic provisions

17. Turning, then, to the domestic legislative provisions, the **Trade Union and Labour Relations (Consolidation) Act 1992** (TULR(C)A), as amended, includes this:

"188

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

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

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect."

18. Failure by an employer to carry out the procedures is regulated by section 189, which provides that if a Tribunal finds the complaint made by a union or workers' representatives or workers themselves, well founded, it must make a declaration and may also make a protective award (see section 189(2)). Entitlement under a protective award is regulated by section 190, which provides that the employer must pay remuneration for the protected period.

19. Important to a fallback argument in this case is **Employment Rights Act 1996** (ERA) Part XII, which makes provision for the insolvency of employers. By section 184(2)(d), remuneration under a protective award under section 189 **TULR(C)A** is within the scope of debts which are to be guaranteed by the Secretary of State. The Secretary of State in this case

has paid the unarguable protective awards of 90 or 60 days as appropriate within the scope of the Employment Tribunal orders.

20. The archaeology of section 188 is relevant to these proceedings. The original wording of section 188(1) and (2) was as follows:

> **"188(1) An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of the union about the dismissal in accordance with this section.**
>
> **(2) The consultation must begin at the earliest opportunity, and in any event –**
>
> > **(a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect;**
> >
> > **(b) where the employer is proposing to dismiss as redundant at least 10 but less than 100 employees at one establishment within a period of 30 days or less, at least 30 days before the first of those dismissals takes effect."**

21. Thus, in the original section 188, the duty to consult arose in respect of a single redundant employee; but only where that employee was represented by a recognised independent trade union. We also see the flowering in section 188(2) of the formula which is at issue in this case, "at one establishment". How did this come about? The text of section 188 was amended by the **Trade Union Reform and Employment Rights Act 1993**, in ways which are not material to this case. There were then proceedings in the European Court of Justice which prompted amendments mainly in respect of the obligation to consult being extended to employees other than those represented by recognised trade unions: see below. After this, the Government, since it was seeking to implement EU law obligations, decided to amend the statute by way of regulations pursuant to the **European Communities Act 1972** – secondary legislation. It explained its proposal in a consultation document on 5 April 1995, as follows:

> **"1. On 8.June 1994, the European Court of Justice (ECJ) gave judgments against the United Kingdom for failure properly to implement the 1975 Collective Redundancies Directive (case**

C-383/92) and the 1977 Acquired Rights Directive (case C-382/92). All but one of the issues raised in those judgments had already been dealt with by amendments to the relevant legislation made in the Trade Union Reform and Employment Rights Act 1993. This note sets out a legislative proposal to remedy the outstanding issue, concerning arrangements for the designation of employees' representatives whom the employer, under the terms of the Directives, must consult about proposed redundancies and business transfers.

5. The Regulations followed the approach previously taken in implementing the Collective Redundancies Directive in requiring an employer to inform and, if appropriate, consult representatives of an independent trade union recognised by the employer in respect of any category of employees affected. In relation to business transfers the information and consultation requirements are less detailed and the obligation to consult will arise only if the employer is proposing measures which may affect employees.

10. The Government proposes to amend s188 of the 1992 Act and Regulation 10 of TUPE to require an employer to consult, at his choice, either a recognised independent trade union or elected representatives of the affected employees. The employer could consult a recognised union for one group of affected employees and elected representatives for another, regardless of whether a union is recognised for other purposes. Employers may be able to use existing consultative machinery which could reasonably have such consultation as one of its purposes and which is based on the elective principle."

22. That sets out the background to the changes and focuses upon what we call the trade union issue. The consultation document was predicated upon the implementation in the UK of obligations owed under the collective redundancies Directive. Tagged onto the end of this document is the following:

"Deregulation

17. The Government believes it is important to alleviate any unreasonable burden on employers which might otherwise result from these new requirements. Two deregulation measures are therefore proposed.

18. First, the present legislation on redundancy handling requires consultation with a recognised trade union even where the employer proposes to dismiss only one employee. The Directive, however, allows Member States to exclude cases where the employer is proposing to dismiss fewer than 20 employees over a 90 day period. Several EU Member States set a threshold, below which consultation is not required.

