Neutral Citation Number: [2025] EAT 188

Case No: EA-2023-001030-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 December 2025

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MICRO FOCUS LIMITED

Appellant

- and –

MR JAMES MILDENHALL

Respondent

- -

- -

Mr Christopher Milsom (instructed by Trowers and Hamlins LLP) for the **Appellant**
Mrs Sarah Hornblower (instructed by TJD Law) for the **Respondent**

Hearing date: 17 September 2025

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JUDGMENT

Amended

SUMMARY

REDUNDANCY

The employment tribunal held that the respondent was in breach of the duty in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") to consult appropriate representatives when "proposing" to dismiss 20 or more employees as redundant within 90 days, implementing Directive 98/59/EC. In light of the decision of the Court of Justice in ***UQ v Marclean Technologies*** [2022] IRLR 548 on the Directive, the tribunal directed itself that an employer who proposed fewer than the threshold number of dismissals within 90 days was subject to the obligation to consult if it subsequently proposed additional dismissals within a period of 90 days (so making the total employees to be dismissed 20 or more). It also held that the respondent operated as the "de facto" employer of the employees whom it was proposed to dismiss as redundant for the purpose of the duty in s.188 and made a protective award of 90 days' pay. Finally, the tribunal held that the respondent had unfairly dismissed the claimant because (i) it did not turn apply its mind to the appropriate "pool" for selection of those to be made redundant and it was outside the range of reasonable responses not to place one other employee in the pool and (ii) it had not adequately consulted with the claimant about his redundancy. The respondent appealed on many grounds.

Held, allowing the appeal only on (1) and (2) below.

1. The tribunal had misdirected itself in relation to ***Marclean***. Properly analysed, ***Marclean*** was not about whether an employer was "contemplating" dismissals for the purpose of Article 2 of Directive but about the meaning of "collective redundancies" in Article 1. Consequently, it did not affect the proper interpretation of the "proposing" in s.188 of TULRCA, the domestic concept corresponding to "contemplating" in the Directive. In any case, it was not possible to interpret "proposing" in s.188 TULRCA as the tribunal did in reliance on its reading of ***Marclean***.
2. The duty in s.188 is owed by an employer when it is proposing to dismiss 20 or more employees, meaning those individuals who have a contract of employment with it. In the context of a corporate group, the Directive also places the obligation to consult on the relevant company with the status of employer. The ET therefore erred in considering that the thresholds in s.188 were met because the respondent acted as the "de facto" employer

for all UK staff when there was evidence that some of those individuals were or may have been employed by discrete legal entities.

3. The tribunal did not err in other respects. TULRCA s.188 does not require a single proposal by a single department; the tribunal correctly approached the protective award; it was entitled to find that the respondent acted unreasonably for the purpose of s.98(4) of the Employment Rights Act 1996 by not including another employee in the "pool" of those at risk of redundancy; and it gave adequate reasons for its finding that consultation with the claimant had been inadequate.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This appeal is against a judgment of the employment tribunal ("ET"), reasons for which were sent to the parties on 3 August 2023, in which the ET decided that the Respondent, Micro Focus Ltd, had unfairly dismissed the Claimant, Mr Mildenhall and was in breach of the duty to consult in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). The ET made an award of compensation for unfair dismissal and a 90-day protective award under s.189 of TULRCA.

2. I shall refer to parties as the Claimant and Respondent, as they were before the ET.

3. The Respondent was represented by Mr Christopher Milsom and the Claimant by Mrs Sarah Hornblower, both of whom appeared in the ET. I am grateful to both for their submissions.

Preliminary: Grounds and Amendment

4. The original Notice of Appeal was sealed on 24 July 2024. At a rule 3(10) hearing on 15 July 2025 a direction was given to amend the Notice of Appeal, and the amended Notice of Appeal dated 17 July 2025 contains the four grounds which were permitted to proceed to a full hearing. Though each ground is supplemented by many paragraphs raising additional arguments, which I address below, the four grounds in the headings are as follows:

    (1) The ET erred in concluding that the Respondent proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

    (2) The ET erred and/or provided inadequate reasoning in making a 90-day protective award.

    (3) The ET erred in its conclusions and/or reasoning on the redundancy pool.

    (4) The ET erred in concluding that the consultation process rendered the dismissal unfair.

5. On reading the Respondent's skeleton argument for the hearing it became clear it was seeking to argue another point: that the ET had misdirected itself at §§39 and 43 of its reasons in relation to its interpretation and application of the judgment of the Court of Justice ("CJEU") in Case C-300/19, ***UQ v Marclean Technologies SLU*** [2022] IRLR 548. Indeed, such an argument was at the forefront of Mr Milsom's submissions. I struggled to see, however, where such a ground was meant to be found in the lengthy Notice of Appeal (which did not even mention ***Marclean***). Mr Milsom contended it was in §7(i) of the Notice of Appeal but that paragraph did not refer to §43 of the ET's reasons where it was said the ET misdirected itself, nor refer to any misdirection of the ET in relation to ***Marclean***.

6. Accordingly, I considered an amendment to the Notice of Appeal was necessary and I gave a direction to that effect. The Respondent applied to amend its Notice of Appeal in an email of 19 September 2025 and by an email of the same date the Claimant's solicitors stated that they

did not object to the proposed amendment. The amendment raised squarely the issue which should have been in the original Notice of Appeal and adds to §7(i) of the Notice of Appeal the following grounds of appeal:

> "The ET thus misdirected itself by treating [***Marclean***] as entitling it to 'look backwards as well as forwards' ([39] and [43]), when assessing whether the employer had a proposal sufficient to trigger s.188 TULRCA 1982:
>
> (a) [***Marclean***] is not authority for determining whether there has been a proposal but on assessing whether a particular dismissal falls within the protected period,
>
> (b) Alternatively, the ET's invocation of [***Marclean***] amounted to the "disapplication or quashing of an enactment" where a fundamental feature of the legislation is that the employer must in fact have the requisite proposal and that the proposal must be prospective (having regard *inter alia* to s.188(3) and liabilities under ss 193-4 TULRCA 1992) and thus precluded by para. 3 of Schedule 1 to the European Union (Withdrawal) Act 2018."

7. Though I had some misgivings about the lateness of raising such a central point (especially where there had already been a rule 3(10) hearing), in circumstances in which Mrs Hornblower was prepared to address the point and did not object to the amendment, I considered it was just to allow it in accordance with ***Khudados v Leggate*** [2005] ICR 1013.

The ET Decision

8. The Respondent is a large international IT company. The Claimant was employed by the Respondent, running its Business Intelligence and Reporting within the sales division, from 1 December 2015 until he was dismissed by reason of redundancy with effect from 29 July 2022. He brought claims in the employment tribunal for unfair dismissal and for a protective award under s.188 of TULRCA (a claim of redundancy was withdrawn). The Respondent denied the claims.

9. The background to this matter is set out in the ET's reasons. After recording the issues for the hearing, the ET made some comments about the credibility of the witnesses (§§8-11). It then made findings of facts about the general background.

10. From 2020 another employee of the Respondent, Mr De Nazareth, was responsible for the Analytics Team. Both he and the Claimant, whom it was agreed was a good performer, reported to the same manager, Mr Luthersson (the Vice-President of Global Support Operations) and the work of their teams overlapped.

11. After the Respondent announced a large-scale reorganisation in September 2021 across its Support Operations, which included the Sales Division in which the Claimant worked, Mr Luthersson was mandated to decide how to effect this cost saving. The ET found, accepting the Claimant's evidence, that on a remote meeting/call in November 2021, he and other employees were shown an Excel document, listing each employee's name and against it the proposed outcome, of continued employment, redundancy or transfer (§§18, 19). At that stage,

however, the Claimant was marked as "IN", meaning it was envisaged he would be retained (§20).