19. It is therefore proposed to amend the UK legislation so that the requirement to consult will only arise where the employer proposes to dismiss as redundant 20 or more employees over a 90 day period. Unless, as now, an employer can demonstrate special circumstances which make it not reasonably practicable to meet the requirement to consult in full, the employer will therefore be required to consult at least 30 days before the first redundancy takes effect where, over a 90 day period, 20-99 redundancies are proposed, or at least 90 days before the date of the first dismissal where 100 or more dismissals are proposed. The maximum compensation for an employer's failure to inform and consult will remain at 30 days pay per employee and 90 days pay per employee respectively.

20. This measure will not, of course, absolve employers from the duty to act fairly and reasonably in handling redundancies and informing and consulting the employees individually, as appropriate, including cases where fewer than 20 redundancies are proposed. Failure to do so may result in a finding of unfair dismissal."

23. There is a further provision to do with timing, replacing "at the earliest opportunity" with "within good time", which is the parallel provision in the Directive.

24. There is no reference in the consultation document to any intention to limit the protection afforded by section 188 to circumstances where 20 employees are made redundant "at one establishment". The matter then came on for debate in the House of Lords. Compliments were passed by Lord McCarthy and Lord Wedderburn QC to the Government spokesman, Lord Chesham, for having brought regulations to the House – apparently, the first Secretary of State for Trade to do so since 1915. A definitive statement of the purpose of the amendment was given by Lord Chesham:

> **"As your Lordships are aware, these regulations have two purposes. First and foremost, they give effect to judgments of the European Court of Justice concerning the implementation in the United Kingdom of the 1975 Collective Redundancies Directive and the 1977 Acquired Rights Directive. […]**
>
> **Article 1 of the Collective Redundancies Directive defines collective redundancies. It allows member states to choose between two thresholds for the number of dismissals concerned, below which thresholds the directive does not apply. The Government have chosen the second of those options; that is where the employer proposes at least 20 dismissals over a period of 90 days. The amendment made by Regulation 3 is entirely consistent with Article 1 of the directive. As the proposed regulation has the purpose of implementing our Community obligation, albeit in different terms from the manner in which it is at present implemented, or alternatively arises out of or is related to that obligation, the use of Section 2(2) of the Act is entirely appropriate."**

25. Having looked throughout the debates, the point Ms Rose draws to our attention is there is not a word about the interpolated phrase "at one establishment", and no expressed intention to limit the protection of section 188 to 20 dismissals within a single establishment. The focus of the statements in Parliament, like the consultation paper, is simply on the employer who is proposing at least 20 dismissals.

26. The Regulations were passed pursuant to section 2(2) of the **European Communities Act 1972** in relation to rights and obligations arising from European measures. The explanatory notes say this:

> **"These Regulations (apart from regulation 8) are made in consequence of the judgment of the European Court of Justice in cases C382/92 and C383/92, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, ([1994] I CR 664) in which the Court held that the United Kingdom had failed to comply with the requirements of Directives 77/187 and 75/129 by failing to provide for consultation of workers' representatives where there was no recognised trade union. The Regulations require the employer to consult either elected representatives of the employees or representatives of a recognised trade union where there are to be redundancies or a transfer of an undertaking. They also limit the requirement to consult about redundancies to cases where at least 20 redundancies are proposed. The Regulations also provide protection for elected representatives against dismissal and against being subjected to any other detriment and confer on them a right to time off with pay to carry out their functions. Trade union representatives already have such protection, and such a right, under the Trade Union and Labour Relations (Consolidation) Act 1992."**

27. We asked Ms Rose where it was explained to parliamentarians or to the public that the Government was by reason of the Directive required to introduce the words "at one establishment". Bereft of any evidence on this, she simply said it must be an oversight of the drafter. The words actually come from the previous version, as we have cited, but it is clear that these words do not derive from the Directive and have not been the subject of any consultation or parliamentary debate. True it is that there was a challenge to the amendment process in **R v Secretary of State for Trade and Industry *ex parte* Unison** [1996] ICR 1003 CA, as Langstaff P on the sift notes, but this did not raise the current issue.

28. The distinction in the legislation relevant to us can be summarised as follows:

> **"(1) Article 1(1)(a)(ii) of the Directive: 'over a period of 90 days, at least 20, whatever the number of workers in the establishments in question';**
>
> **(2) Section 188(1) of TULRCA: '20 or more employees at one establishment within a period of 90 days or less'."**

29. There one can see starkly the difference between the two phrases. As we will explain, we accept Ms Rose's argument that there is a difference between the two and the submission that the domestic provision is more restrictive than the Directive when it comes to dismissal of 20 or more employees.