12. By mid-January there was an "intense period of planning" and a proposal to consolidate teams, leading to a second "master spreadsheet" being created in March 2022. The ET held that this was "after the time at which the proposals had been solidified" (§22).

13. **Collective consultation**. The ET dealt with the facts relevant to collective consultation at §§23-31. It found that there was no reliable evidence from the Respondent's witnesses on the background to the collective consultation. Of the two witnesses the Respondent called, Mr Luthersson gave no evidence on the matter and Ms Friend had "no knowledge whatsoever" of a table purporting to show those who were dismissed, nor relevant evidence about the number of employees the Respondent proposed to dismiss. Nor was there any reliable documentary evidence (§§24-27). The ET was critical of this approach (§28).

14. In the event, the ET accepted the evidence of the Claimant. His evidence, based on the March 2022 spreadsheet, was that at least 45 UK staff members were to be made redundant in just one business area, under the direction of Mr Steinmetz (I was shown the table on which this evidence was based, though its detail was not entirely clear to me). If the remaining 1,000 UK employees were considered, the number might well be higher. The ET considered there must have been a prior proposal to make that minimum 45 employees redundant, which had crystallised in early January 2022 (§30).

15. The ET set out the law on s.188 of TULRCA. It directed itself that in the context of a corporate group, each employer's batch of redundancies must be considered separately, referring to ***E Green & Sons v ASTMS*** [1984] ICR 384 (§36). In addressing the meaning of "proposing" in s.188, it said this at §39:

> "The ECJ in [***Marclean***] ruled that under the Directive, an employer proposing redundancies must look backwards and forwards for 90 days to determine whether there are sufficient redundancies to trigger the collective consultation obligations. Following ***Marclean***, an employer who has proposed fewer than 20 redundancies and then subsequently proposes further redundancies within 90 days (making the total 20 or more) should as far as possible consult collectively with the first group as well as the second (although in practice there may be a limit on how much can be done, depending on how far the first redundancy exercise has progressed)."

16. The ET's conclusions on s.188 were at §§42-46:

> "42. Clearly, the evidence before the Tribunal was not perfect, but the Tribunal considered that there was enough evidence before it to reach a conclusion that [on] the balance of probabilities that there was a proposal to dismiss more than 20 employees of the Respondent, within a 90 day period including 29 April 2022.
>
> 43. In making this finding, the Tribunal has taken into account that there may be several different employers, but given the scale of the group operation in the UK, the scale of the cost cutting, the Claimant's analysis of the data, and the evidence given by the Claimant that the Respondent operated as the de facto employer of all UK staff,

> the Tribunal considers on the balance of probabilities that there was a proposal which affected more than 20 employees of the Respondent. It also notes and takes into account, in making this finding, as per Marclean, that there is an obligation to look backwards as well as forwards so that an employer who has proposed fewer than 20 redundancies and then subsequently proposes further redundancies will be caught by the section 188 obligations.
>
> 44. In relation to establishment the Tribunal makes finding [*sic*] based on the evidence of the Claimant, who states that the Respondent operated as a de facto employer for all UK staff, with a consolidated payroll, HR system, organisational chart and style of email address. The Tribunal finds that Respondent's UK operations were a single establishment.
>
> 45. Therefore, the Tribunal finds that the Respondent did propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, which included the date on which the Claimant was dismissed on 29 July 2022. As such, section 188 imposed a duty on the Respondent to collectively consult with affected employees including the Claimant. The parties are in agreement that there was no collective redundancy consultation undertaken.
>
> 46. The protected period runs from the date of the first dismissal within the relevant 90 period, which the Tribunal finds is 31 January 2022 based on the summary table at page 278."

17. The ET dealt with the remedy for the purpose of the protective award under s.189 at §§91-92. In short, it did not accept that the Respondent had a genuine and reasonable belief that the threshold numbers for triggering the duty in s.188 had not been met in the absence of any supporting evidence from the Respondent's witnesses. It concluded that there were no circumstances making it just to award less than the maximum protective award of 90 days.

18. **Unfair dismissal**. The ET addressed the factual background relating to the claim of unfair dismissal in its reasons at §§47-63. The ET's factual findings included that a decision to consolidate the teams of the Claimant and Mr De Nazareth was made in around December 2021 to January 2022. After referring to Ms Friend's evidence to the effect that the Respondent had considered but discounted placing the Claimant and Mr de Nazareth in a pool for redundancy selection, the ET stated:

> "49. Mr Luthersson's evidence, was clear that if Ms Friend had got the impression that pooling Mr De Nazareth and the Claimant had been considered and discounted by him, that she was incorrect in relation to that. Mr Luthersson's evidence was very clear about considerations in selecting Mr De Nazareth for the role. Mr De Nazareth [*this should read Mr Luthersson*] made clear to the Tribunal that, behind closed doors, he went through a process of considering who, of the Claimant and Mr De Nazareth, would be best for the role by speaking to stakeholders including Mr Steinmetz. However he did not consider creating a redundancy pool for the purposes of that selection process. One of those stakeholders with whom Mr Luthersson had discussions with preferred the Claimant for the consolidated role."

In the event, Mr Luthersson decided Mr De Nazareth should lead that team (§50).

19. Thereafter, the ET made findings about meetings and discussions that took place between the

Claimant and Mr Luthersson from 17 January 2022 onwards. It found that at a meeting on 21 January, Mr Luthersson told the Claimant that Mr De Nazareth would be leading the team in future and the Claimant said he did not want to work with him (§52). This was confirmed at a meeting on 8 February 2022.

20. At a meeting on 31 March 2022 the Claimant was told he was formally at risk of redundancy and at a meeting on 13 April 2022 the Claimant complained that the decision to make him redundant had been pre-determined.

21. The ET set out the relevant statutory provisions and summaries of some of the case-law on unfair dismissal in the context of redundancy at §§64-74. In the section applying the law to the facts, the ET noted that the parties agreed the reason for dismissal was redundancy. In essence, it held that the dismissal was unfair for two reasons: first, the Respondent had unreasonably not considered placing both the Claimant and Mr Nazareth in a pool; second, the consultation had been pre-determined, meaning that the Claimant could not adequately respond to it, and he was not given adequate information. The ET rejected a third argument and found that the Respondent had taken reasonable steps to find the Claimant alternative employment.

22. The conclusions on the "pool" and consultation are set out at §§76-79 of the ET's reasons:

> "76. The Tribunal makes a finding that the Respondent did not turn its mind to the appropriate pool for selection for the new role heading the consolidated team. The reason for this finding is Mr Luthersson's evidence, he was clear that if Ms Friend had got the impression that pooling Mr De Nazareth and the Claimant had been considered and discounted, that she was incorrect in relation to that. Mr Luthersson's evidence was very clear about considerations in selecting Mr De Nazareth for the role, but it was clear to the Tribunal that no thought had been given to the appropriate pool for selection. The Respondent simply had not turned its mind to it. Instead it had reached a decision regarding who should lead the team behind closed doors and then presented it to the Claimant as a decision which had already been made (in the meeting on 21 January 2022).
>
> 77. It is not the Tribunal's role to substitute the Respondent's decision on pooling with its own. In circumstances where the Respondent had not turned its mind to pooling Mr De Nazareth and the Claimant, the Tribunal finds this was outside the reasonable range of responses. The Tribunal has regard to the fact that the Claimant was put forward as a possible candidate for the role by Mr Luthersson in the meeting on 14 January 2022, and stated in cross examination that one stakeholder preferred the Claimant for the role. In those circumstances it was outside the range of reasonable responses not to consider the Claimant's inclusion in the pool alongside Mr De Nazareth.
>
> 78. The Tribunal finds that the decision regarding whether the Claimant's role was redundant, and that Mr De Nazareth would lead the consolidated team was determined before the meeting on 21 January 2022. It was pre-determined in the sense that Mr Luthersson had made a decision and informed the Claimant of the outcome. It was not presented at a formulative stage for feedback from the Claimant. A final decision had already been made.