The facts

30. Ethel Austin is a chain of 90 stores and a head office. The business had gone into administration on 8 March 2010. 490 employees were made redundant having been employed at locations with 20 or employees, 469 at its head office and distribution centre at Knowsley, Liverpool, and 21 at its store at Edgware. They received the maximum 90 day award. However, 1,210 employees were made redundant and received no protective award since they were at locations with fewer than 20; that is, every store apart from Edgware.

31. Woolworths went into administration on 27 November 2008 and ceased to trade on 3 January 2009. 3,233 employees were not entitled to receive a protective award by application of the same rule. We understand more than 27,000 employees were employed prior to the crash.

32. Both companies went from administration into liquidation. The simple arithmetic in this case is that something like 4,400 workers – 1,210 at Ethel Austin and 3,233 at Woolworths – have been excluded from the payments awarded to their colleagues of 90 days' pay (Austin) and 60 days' (Woolworths). That is the practical consequence which is in issue in this case.

The argument and conclusions

33. The Claimants submitted the Employment Tribunals had erred in law in their construction of the Directive and s188. The graded contentions of Ms Rose and Mr Steele are these:

> **"In order to comply with the Directive, section 188 should be interpreted as requiring the employer to consult where it proposes to dismiss as redundant 20 or more employees (a) at one *or more* establishments; and/or (b) at one establishment, broadly interpreted in accordance with the Directive to mean the whole of the relevant retail business, rather than each of its individual stores; and/or (c) deleting the words 'at one establishment' from section 188."**

34. We accept Ms Rose's contentions, primarily contention (c), unopposed as they are, having tested them ourselves in debate to an extent we would not normally have done, and albeit not to the standard of counsel who would be instructed by the Respondents. So our analysis, we hope, will be forgiven for being the shorter.

35. The starting point is the nature of the obligation as set out at Article 1 of the Directive. The three-tiered obligation is a key feature of option (i) in the Directive. It is not relevant to option (ii) which is simpler. The only number within it is 20. There is no reflection on the size of the pre-existing workforce or of the ratio between those to be dismissed and those to stay. There is no three-tiered proposition for defining who is to receive consultation and ultimately any protective award. The restriction to one establishment on the construction given to s188 by the Tribunals here means that very substantial numbers of employees are excluded from the right. The simple proposition we have recorded above is there should be some interpretation to yield the outcome that the obligation arises when 20 or more are to be dismissed irrespective of where they work.

36. The first issue to consider is what the Directive means, because the domestic measure to be construed, section 188, is introduced in order to transpose it. The requirement was set out in the **European Commission v UK** [1994] ECR 1/2435, which was to harmonise the rules relating to redundancies. The meaning of establishments has been the subject of judicial interpretation in accordance with option (i). Counsel say there is no case in the Luxembourg court in respect of option (ii), and so it falls for us to decide its meaning if we are confident that we can do so without a reference to the CJEU. To do this we will consider, first, the European Union cases which might assist. Ultimately, the submission is that by way of the interpretative obligation imposed on our court, no force should be given to the requirement that each establishment yields 20 or more redundancies.

37. We must look at the meaning of establishment. In **Rockfon AS v Specialarbeijderforbundet I Danmark** [1995] ECR 1/4291 we find in the Judgment the following:

> **"30. [A]n interpretation of the term "establishment" like that proposed by Rockfon would allow companies belonging to the same group to try to make it more difficult for [the Directive] to apply to them by conferring on a separate decision-making body the power to take decisions concerning redundancies. By that means, they would be able to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could be denied the right to be informed and consulted which they have as a matter of course under the Directive. Such an interpretation therefore appears to be incompatible with the aim of the Directive."**
>
> **32. The term "establishment" appearing in article 1(1)(a) of [the Directive] must therefore be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an "establishment," for the unit in question to be endowed with a management which can independently effect collective redundancies."**

38. We accept Ms Rose's submission that the court there was applying a definition of establishment consistent with the core objective, which was "*to afford greater protection to*

workers in the event of collective redundancies" (paragraph 29) when the alternative proposition advanced by the employer in that case would have restricted workers' rights.

39. **Rockfon** was considered in **Athinaiki v Chartopoiia AE v Panagiotidis** [2007] ECR 1/1499, where the Court held as follows on a reference from a Greek tribunal:

> **"23. According to the Court's case-law, the concept of 'establishment', which is not defined in that directive, is a term of Community law and cannot be defined by reference to the laws of the Member States (Case C-449/93 Rockfon [1995] ECR 1-4291, paragraphs 23and 25). It must, accordingly, be interpreted in an autonomous and uniform manner in the Community legal order.**
>
> **26. In so doing, the Court has defined the term 'establishment' very broadly, in order to limit as far as possible cases of collective redundancies which are not subject to Directive 98/59 because of the legal definition of that term at national level (see, inter alia, Joined Cases C-187/05 to C-190/05 Agorastoudis and Others [2006] ECR 1-7775, paragraph 37). However, given the general nature of that definition, it cannot by itself be decisive for the appraisal of the specific circumstances of the case at issue in the main proceedings.**
>
> **27. Thus, for the purposes of the application of Directive 98/59, an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.**
>
> **28. Given that the objective pursued by Directive 98/59 concerns, in particular, the socio-economic effects which collective redundancies may have in a given local context and social environment, the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'.**
>
> **29. It is, moreover, in this spirit that the Court has held that it is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently effect collective redundancies (Rockfon, paragraph 34, and point 2 of the operative part). Nor must there be a geographical separation from the other units and facilities of the undertaking.**
>
> **30. In the light of those considerations, the Court finds, first of all, that the fact that Greek Law 1387/1983 uses the terms 'establishment' and 'operating unit' interchangeably is not in itself contrary to Directive 98/59, provided that the interpretation given by the Court of the concept of 'establishment' is followed and the use of two terms cannot lead to the exclusion of categories of workers from the protection intended by that directive.**
>
> **32. Those factors clearly give such a unit the air of an 'establishment' for the purposes of the application of Directive 98/59, in accordance with the considerations set out by the Court in paragraphs 27 to 29 of the present judgment, and bring the unit in question within the scope of this Community concept. The fact that decisions concerning the operating expenditure of each of those units, the purchase of materials and the costing of products are taken at the company's headquarters, where a joint accounts office is set up, is irrelevant in this regard."**

40. Thus it will be seen that "unit" is not a term that is universally applied. Distinguishing what is an establishment in one case from another is directed by the core objective of advancing the rights of workers in accordance with the Directive and the Charter. One can, as the European Court said in **Athinaiki**, regard it as a broad construction, or possibly a narrow construction, but either way it has to be a construction which pursues the core objective.

41. The insertion of the phrase "at least 20 *whatever the number of workers normally employed in the establishments in question*" in option (ii) does not detract from it; rather, it emphasises that the location where people work is irrelevant. Common to options (i) and (ii) is the focus on numbers of people to be dismissed, the number of redundancies, as the governing part of Art1(a) shows. The numbers are either 10, 10%, 30 (option (i)) or 20 (option (ii)). The difference between them is that option (i) requires you to consider the size of the existing workforce and in which establishments employees work. There is no such linkage in option (ii) and the extra words simply emphasise this distinction. There is no need to construe establishment in any particular way for option (ii), for the duty to consult applies "whatever" establishment they work in. The point does not arise, whereas the authorities show that the meaning of the term is critical for option (i).

42. Construction of establishment in s 188 so as to give effect to the protection of workers' rights could be given using Ms Rose's contention (b). If all of Austin's, or of Woolworths', shops and administration of them, are construed as one establishment, large numbers of employees are given protection, which the atomised construction site by site has denied them.

43. In England the matter was considered in **MSF v Refuge Assurance** [2002] ICR 1365, a Judgment of Lindsay P with members. The EAT said this:

> **"52. As will have been seen, article 1(1)(a) of Directive 75/129 gives member states a choice of two types of collective redundancy which they may adopt in their domestic legislation. The second is one which is irrespective of the number of workers normally employed in the establishments in question. However, section 188 of the 1992 Act, whilst appearing to take the second choice (redundancies of at least 20 persons over 90 days) speaks of the redundancy of 20 or more being "at *one establishment*". In this respect, too, it appears to us to differ from the Directive to a degree irremediable by construction. Again, given that the union are neither able to enforce the Directive nor to disapply the section, we are left with the task of applying a straightforward construction of the language of the section to the facts. Thus there arises the question of what is "an establishment". The question is important in the case before us as field staff workers worked in relatively small units which, if each was separately regarded as an establishment, would effectively disapply section 188 simply by reason of the smallness of the branches concerned and the thin spread of redundancies over a large number of them."**

44. The phrase "irremediable by construction" gives rise to a challenge by Ms Rose. She says this case is right in part in that it authoritatively holds that there is a difference in the language. In our judgment it also implicitly holds that the UK adopted option (ii) (as the *Hansard* citation above shows); and that the rights of workers are more restricted under s188, for otherwise the court would not be called on to remedy them. But since that was a private-sector case it was not open to counsel there to argue against it.