> 79. The Claimant was not given any explanation as to why the combined role had been given to Mr De Nazareth. He was left in the dark regarding the basis on which the selection had been made, such as the stakeholder feedback which Mr Luthersson stated in cross examination had been taken in relation to both the Claimant and Mr De Nazareth's suitability for the new role leading the combined team. Since the decision had been pre-determined, and presented to the Claimant as already having been made, without any information as to how that decision had been reached, the Claimant could not be expected to meaningfully respond to it. He was not given adequate information on which to respond, such as being told the requirements of the consolidated role, or the basis for selection."

23. The ET summarised its conclusions at §83.

24. Finally, the ET turned to the remedy for unfair dismissal. Applying ***Polkey v AE Dayton Services*** [1988] ICR 142, it decided that if the process had been undertaken fairly there was a 65 per cent. chance that the Claimant would have remained employed by the Respondent (§88).

25. **The reconsideration decision**. The appeal to the EAT was initially stayed to enable an application for reconsideration to be made. The Respondent duly submitted a reconsideration application dated 23 January 2024, in which it set out some arguments relevant to ground 1 of the appeal, concerned with s.188 TULRCA.

26. The ET's reasons for refusing to reconsider its judgment were sent to the parties on 4 June 2024. In summary, it did not agree with the Respondent's starting point to ground 1, set out at §3 of its Notice of Appeal and, as a result, considered there were no reasonable prospects of the decision being varied or revoked.

The Legal Framework

27. The provisions in ss 188-197 of TULRCA were intended to implement the UK's obligations under the Collective Redundancies Directive, originally Directive 75/129/EEC and now Directive 98/59/EC (the "Directive"). The purpose of the Directive is to ensure greater protection for workers in the event of collective redundancies as well as harmonising the rules across the EU: see recitals (2)-(4) and ***USDAW v Ethel Austin Ltd*** [2015] ICR 675 at §62.

28. Article 1(1) of the Directive defines "collective redundancies" in these terms.

> "(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;"

29. Article 2(1) states that 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". Article 2(2) sets out details of what topics the consultation must cover, including ways and means of avoiding redundancies. The employer must provide workers' representatives with specified information so that they can make constructive proposals (Article 2(3)). These obligations apply "irrespective of whether the decision is being taken by the employer or by an undertaking controlling the employer" (Article 2(4)).

30. Employers also owe an obligation to notify competent public authorities - in the UK the Secretary of State - of "any projected collective redundancies" (Article 3(1)). The Directive is without prejudice to more favourable provisions in national law (Article 5). Member States owe a duty to ensure procedures for enforcing the obligations though, as is usual, it does not specify the nature of the remedies (Article 6).

31. Implementing Article 2(1) of the Directive, s.188(1) of TULRCA states as follows:

> "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."

The section goes on to specify the timing and content of consultation and the information which the employer must disclose. "Dismissal" for this purpose has the meaning in s.95 of the Employment Rights Act ("ERA"): see s.298 TULRCA (though dismissal on expiry of a fixed-term contract is excluded from the s.188 regime by s.282). For this purpose, "dismissal as redundant" bears the special meaning in s.195.

32. By s.188(3) of TULRCA: "In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation had already begun." In the event of "special circumstances" rendering it not reasonably practicable to comply with the duties, the employer must take such steps that are reasonably practicable: s.188(7).

33. The persons who may complain to a tribunal about a breach of s.188 are specified in s.189(1). For example, where the failure relates to the representatives of a trade union, the union brings the complaint (s.189(1)(c)); in some other cases, the complaint may be brought by any of the "affected employees", defined in s.196(3), or employees who have been dismissed as redundant. If a tribunal finds a complaint well-founded, it makes a declaration and may also make a protective award (s.189(2)). By s.189(3):

> "A protective award is an award in respect of one or more descriptions of employees—
> (a) who have been dismissed as redundant, or whom it is proposed to dismiss as

> redundant, and
> (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,
> ordering the employer to pay remuneration for the protected period."

The "protected period" is of such length as the tribunal determines to be just and equitable, subject to a maximum of 90 days: see s.189(4). Once a tribunal has made a protective award, employees of the relevant description are entitled to remuneration for the protected period (ss 190-191).

34. The obligation in Article 3 of Directive is implemented by s.193, under which an employer proposing to dismiss threshold numbers of employees within 90 days or less must notify the Secretary of State: s.193. It is a criminal offence to fail to give a notice in accordance with that section: s.194.

35. The general approach of the EAT to the reasoning of an employment tribunal is set out in the by now familiar words of Popplewell LJ in ***DPP Law Ltd v Greenberg*** [2021] IRLR 1016 at §§57-58.

The Grounds of Appeal

36. As set out above, there are four grounds of appeal, each of which encompasses additional sub-grounds, and the first ground has been amended to include the additional grounds set out at §6 of this judgment.

Ground 1: proposing to dismiss 20 or more employees within 90 days

37. Under this appeal ground, set out in §§3-9 of the amended Notice of Appeal, it is said there was no basis on which the ET could conclude there was a proposal to dismiss as redundant 20 or more employees so as to engage s.188 of TULRCA. After explaining the background, the four relevant sub-grounds are numbered (i) to (iv) in §7 of the Notice of Appeal. Below I refer to, and renumber, those sub-grounds as grounds 1(i)-(iv). I shall deal with each of those in turn, as well as the new amended grounds added to ground 1(i).

38. **Ground 1(i): retrospective counting**. In this ground, the Respondent challenges §31 of the ET reasons, in which the ET found that the Respondent "was not keeping track of the number of employees potentially affected by its redundancy proposals". It is said that the ET "put the cart before the horse", because the obligation under s.188 requires a fixed proposal to dismiss and is not based on the numbers who, viewed retrospectively, were placed at risk.

39. I do not consider this is a fair reading or criticism of §31 of the ET's reasons. The ET correctly directed itself in accordance with s.188(1)(a) of TULRCA at §32. Of most relevance to this ground, at §37 the ET stated that the "obligation for collective consultation is triggered by the proposal, not the number of individuals who are in fact dismissed" (my emphasis).

40. That the Respondent did not keep track of the employees who were in fact made redundant, as the ET observed at §31, was no more than part of the evidential mosaic, which the ET

acknowledged was "not perfect" (§42). It was part of the background to show why, in the absence of reliable evidence from the Respondent's witnesses, the ET relied on the evidence of the Claimant in inferring that there must have been a prior proposal to dismiss at least 45 employees (§30). The paragraph which is said to be erroneous is no more than a justified comment on the Respondent's lack of evidence, was not part of the ET's conclusions at §§42-46 and, when it is read in context, does not begin to provide any support for the alleged error of law. In light of the principles of ***DPP Law v Greenberg***, I reject this ground of appeal.

41. **Amended new ground 1(i): Erroneous reliance on *Marclean*.** Though tagged onto ground 1(i), this amendment, for which I have granted permission, is a completely new point. It is said that the ET misdirected itself at §39 and §43 because it treated ***Marclean*** as meaning it should "look backwards as well as forwards" when assessing whether the employer had made a proposal sufficient to trigger the thresholds in s.188. This is supported by the two further sub-grounds, (a) and (b), set out above.

42. In the following sections I (i) clarify the legal status of ***Marclean*** and how it is potentially relevant to the interpretation of s.188; (ii) consider what ***Marclean*** actually decided about the meaning of the Directive; (iii) address the effect of ***Marclean*** on the interpretation of s.188; (iv) consider the ET's self-direction and application of s.188 in light of my conclusions about the judgment in ***Marclean***. I have taken some time to address these points because some commentaries, such as the IDS Handbook on Redundancy, suggest that the decision in ***Marclean*** may lead to aggregating distinct proposals for dismissals, giving rise to a potential incompatibility between ***Marclean*** and s.188 of TULRCA. The point is not only important to the present appeal and so I have addressed it fully below.

(i) The legal status of ***Marclean***

43. ***Marclean*** was decided on 11 November 2020, prior to "IP completion day" within the meaning of s.1A(6) of the European Union (Withdrawal) Act 2018 ("EUWA") – that is, 31 December 2020. It was accordingly part of "retained EU case law" within the meaning of s.6 EUWA prior to its amendment by Retained EU Law (Revocation and Reform) Act 2023 ("REUL") to refer to "assimilated law" in place of "retained EU law". It is therefore binding on the meaning and effect of the Directive. No domestic appellate decision, however, has considered the effect of ***Marclean*** on s.188.

44. In addition, at the time of the events here, the principle of supremacy of EU law applied to the interpretation of s.188 of TULRCA by virtue of s.5 EUWA. The Explanatory Notes to s.5 of EUWA explain at §104 that principle includes the duty to interpret domestic legislation, so far as is possible, consistently with EU law in accordance with what is usually called the ***Marleasing*** duty, after Case C-106/89, ***Marleasing SA v La Comercial Internacional de Alimentacion*** [1990] ECR I-4135. Although REUL has now abolished the supremacy principle, as a result of the transitional provisions in s.22(5) of REUL this does not apply to "anything occurring before the end of 2023" - and the events here all took place before that date.

45. The upshot as regards this appeal is that the judgment of the CJEU in ***Marclean*** is binding case law authority on the meaning of the Directive and s.188 TULRCA fell to be interpreted, so far as is possible, to achieve the result of the Directive as interpreted in ***Marclean***. Quite separately from the legal position under EUWA as a result of EU law, s.188 was intended to implement the provisions in the Directive and so should be construed purposively in light of that aim in accordance with ordinary domestic principles: see ***Fry & Son Limited v Secretary of State for Housing, Communities and Local Government*** [2025] UKSC 35.

*(ii) What **Marclean** decided*

46. That brings me on to what ***Marclean*** actually decided. It is useful to start with the legislative context. Article 1(a) of the Directive, set out above, defines "collective redundancies" as meaning dismissals "effected" by the employer, and gives Member States a choice as to the number of dismissals and time periods falling within that definition. Separately, Article 2(1) triggers the obligation to consult where the employer is "contemplating collective redundancies" and Article 3 requires notification to the competent public authority of "projected" collective redundancies.

47. Under the Directive, the obligations of consultation and notification must precede the decision to terminate individual workers' contracts: see Case C-188/03, ***Junk v Kühnel*** [2005] IRLR 310 at §§36-37, 45. The employer must start those consultations "once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken" (***Akavan Erityisalojen Keskusliito v Fujitsu Siemens Computers Oy*** [2010] ICR 444, Case C-44/08, at §48).

48. The issue in ***Marclean*** concerned the meaning of "collective redundancies" in Article 1(1)(a). It appears that Spanish law, in a similar manner to Article 1 of the Directive, defined "collective redundancies" by reference to the threshold number of "terminations" taking place over a period of 30 or 90 days (CJEU §5). When the worker, UQ, was dismissed on 31 May 2018, she claimed her dismissal was null and void under Spanish law because of a breach of domestic law on collective redundancies. She argued her dismissal should be linked with other subsequent dismissals for the purpose of meeting the thresholds in the domestic legislation - Article 51 of the Workers' Statute - because it formed part of covert collective redundancies. The Tribunal Supremo had held that as a result of national case law account could only be taken of dismissals in the 90 days preceding the disputed dismissal; subsequent dismissals could not be taken into account unless the employer acted abusively, such as deliberately "staggering" dismissals (Advocate General at §14, CJEU at §§18-19).

49. In that context the referring court asked questions about the interpretation of Article 1(1)(a) of the Directive. The question from the referring court was essentially whether, for the purpose of deciding whether an individual dismissal formed part of collective redundancies within the meaning of that provision, the focus should be on the number of dismissals "effected" by the employer (i) before that dismissal, (ii) after that dismissal or (iii) in any period of 30 or 90 days in which the individual was dismissed (§23). The CJEU held that the first and second methods were incompatible with the language of Article 1(1)(a) and the purpose of the

Directive to protect workers, so that the correct method was to focus on any period of 30 or 90 days surrounding the individual dismissal during which the maximum number of workers were dismissed: see §§28-37. The answer to the questions is at §37 of the CJEU's judgment:

> "In the light of the foregoing considerations, the answer to the questions referred is that art 1(1), first subparagraph, (a) of Directive 98/59 must be interpreted as meaning that, in order to assess whether a disputed individual dismissal forms part of a collective redundancy, the reference period laid down in that provision to determine the existence of a collective redundancy must be calculated by taking into account any period of 30 or 90 consecutive days during which that individual dismissal occurred and during which the largest number of dismissals were effected by the employer for one or more reasons not related to the individual worker concerned, within the meaning of that provision."

50. On my reading, ***Marclean*** is not about when an employer is "contemplating" collective redundancies at all. It is only about the meaning of "collective redundancies" in Article 1(1)(a) and the correct method of determining whether the threshold number of redundancies has been "effected" within the relevant period. This is for the purpose of deciding whether an individual dismissal forms part of those collective redundancies. The remedies for breach of the obligations in the Directive are not restricted to those individuals whose "disputed" dismissal – to echo the language of the CJEU - falls within any particular time frame related to other dismissals (which is presumably a matter for Member States to determine under Article 6), though there was a potential unfairness to UQ if she was denied a remedy because of the restrictive approach taken in the Spanish case law to when her dismissal could form part of collective redundancies. But nothing in the CJEU's judgment in ***Marclean*** purports to question or cast doubt on the CJEU decisions on when an employer is "contemplating" collective redundancies in the future for the purpose of Article 2.

51. However, there is a suggestion in the opinion of AG Bobek that the analysis in ***Marclean*** may affect the prior question of when an employer is "contemplating dismissals". The AG rejected an argument from the Polish Government to the effect that the focus should be on the dismissals executed in accordance with the employer's plan, aggregating the first of such dismissals with any subsequent dismissals in the period of 30 or 90 days, in accordance with Articles 2-4 (§§37-38). According to the AG, once the number of dismissals effected by the employer "reaches the threshold provided for in the Directive, the rules of that instrument become applicable, regardless of the subjective intention of the employer" (§39; emphasis in original). This might be read as suggesting the duties are triggered just because of the number of subsequent dismissals and the period within which they occur, regardless of what the employer in fact contemplated in advance of those dismissals – in effect, a retrospective test.