45. The date of the case is important in two respects, as it predates certain other of the relevant authorities, which, it has to be said, were not shown to Langstaff P in the first Notice of Appeal in these cases. These are to do with the interpretative obligation and with whether the matter could be weighed against a private-sector employer or, alternatively, only against an emanation of the state.

46. **MSF** was referred to in a Judgment of Langstaff P, sitting in the EAT in Scotland, in **Renfrewshire Council v Educational Institute of Scotland** [2013] ICR 172, where he added his own reflections on the correctness of it:

> **"23. The employment tribunal had found that each branch office was a separate costs centre, and that each branch office manager was the direct line manager of the field staff assigned to that particular branch office. The tribunal held that each member of the field staff was assigned to a particular branch office as his or her place of work. Despite that the tribunal concluded that the "establishment" was not the branch office; in all the circumstances of the case it was "the entire field staff of each respective employer". This view was held erroneous: Rockfon had to be applied:**
>
> > **'firstly because in section 188 the word should, if possible, be given the meaning ascribed to the same word in the Directive by Rockfon ... Secondly, we are unconvinced of the value of cases looking at the word in other statutory contexts. Thirdly, in any event we are unconvinced that these domestic authorities lead to a meaning that differs from the Rockfon meaning - see in particular Lord Advocate v Babcock & Wilcox (Operations) Ltd [1972] I WLR 488 and Barratt Developments (Bradford) Ltd v Union of Construction, Allied Trades and Technicians [1978] ICR 319.'**
>
> **24. Accordingly, it has become accepted wisdom (at least at appeal tribunal level) that the same definition of "establishment" is to be applied for the purposes of section 188 as for article 1(1)(a)(i) of the Directive: Mr Napier points out that this is instanced in Potter v Sound Control Modern Music Stores Ltd (unreported) 23 January 2009 (Judge Peter Clark, sitting alone), where Rockfon and MSF are referred to as "the standard authorities" .**
>
> **25. I must confess to considerable misgivings whether the decision in MSF is, despite this general acceptance, necessarily a proper application of that in Rockfon. Although the Court of Justice did define "establishment" as I have noted, it did so expressly to advance the purpose of the Directive by regard to the consequences if (on the facts of that case) a larger unit were to be adopted as the establishment than that contended for by the employer. The right to consultation where it was contemplated that there might be a number of dismissals for reasons unconnected with the personal characteristics of the workers in question would be defeated, rather than advanced, by adopting the employer's approach. The decision, being one of the Court of Justice may be seen as one in which the reasoning was part and parcel of the decision, and it might almost as well be interpreted as a decision that that "unit" constitutes an establishment for the purposes of Directive 98/59 which most widely confers consultation rights: for the "sliding scale" in article 1(1)(a)(i) this would usually be smaller rather than larger units, subject only to the applicable numerical thresholds, as it is to be interpreted as a decision that lays down a definitional starting point from which the rights in issue flow. For the applicability of rights deriving from article 1(1)(a)(ii) the larger the "establishment" is conceived to be the more likely it is that workers within it will be protected. The danger to what would otherwise be rights to consultation might be averted if the emphasis in applying Rockfon were to be placed on the purposive logic which led to the answers to the questions given by the court in that case, rather than literally upon the wording used to express the scope of "establishment".**
>
> **26. However, I do not consider that it is open to me to take an approach other than that taken in MSF. First, neither party has invited me to do so (though Ms Jones has referred me to criticism in *Harvey on Industrial Relations and Employment Law*, Division E ("Meaning of Establishment"), paras 2531-2549, to the effect that the decision in MSF runs counter to the purposive logic which the Court of Justice adopted in Rockfon). Second, it is a decision which though not binding upon me is, as a decision of the appeal tribunal, none the less one which is normally to be followed unless a later court is confident it is erroneous, and I am not. Third, as Lindsay J observed, the decision is consistent with the approach taken in earlier domestic authority.**
>
> **…**