52. I have not found the particular passage in the AG's reasoning entirely easy to follow and neither party addressed it in argument. The AG might have meant that if the employer in fact dismisses more than the threshold amount within the relevant time period, then the national court must infer as a matter of evidence that there was a prior contemplation of such dismissals. But this reading is hard to reconcile with his statements in §39 that the employer's plan "might be of evidential relevance" but is "not decisive" and the rules apply automatically,

"regardless of the subjective intention of the employer".

53. This aspect of his AG's Opinion was not picked up or endorsed by the CJEU, the judgment of which was closely focused on the interpretation of Article 1(1)(a) and the restrictive approach taken in Spanish law to when a dismissal formed part of collective redundancies. The AG's Opinion cannot override the CJEU case-law on what is meant by "contemplating" collective redundancies (an issue to which the questions in ***Marclean*** were not even directed). That depends upon the employer's contemplation of what it will do in the future; it requires that the employer in fact subjectively contemplates or plans such redundancies at the relevant time (see Case 284/83, ***Dansk v H Nielsen & Søn***, ***Maskinfabrik*** [1985] ECR 553 §17, cited in ***Akavan*** at §41, and ***Akavan*** at §§36-49). The cases on "contemplating" do not suggest that the duty in Article 2 is triggered automatically simply in virtue of the employer having subsequently "effected" the relevant number of redundancies within a relevant period[1] (though in those circumstances it will often be a very likely finding of fact that the employer was at some prior stage "contemplating" such dismissals). On the contrary: the employer "contemplates" collective redundancies in the future so long as they are envisaged to meet the relevant numerical and temporal thresholds, regardless of whether in fact the dismissals which are later "effected" meet those thresholds and regardless of when a particular "contested" individual dismissal is "effected". References elsewhere in the Directive to "projected" redundancies (see Article 2(3)(b) and Article 3) reinforce that interpretation.

54. The result is, in my judgement, that ***Marclean*** does not affect the question whether an employer is "contemplating collective redundancies" for the future within the meaning of Article 2(1). The case was not about that issue at all. The CJEU's case-law on "contemplating collective redundancies" shows that is a distinct and necessary requirement to trigger the obligations under the Directive, requiring a focus on what the employer contemplated or planned at the time for the future. If the CJEU in ***Marclean*** intended to replace this requirement for triggering the duty, and the associated case-law of the CJEU addressing it, with a new test based on an objective assessment of how many dismissals in fact are effected within a relevant period, it would have said so. The proper meaning of "contemplating" collective dismissals within the meaning of Article 2 is explained by cases such as ***Akavan***, and not ***Marclean***.

(iii) The Interpretation of TULRCA

55. The consequence of my analysis is that ***Marclean*** does not affect the meaning of "contemplating collective redundancies" in Article 2 and should not therefore be read as affecting the proper interpretation of the corresponding concept in s.188 of TULRCA, of whether an employer is "proposing" 20 dismissals within 90 days. In common with "contemplating" in the Directive, that is a question based on what the employer was "proposing" for the future which is not necessarily answered by what in fact happens

[1] Since ***Marclean***, in Case C-589/22, ***JLOG v Resorts Mallorca Hotels International*** [2024] ICR 588 the CJEU has reiterated that the consultation obligation arises once the employer contemplates or plans collective redundancies: see §32. Although this case was decided after IP completion day, I may have regard to it to the extent it is relevant to this appeal: see s.6 EUWA.

subsequently.

56. In any case, I consider the language and structure of TULRCA is clear. First, unlike the Spanish legislation, TULRCA does not define collective redundancies by reference to the number of dismissals which have been "effected" within any period. Instead, it looks to whether the employer is "proposing" to dismiss as redundant 20 or more employees within 90 days, a necessarily prospective question based on the employer's plans. Thus it applies even if fewer than 20 employees are actually dismissed or if the proposed dismissals do not occur within the envisaged period of 90 days or less but within a longer period. This interpretation is fully consistent with the objective of the Directive (and hence TULRCA) under which consultation is meant to be a means of avoiding redundancies or reducing the number of employees dismissed: so much the better if triggering the obligations results in fewer dismissals than were originally proposed.

57. Second, under TULRCA a claimant is not only able to bring a claim or recover compensation if their dismissal precedes or follows the period in which other dismissals are effected - unlike what seems to have been the Spanish law at issue in ***Marclean***. Thus a complaint can be brought under TULRCA by the persons listed in s.189(1), including in some circumstances by any of the "affected employees", meaning those who "may be affected by the proposed dismissals or who may be affected by measures taken in connection with such dismissals" (s.196(3)). Those persons need not be dismissed. As to remedy, a protective award may be made for employees (i) "who have been dismissed as redundant or it is proposed to dismiss as redundant" and (ii) "in respect of whose dismissal or proposed dismissal" the employer has failed to comply with s.188 (s.189(3)). The latter phrase presumably means the employee must fall within the scope of those whom the employer was proposing to dismiss; but it is not a precondition of these provisions that an individual employee be effected within any particular time frame in relation to other dismissals (cf. the Spanish legislation in ***Marclean***). If the concern of the CJEU in ***Marclean*** was that the employee would be denied a remedy by the Spanish rules on what dismissals formed part of the collective redundancies, that is not an issue which arises under TULRCA.

58. Third, I do not consider it is possible to construe s.188 of TULRCA other than as requiring a focus on what the employer is "proposing" at the time for the future. It cannot simply be deduced from the fact that 20 or more dismissals occur within any period of 90 days that the employer, at some stage, was or must have been "proposing" all those dismissals. For example, a second tranche of dismissals may be proposed more than two months after a first tranche, and the second tranche may result from events which were entirely unforeseeable when the employer proposed the first tranche. To contend that, viewing matters in the light of later events, the employer was "proposing" all the dismissals when it proposed the first tranche is to stretch "proposing" beyond its breaking point. Nor is a different result permissible by reliance on the more radical ***Marleasing*** duty, even by reading words into the provision. The ***Marleasing*** approach reaches its limits when the proposed interpretation goes against the

underlying thrust or fundamental features of the legislation.[2] The fundamental feature or thrust of s.188 is that it looks to what the employer was in fact "proposing" at the relevant time for the future, not to how many dismissals were in fact effected or proposed when matters are viewed retrospectively.

59. Fourth, the ET's interpretation of ***Marclean*** will also produce a direct conflict with s.188(3) in some circumstances. Viewed in isolation, what the employer is currently proposing may not reach the threshold numbers in s.188 TULRCA; but "looking backwards" from the present and adding dismissals which were proposed in the past may lead to crossing the threshold. Where the employer has already begun statutory consultation in respect of the past dismissals, the result is in direct conflict with s.188(3), by which "no account" shall be taken of employees in respect of whose dismissal statutory consultation has already begun.

60. In summary: the consistent and clear focus of these provisions is on what the employer is "proposing" for the future. A tribunal cannot simply deduce the answer to that statutory question from the total number of employees dismissed, or proposed to be dismissed, within any period of 90 days by looking backwards and forwards, regardless of the circumstances. Rather, in applying s.188 a tribunal should focus on the statutory question of whether an employer was "proposing" to dismiss the relevant numbers at the material time. It should not be distracted by concepts from ***Marclean***, directed to answering a question about the meaning of a very different concept in Article 1(1)(a) Directive and its impact on Spanish law with no clear parallels in TULRCA.