> **Sixth, there seems to me to be force in the view of the appeal tribunal expressed in para 52 in MSF [2002] ICR I365 that the Act might not be compatible with the Directive, since the word in section 188 is "establishment", in the singular, whereas in the Directive it is in the plural - "the establishments in question". If so, then the meaning of "establishment" as defined in Rockfon would not conflict with the purpose of the Directive in any case to which article I(I)(a)(ii) applied, since in such a case the "establishments" would be aggregated for the purpose of establishing a numerical threshold. On this analysis, any shortcoming in ensuring the widest coverage of consultation rights under the Directive is the consequence of what must be assumed to be a deliberate legislative choice by Parliament; but the definition in Rockfon would still fall to be applied."**

47. Ms Rose argues that Langstaff P did not have deployed in front of him all of the relevant arguments in this case. She notes that certain of the points are reflected by the President himself in what we see as a *cri de coeur* indicating that he was wanting of arguments from representatives and he had to do the best he could. Ms Rose says this is the foundation for arguing that the decision as to being irremediable may not have been correct.

48. The principal case that has been the tipping point in Ms Rose's submissions is **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, which sets out the full canon for the proper approach to be taken by a court when undertaking its duty to interpret legislation pursuant to section 3 of the **Human Rights Act 1988**, so as to comply with Convention obligations, as far as it is possible to do so, and to add or take words away to comply with higher purposes. This case was relied on and followed by Underhill P as he then was, in the context of the duty of a court to interpret legislation, as far as possible, compatibly with EU law obligations, in **EBR Attridge LLP v Coleman** [2010] ICR 242. We will not weary the transcript with citations from **Ghaidan**, because, as is to be expected from this source, Underhill P deals with them comprehensively and astringently, and he said this:

> **"13. It is entirely clear from those passages - and it was common ground before me - that the approach to the application of section 3 of the 1998 Act advocated by the majority is equally applicable in cases of the present kind, where a court or tribunal is obliged "so far as possible" to interpret a domestic statute in order to give effect to EU law; and Ghaidan v Godin-Mendoza [2004] 2 AC 557 has indeed since been so applied by the Court of Appeal in a case**

involving EU law: see R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs [2006] STC 1252.

14. Applying that approach, I agree with the employment judge, and with Judge Peter Clark [2007] ICR 654 when the matter was first before this tribunal, that there is nothing "impossible" about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in Ghaidan v Godin-Mendoza [2004] 2 AC 557 make clear, that is not in itself impermissible (see, e g, per Lord Nicholls, at paras 32-33). The real question is whether it would do so in a manner which is not "compatible with the underlying thrust of the legislation" (per Lord Nicholls, at para 33) or which is "inconsistent with the scheme of the legislation or with its general principles" (per Lord Rodger, at para 121). In Ghaidan v Godin-Mendoza the majority were prepared to interpret the words "wife or husband" in Schedule I to the Rent Act 1977 as extending to same-sex partners. That was plainly not the intention of Parliament when the Act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went "with the grain of the legislation" (in Lord Rodger's phrase). In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination "on the ground of disability" still remains central. In the case of other kinds of discrimination, the United Kingdom legislation, as construed by the courts without reference to EU law, already outlaws associative discrimination: see the decision of this tribunal in Showboat Entertainment Centre Ltd v Owens [1984] ICR 65, approved by the Court of Appeal in Weathersfield Ltd v Sargent [1999] ICR 425. The particular route to that result adopted in those cases is not available here because of the specific references in the 1995 Act to "a disabled person", but the conclusion reached in them confirms that as a matter of United Kingdom law the policy underlying the anti-discrimination legislation applies to associative discrimination as much as to "primary" discrimination. I can see no reason why there should be a different policy as regards disability discrimination and no reason to suppose that the choice to draft by reference to "a disabled person" reflected a deliberate and different policy judgment."

49. The question, therefore, is: can section 188 be construed in the light of the Directive to exclude the words "at one establishment" or to add words "at one *or more* establishment*s*", or would such a construction go against the grain of the legislation? For this the Judgment in **Marleasing SA v La Comercial Internacional de Alimentación SA** [1990] ECR 1/4135 supplies the principle. This permits additional words to be put in. They could be taken out; they can be moved around. There is no difference between the interpretative obligation under section 3 of the **Human Rights Act 1998**, considered in **Ghaidan**, and the interpretative obligations arising in the context of EU law. In **Ghaidan** there was express reference to domestic and ECJ authorities on such interpretation in employment law cases by all of the Law Lords in the majority: see for example citations from **Pickstone v Freemans PLC** [1989] AC 666 HL and **Litster v Forth Dry Dock** [1990] I AC 546 HL.