61. There are two further points to make, however. First, what in fact happens subsequently will often be highly relevant evidentially to what the employer was "proposing" in the past. For example, a tribunal should scrutinise carefully the evidence where an employer in fact dismisses 20 or more employees within a period of 90 days but denies this was something it was at any stage "proposing" in the past. Dismissals do not happen by accident. Tribunals should be astute to see through artificial divisions of dismissals into batches, deliberate delaying or staggering of dismissals to take advantage of s.188(3) or other means of circumventing the important duties in s.188. If, as the employee alleged in ***Marclean*** (see AG at §8), the employer was engaged in "covert" collective redundancies of which her dismissal formed part, tribunals have the tools to detect these and TULRCA provides the means of giving claimants a proper remedy. Approaching the evidence robustly and realistically, and bearing in mind the protective purpose of the legislation, a tribunal may legitimately infer an employer was at some stage "proposing" sufficient collective dismissals to trigger the duties from the fact of their subsequent occurrence.

62. Second, the present participle of "contemplating" in the Directive or "proposing" in s.188(1) of TULRCA is not so inelastic that it is tied to a single moment in time. The subsection does not refer to a single decision, nor to "a proposal". An employer who proposes, say, six

[2] See the convenient summary of the relevant principles in ***Vodafone No.2 v Revenue and Customs Commissioners*** [2010] Ch 77 at §§37-38.

dismissals on Monday, seven on Tuesday and eight on Wednesday may readily be said to be "proposing" 21 redundancies that week. Tribunals should not give "proposing" a narrow meaning in the temporal sense, in accordance with the purpose of these provisions to protect workers. But in every case it will be a question of fact for the ET to decide whether the employer was, at some stage, "proposing" the threshold number of dismissals.

(iv) The ET judgment

63. This finally brings me back to the ET's judgment. The ET's interpretation of the effect of ***Marclean*** is set out at §39 of its reasons, cited at §15 of this judgment. It read ***Marclean*** as meaning that an employer proposing redundancies "must look backwards and forwards for 90 days to determine whether there are sufficient redundancies to trigger the collective consultation obligations", so that an "an employer who has proposed fewer than 20 redundancies and then subsequently proposes further redundancies within 90 days (making the total 20 or more), should as far as possible consult collectively" with both groups. It made a similar statement at §43 of its conclusions. It seems it meant that, looking backwards and forwards from a particular proposal, the duty to consult is automatically triggered if the combined effect of that proposal and any earlier or later proposals is 20 or more proposed redundancies within any period of 90 days. The ET did not explain how this interpretation fits with the word "proposing" in s.188.

64. For the reasons set out above, I consider that the ET's interpretation of ***Marclean*** was misplaced. Properly analysed, ***Marclean*** is not about when an employer is "contemplating collective redundancies" within the meaning of Article 2(1) of the Directive and nor, therefore, should it be read as affecting the interpretation of related concept of "proposing" in s.188 of TULRCA. In any event I do not consider it is possible to interpret the provisions in ss 188-198 of TULRCA in the way the ET thought ***Marclean*** mandated. The correct focus of those provisions is on whether the employer at some stage was "proposing" collective redundancies for the future. The ET therefore erred in law on this issue of statutory construction.

65. In the event, at least in her oral submissions, I did not understand Mrs Hornblower to dispute ***Marclean*** did not affect the meaning of "proposing to dismiss" 20 or more employees within a period of 90 days in s.188. Her submission, however, was that the ET correctly directed itself as to what was meant by a proposal (see its reasons §§37-38) and had made a separate, distinct finding that there was a proposal which crystallised in January 2022 to dismiss more than 20 employees within a period of 90 days: see especially §42.This was not an exercise which involved separate, staggered proposals. Any misdirection in §39 and §43, she argued, could not infect this prior and distinct finding.

66. The question for me is whether I am able to conclude that the ET's legally erroneous approach in §§39 and 43 of its reasons cannot have affected the result and was immaterial or, based on the ET's findings of fact, the inevitable result would have been the same: see Laws LJ in ***Jafri v Lincoln College*** [2014] ICR 920 at §21. Although I see much force in Mrs Hornblower's submission, the difficulty it faces is that in §43 the ET was explicit that it had taken "into

account" in "making this finding" - which I take as a reference to the finding in §42 that there was a proposal in, presumably, January 2022 - the approach the ET thought ***Marclean*** required. No doubt it was open to the ET to decide on the evidence before it that in around January 2022 or at some other time the employer was "proposing" to dismiss more than 20 employees within a 90-day period. But I cannot entirely discount the possibility that the ET erroneously looked "backwards and forwards" in making this finding or in reaching its conclusion; and, if it had not done so and had instead simply focused on whether the employer in light of the evidence was "proposing" at some stage to dismiss 20 or more employees within 90 days, a different finding was a possibility.

67. In any case, given my conclusion on ground 1(iii) below, relating to "de facto" employment, the decision of the ET on s.188 cannot stand and the question will have to be remitted to the ET to decide if the Respondent was "proposing" the threshold number of dismissals of its own employees. That question should be resolved in accordance with the correct approach I have outlined above.

68. **Amended new ground 1(i): ET disapplied or quashed an enactment, contrary to EUWA 2018.** This is the second aspect to the Respondent's new ground, that the ET's invocation of ***Marclean*** amounted to the "disapplication or quashing of an enactment", preluded by §3 of Schedule 1 to EUWA 2018 (since repealed by s.4 of REUL but only as regards acts occurring after the end of 2023). Reference in this ground is made to s.188(3) of TULRCA, which I have set out at §32 above.

69. At the material time, §3 of Schedule 1 to EUWA stated as follows:

> "There is no right of action in domestic law on or after [IP completion day]1 based on a failure to comply with any of the general principles of EU law.
> (2) No court or tribunal or other public authority may, on or after [IP completion day]1 -
> (a) disapply or quash any enactment or other rule of law, or
> (b) quash any conduct or otherwise decide that it is unlawful,
> because it is incompatible with any of the general principles of EU law."

70. For this purpose, "general principles" of EU law include matters such as non-retroactivity, proportionality or some fundamental rights such as the right against discrimination: see the Explanatory Notes to EUWA 2018 at §§53, 166-167. Prior to Brexit, such general principles could be relied upon to disapply conflicting provisions of domestic law. An example is ***Innospec v Walker*** [2017] ICR 1077 in which the Supreme Court relied upon the general principle of non-discrimination to disapply §18(1)(b) of Schedule 9 the Equality Act 2010: see Lord Kerr at §§73-74

71. But here the ET did no such thing. It never purported to rely on any general principles of EU law (and nor did the Claimant) and it never purported to disapply or quash any enactment or statutory provision, such as s.188(3) of TULRCA (which in any case was inapplicable on the facts because no collective consultation ever began here).There is nothing in this point.

72. **Ground 1(ii): impermissible focus on "de facto" employer**. Under this ground it is said that at §§43 and 44 of its reasons, in which the ET referred to the Respondent operating as the "de facto" employer for all UK staff, the ET impermissibly aggregated individuals in the group of 45 who were employed by discrete legal entities.

73. TULRCA s.188 applies only to "employees", defined in accordance with s.295 as meaning individuals who work under contracts of service of apprenticeship. The "employer" for the purpose of s.188 means "the person by whom the employee is (or, where the employment has ceased, was) employed": s.295(1). Although these provisions contain no definition of "employment" (contrast s.230 ERA which defines "employment" as regards an employee as meaning "employment under a contract of employment"), it was common ground before me that the definition of "employer" within the meaning of s.295 TULRCA requires a contract between the employee and the putative employer.