50. In our judgment, Ms Rose is correct when she argues that option (ii) imposes no site-based restriction on the number of employees ie no establishment however defined. The duty of the UK was to implement the Directive. It could of course have done better (see Article 5) but it did not "gold plate" the rights except it may be argued to the limited extent of the graded minimum timescale for starting consultation in s188(1A). But it was not entitled to dilute the protection, and our cases provide graphic illustrations of its detrimental effect. The consultation paper, *Hansard*, and the explanatory notes to the Regulations show that the "one establishment" limitation was not regarded as fundamental to the policy of the legislation: the term was never mentioned. The concerns expressed about over-regulation were not related to the situation where an employer made more than 20 employees redundant across more than one establishment. The clear Parliamentary intention was to implement the Directive correctly. Applying the principles pulled together by Underhill P, the court is entitled to construe section 188 so that it complies with the obligation under the Directive. The state of the authorities has moved on since Lindsay P eschewed any remediation of this. We now have the statements of principle set out in **Ghaidan** and **Attridge**, which explain the extent of the court's interpretative function where the literal words of a statute are in conflict with the Directive. Some support now is also available from Langstaff P in **Renfrewshire**.

51. We have the utmost diffidence about adopting a construction differing from successive Presidents of this court but it is open to us to do so where we consider new arguments have been raised which we hold are correct. Since it remains for us to decide this matter, we hold that Ms Rose's submission is correct.

52. Any of the three contentions she proposes would achieve the same effect. We would if necessary accept her contention (b). The only way to deliver the core objective of protection of the dismissed workers in the two cases on appeal is to construe establishment as meaning the retail business of each employer. This is a fact-sensitive approach which may not be the same in every case but it is consistent with the core objective as applied to the facts in these two cases. We would correct one aspect of her written submission (para 3) and probably para 4 in the Woolworths executive judgment to the effect that there is consideration of the numbers of employees at any establishment before the redundancies. We are concerned only with the numbers dismissed. As it happens, all were dismissed for redundancy so in our cases it makes no difference.

53. We would however go further, since Ms Rose's contention (c) make the point more clearly and simply so that it can be applied without detailed consideration of the added fact sensitive dimension. We hold that the words "at one establishment" should be deleted from section 188 as a matter of construction pursuant to our obligations to apply the Directive's purpose.

54. Ms Rose's contention (a) is inconsistent with our holding that the additional words in option (ii) emphasise that it is irrelevant to consider the size of the workforce and at what establishments people are employed prior to the redundancies. If we are going too far in adopting contention (c) or (b) then we would adopt contention (a) so as to give effect to the purpose as we have seen it in **Rockfon**.

55. We suggested to Ms Rose a further proposition which was literal and did not invoke EU principles. In each of the two appeals the employer had one establishment at which there were 20 dismissals. Once over that threshold in that one establishment, the obligation to consult is triggered for all the dismissals, extending protection even to a shop with only one dismissed employee, since the staff in the smaller workplaces would be "affected employees". This construction is consistent with Parliament's purpose in 1995 in seeking to deregulate the economy to exempt all businesses from the collective obligations when only one employee is to be dismissed; and to exempt small businesses unless they have a sufficiently substantial workforce from which to propose 20 dismissals.

56. That would, of course, save this case and cause us to allow the present appeals. Ms Rose considered this reasoning "impressive". But while acknowledging that her clients would succeed on appeal, she resisted it as not going far enough. It does not provide a lasting solution, because it still remains open for argument about whether the workers are actually allocated to the establishments, and there may be some cases where there would be differential analysis. If our opinion on Ms Rose's own three contentions is wrong, this literal approach yields the same practical outcome. We allow the appeals

The alternative arguments

57. The alternative way in which the point is put (Ms Rose's second) is that there is a directly applicable right under the Treaty by which the Claimants in this case may obtain justice. It is not necessary for us to decide this point but in deference to the unopposed argument we offer a tentative view.