74. It follows that in the context of a corporate group there must be a contractual link between the employees whom it is proposed to dismiss and the corporate employer which is subject to the duty under s.188: see ***E Green & Sons*** at 357D-F where, in construing the equivalent provisions in the predecessor legislation, the EAT pointed out that the definition of "employer" applying to the provisions on collective consultation did not extend to associated employers. The same must apply to s.188 of TULRCA, which is a consolidating statute. Moreover, it is only the other party to the contract – the employer - which may dismiss the employees in accordance with the definition of "dismiss" in s.298 of TULRCA (which adopts the definition in s.95 of ERA).

75. The parent Directive embraces the broader EU concept of "worker", which can extend to those in an "employment relationship" with their employer: see ***Balkaya v Kiesel*** [2015] ICR 1110. No argument was run here that the workers whom it was proposed to dismiss were in an "employment relationship" with the Respondent, even if they had no contract with it. But in any case, such a path appears to be blocked by ***Akavan***. There, the CJEU held that the Directive does not restrict the freedom of a corporate groups to organise their activities as they see fit and places the obligation to consult with worker representatives and notify the relevant authority on the company which employs the workers, not the parent company: see ***Akavan*** at §§59,62,65. By virtue of Article 2(4) of the Directive, the obligation may be triggered by a decision of the parent company or the undertaking which employs the workers (***Akavan*** §62). But, according to the CJEU, the obligation itself "falls on the subsidiary which has the status of employer once that subsidiary, within which collective redundancies may be made, has been identified" (§65). In focusing on the corporate body which employs the workers, the Directive and domestic law appear to be in harmony.

76. Consequently, I consider the ET misdirected itself at §§43 and 44. Although it cited s.295 of TULRCA at §35 and the EAT's judgment in ***E Green & Sons*** at §36, it incorrectly applied a concept of "de facto" employment in its conclusions, inconsistent with a focus on whether there was a contractual link between the Respondent and the relevant employees whom it was proposing to dismiss. The ET should have asked itself whether the Respondent was

proposing to dismiss as redundant 20 or more employees employed under contracts of employment with it.

77. I did not understand Mrs Hornblower in the end to dispute this. Instead, she pointed to what she described as the "paucity" of evidence before the ET that there was more than one employer which, she said, amounted to little more than some contracts of employment and a short reference in the statement of Ms Friend. However, it seems there was at least some evidence that, of the employees among the 45 relied upon by the Claimant, some were or might have been employed by different employers, such as Micro Focus Software Ltd ("MFSL") and Autonomy Software Ltd ("ASL"), to which Mr Milsom referred in his closing submissions to the ET (the example given in argument was of a Ms Butcher whom the Respondent said was employed by ASL). The Respondent's summary table, though found to be unreliable, also indicated that some of the employees made redundant were employed by ASL or MFSL. Moreover, the ET itself recognised that there "may" be several different employers at §43, without specifying how many employees were not employed by the Respondent, how many were employed by it, or whether discounting those with different employers would still mean the Respondent must have been proposing to dismiss at least 20 of its employees within 90 days.

78. In these circumstances, I am not able to conclude that the ET's misdirection cannot have affected the result nor what the inevitable result would have been if the ET had asked itself and addressed the correct legal question: see ***Jafri*** above. I therefore allow this ground of appeal.

79. **Ground 1(iii)**: **no single proposal to dismiss**. Under this ground, the Respondent states (Notice of Appeal, §7(iii)):

> "Section 188 TULR(C)A 1992 could not in any event apply to the restructure exercise in view of the Claimant's concessions. The means of reducing costs were delegated to each department. There was never a fixed headcount reduction. The range of options open to each department were necessarily individual rather than collective. The collective consultation requirements in s188(1B)-(7B) could not be performed in those circumstances. It is for this reason that a single proposal to dismiss as 20 or more is a pre-requisite for the obligations under s188 TULR(C)A 1992. There was never any such proposal in respect of the restructure..."

80. There are several strands to this ground of appeal, which raises challenges to various factual findings of the ET. They need some unpacking.

81. The supposed "concessions" made by the Claimant were set out at §3 of the Notice of Appeal. They include contentions that the Claimant conceded that (i) the Respondent had fully complied with its disclosure obligation; (ii) the Respondent did not have an overall redundancy proposal imposed from above; (iii) it was up to each "business" to decide how to make the costs saving; (iv) Mr Luthersson's evidence that Respondent never had a proposal to delete roles from above was true; and (iv) some of the 45 employees were not made redundant. The ET addressed these in its reconsideration decision. Some are not established

as conceded at all. For example, the ET did not accept Claimant did concede, as alleged, that Respondent had complied with its disclosure obligation and nor did it accept that Mr Luthersson's evidence set the whole picture.

82. The next strand of this ground makes various assertions: for instance, that it was conceded that means of reducing costs were delegated to each "department" and there never was a proposal from above. In its reconsideration decision the ET accepted this was a fair representation of the position before the ET: see §21. However, it went on to explain the position in more detail: that what had been imposed from above were costs savings of $400-500 million, that individual "functions" were tasked with making savings, it was inevitable that redundancies would follow and by January 2022 this had crystallised into a proposal to dismiss more than 20 employees. The ET's written reasons correspond with this: see §§16, 17, 42. Those findings cannot be said to be perverse.

83. More fundamentally, I do not accept the legal submission integral to this ground. Even taking the Respondent's case at its highest, and assuming that the uncontested evidence was that each department within the Respondent made an individual decision of how many employees would be made redundant and there was no proposal from above, I do not accept that this meant s.188 TULRCA could not apply as a matter of law.

84. The starting point is that s.188 applies where an "employer" is proposing to dismiss the relevant numbers of employees, just as the Directive applies where the "employer" contemplates collective dismissals (Article 2(1)). In the present context, it is the employer alone that by definition can terminate contracts of employment for the purpose of the statutory concept of dismissal because it alone is party to the contract of employment.

85. Second, neither s.188 nor Article 2 of the Directive refers to any need for a single, unified proposal. Instead, the language indicates that it is sufficient if the employer is "proposing" (s.188) or is "contemplating" (Article 2) dismissals of the relevant number within the relevant time frame. A corporate employer can only act through individuals. But even if each department had some autonomy in deciding how many workers it was proposed would be dismissed, each department must necessarily have been proposing dismissal by the employer, the other party to the contract of employment which alone had the power to dismiss. An employer as an entity may properly be said to be "proposing" dismissals where that is the result of a combination of separate decisions by departments or individuals within that employer.

86. Third, the Respondent's interpretation would undermine the purpose of the Directive and hence TULRCA to protect workers: see recital (2) to the Directive and ***USDAW v Ethel Austin***, referred to above. If the Respondent is correct, it has found a simple way of avoiding the obligations of the Directive and TULRCA. So long as the employer delegates decisions about the number of redundancies to individual departments - or perhaps individual managers - and each department decides to make redundancies that fall beneath the relevant numerical threshold, the obligation to consult can never arise because there will never be a single, unified

"proposal" to make the required number of redundancies. It is an open invitation to render illusory the important obligations to consult with appropriate representatives and to inform the Secretary of State.

87. Fourth, the Respondent's interpretation would provide a means of sub-dividing dismissals beyond that already provided for in TULRCA and the Directive. Both the Directive and s.188(1) apply where an employer is proposing to dismiss 20 or more employees "at one establishment" within the prescribed period. Where redundancies occur across several different establishments, the numbers are not aggregated. The ET here found that the Respondent's UK operations were a single establishment (§44) and that finding is not challenged in the grounds of appeal (as Mr Milsom accepted in oral submissions). The Respondent's submission entails, however, a further means of disaggregation - that is, by department - not found in the language of s.188 or the Directive.