58. Reference is made to the Judgment of the European Court in **Kükükdeveci v Swedex GmbH & Co KG** [2010] IRLR 346, where the Court said this:

> **"44. By its second question the referring court asks whether, where it is hearing proceedings between individuals, in order to disapply a national provision which it considers to be contrary to European Union law, it must first, to ensure protection of the legitimate expectations of persons subject to the law, make a reference to the Court under Article 2 TFEU, so that the Court can confirm that the legislation is incompatible with European Union law.**
>
> **46. In this respect, where proceedings between individuals are concerned, the Court has consistently held that a Directive cannot of itself impose obligations on an individual and cannnot therefore be relied on as such against an individual (see, inter alia, case 152/84 Marshall [1986] IRLR 140, paragraph 48; case C-91192 Faccini Dori[1994] ECR 1-3325, paragraph 20; and Pfeiffer and others, paragraph 108).**
>
> **47. However, the member states' obligation arising from a Directive to achieve the result envisaged by that Directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the member states including, for matters within their jurisdiction, the courts (see, inter alia, to that effect, case 14/83 von Colson and Kamann [1984] ECR 1891, paragraph 26; case C-106/89 Marleasing [1990] ECR 1-4135, paragraph 8; Facccini Dori, paragraph 26; C-129/96 Inter-Environnement Wallonie [1997] ECR 1-7411, paragraph 40; Pfeiffer and others, paragraph 110; and joined cases C-378107-C-380/07 Angelidaki and others [2009] 3 CMLR 571, paragraph 106).**
>
> **48. It follows that, in applying national law, the national court called on to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in question, in order to achieve the result pursued by the Directive and thereby comply with the third paragraph of Article 288 TFEU (see, to that effect, von Colson and Kamann, paragraph 26; Marleasing, paragraph 8; Faccini Dori, paragraph 26; and Pfeiffer and others, paragraph 113). The requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European Union law when it determines the dispute before it (see, to that effect, Pfeiffer and others, paragraph 114).**
>
> **49. According to the national court, however, because of its clarity and precision, the second indent of Paragraph 622(2) of the BGB is not open to an interpretation in conformity with Directive 2000/78.**
>
> **50. It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, Mangold, paragraphs 74-76).**
>
> **51. In those circumstances it is for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, Mangold, paragraph 77)."**

59. That is the gateway to the application as between citizens - the individual workers or Usdaw on the one hand and Austin and Woolworths on the other - of the same interpretative

approach guided by the purpose of the legislation. We would be minded to uphold Ms Rose's submission based on **Kükükdeveci**. It was open to her to make it following the Judgment in **Autologic Holdings v IRC** [2006] 1 AC 118 HL, where Lord Nicholls said at paragraph 16 that UK legislation inconsistent with the directly applicable provisions of Community law should not be followed.

60. In those circumstances, reliance on the Charter (see above) and on the Treaty gives sufficient access to this interpretative tool. A national court is obliged to disapply any provision of national law incompatible with this right, irrespective of who the parties are. In our judgment, Ms Rose's submission has some substance. She makes it as her secondary point and majors on the interpretive **Marleasing** approach, but she is right to the extent that no Respondent is here to argue against it.

61. If she is wrong about that, she invites us to consider the Directive as containing directly applicable provisions relating to emanations of the state (see **Foster v British Gas** [1990] ECR 1/3313). How does this arise? As a matter of fact, the Secretary of State is a party to the Woolworths case. The Woolworths case was joined by order of HHJ Peter Clark to the Austin case. By virtue of Part XII ss 188-9 of the **Employment Rights Act 1996** the Secretary of State is responsible for payment of the protective awards to all of the employees. Thus, on Ms Rose's argument, this is a case which is amenable to a directly effective right and a remedy against the Secretary of State.

62. With slightly less confidence in that argument we would be minded to agree with it, again in the absence of the Secretary of State, in whose principal interest it would be to come and

defeat it if it were wrong. From what we have said, 4,400 workers are now going to be seeking from the Secretary of State 60, alternatively 90, days' pay. It is a very large sum. Doing the best we can, without argument from him, we would be minded to uphold Ms Rose's argument as to direct effect against him in this case.

Disposal

63. We do not consider it necessary to refer this to the Luxembourg court in the light of our holdings above. The appeals are allowed. Time is given for counsel to draw the orders. Any application for permission to appeal may be made to the EAT within 14 days, or direct to the Court of Appeal within 21 days, of the transcript of the judgment.