88. Fifth, I do not accept Mr Milsom's argument that in what he describes as such "fragmented" circumstances, the duties to consult are unworkable or have no sensible application. It is the responsibility of the employer to assess the employees potentially affected by the dismissals or measures taken in respect of them: see s.188(1). It cannot escape these duties by delegating the decisions to local departments or managers. If two separate departments or two individual managers within an employer each decide on the same day that the employer will dismiss 15 workers within the next 90 days, the obligations to consult are triggered (or at least it is open to an employment tribunal to find that they are).

89. For all these reasons, I reject this ground.

90. **Ground 1(iv): no adequate reasons to reject Respondent's evidence**. Under this ground, the Respondent contends that the ET had "full information" about those placed at risk of redundancy within the Respondent which, it says, did not attain 20 and the "ET provided no or no adequate reasons to reject this evidence".

91. I do not follow this ground. The ET carefully explained why it did not accept the Respondent's evidence, including Mrs Friend's evidence that only 20 employees were dismissed, at §§23-31 of its reasons. The ET was not obliged to refer to all the evidence before it: see ***Greenberg***, above, per Popplewell LJ at §57. It fully explained why it preferred the Claimant's evidence and why it viewed the Respondent's evidence was unsatisfactory. This ground has little to commend it.

Ground 2: the protective award

92. This ground is that the ET erred in making a 90-day protective award because it failed to take into account that the Respondent's default was not deliberate but the product of a genuine belief that the s.188 duty did not apply. It is further contended that the ET's decision was inadequately reasoned.

93. The protective award is based on the length of the "protected period" within the meaning of

s.189(4). It begins on the date on which the first of the dismissals to which the complaint relates took effect, and is of such length as the tribunal considers just and equitable "having regard to the seriousness of the employer's default", up to a maximum of 90 days. The leading authority on the meaning of s.189(4) is the Court of Appeal's judgment in ***Susie Radin v GMB*** [2004] ICR 893. The "required focus is not on compensating the employees but on the default of the employer and its seriousness", intended to ensure an effective sanction for breach of the employer's obligation (Peter Gibson LJ at §26). According to Peter Gibson LJ at §45:

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

94. The ET provided an appropriate paraphrase of the law at §41 of its reasons. It noted that no collective consultation had been undertaken (§45). In the absence of any witness from the Respondent to explain that it had a genuine and reasonable belief that the threshold was not met, it decided there were no circumstances justifying a departure from the maximum period (§§91-92).

95. Contrary to how it was put in the Notice of Appeal, the ET did not ignore the Respondent's argument that its default was based on a genuine belief that the obligations under s.188 did not arise. Rather, it decided not to accept that mitigation without witness evidence to show that the Respondent in fact held such a genuine belief - a conclusion it was entitled to reach. The ET has provided perfectly sufficient reasons for its conclusion. I reject this ground of appeal.

Ground 3: **the "pool" in unfair dismissal**

96. This ground is a challenge to the ET's conclusion and reasoning in relation to unfair dismissal, and the ET's decision that "no thought had been given to the appropriate pool for selection" (§76). There are several strands to this ground, set out at §§11-17 of the Notice of Appeal, under the overarching contention that the ET fell into the "substitution mindset" or its decision was perverse (Notice of Appeal, §13). There are four sub-grounds amplifying this ground which I address in turn below.

97. The "pool" is a shorthand expression for the group of employees placed at risk of redundancy and to whom (fair) selection criteria are applied for the purpose of deciding who among them

should be made redundant. The principles to be applied for the purpose of s.98(4) of ERA when considering the "pool" were summarised by the EAT in ***Capita Hartshead Ltd v Byard*** [2012] ICR at 1256, §31.

> "(a) 'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne-Wilkinson J in ***Williams v Compair Maxam Limited*** [1982] IRLR 83 [18];
> (b) '[9] … the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in ***Hendy Banks City Print Limited v Fairbrother and Others*** (UKEAT/0691/04/TM) ;
> (c) 'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem' (per Mummery J in ***Taymech v Ryan*** [1994] EAT/663/94);
> (d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that
> (e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

98. The alleged unfairness upon which the Claimant relied was that Mr De Nazareth was given the consolidated role before commencement of the redundancy process and the Respondent failed to consider identifying a "pool" for selection which should have included both him and the Claimant: see issues summarised at §6 of the ET's reasons. Based on Mr Luthersson's evidence to which it had referred at §49, the ET decided at §76 that the Respondent "did not turn its mind to the appropriate pool for selection" and "no thought had been given to the appropriate pool for selection", echoing what it had found at §49.

99. The first sub-ground, at §14 of the Notice of Appeal, is that the only role to be removed was that of the Claimant, whereas the role of Mr De Nazareth would continue with the added responsibilities of Business Manager. It is said that Mr De Nazareth's role was not at risk, so that the ET "erred in concluding that failing to place Mr De Nazareth at risk of redundancy via a pool made the Claimant's dismissal unfair". In effect, Mr Milsom sought to contend that a "pool" of one fell within the range of reasonable responses - see e.g. ***Wrexham Golf Co Ltd v Ingham***, UKEAT/0190/12/RN - and the ET had fallen into the substitution mindset.

100. I do not accept this ground. First, the ET correctly directed itself in accordance with the principles in ***Capita Hartshead*** at §71, emphasised that it must not substitute its decision for that of the employer at §72, and was clear that an employer who adopts a pool of one does not necessarily act unreasonably, referring to ***Wrexham Golf Club***, at §73. Second, in his oral submissions Mr Milsom conceded that he did not and could not challenge the ET's finding that the Respondent failed to consider creating a redundancy pool. Third, the ET expressly decided at §77 that it was outside the range of reasonable responses not to consider the

inclusion of Mr De Nazareth in a pool, referring to the fact that one stakeholder thought the Claimant was a better candidate. The pool is not necessarily restricted to employees doing the same job or similar work as the claimant, as cases such as ***Taymech*** recognise, and the ET's decision it should encompass Mr Nazareth cannot be characterised as perverse. The assertions in §14 of the Notice of Appeal do not show that the ET misapplied the relevant principles and its reference to the range of reasonable responses at §77 shows it had them firmly in mind.

101. The second sub-ground, at §15 of the Notice of Appeal, is that the ET's findings were "contradictory and therefore perverse" because the Respondent had given consideration to the Claimant leading the team (see §49), so that it was "not open to the ET to conclude that the Respondent 'did not turn its mind to the appropriate pool for selection'". However, the ET's finding at §49, supported by Mr Luthersson's evidence, was that he did not consider creating a redundancy pool, so that there is no inconsistency with the ET's conclusion at §76. Moreover, as I have already mentioned, in his oral submissions Mr Milsom accepted he could not go behind that express finding, with the consequence that this ground of appeal evaporates.

102. The third sub-ground, at §§16 of the Notice of Appeal, is that the ET failed to consider relevant factors which "Mr Luthersson considered when placing the Claimant at risk and thus adopting a 'pool of one'". Reference is made, for example, to the additional responsibilities of Mr De Nazareth, the 23 employees directly and indirectly reporting to him, and his higher position than the Claimant in the corporate hierarchy.

103. As I have already stated, a tribunal is not required to refer to all the evidence before it, and nor it is legitimate to infer from a failure to refer to an item of evidence that the tribunal did not take it into account. The ET referred to the different teams of the Claimant and Mr De Nazareth at §13-15, observing that at one time the Claimant had 30 employees reporting to him and the fact that Mr De Nazareth was a director. It was not required to address all the evidence about the differences between their roles and there is no challenge to the adequacy of the ET's reasons. This ground is, in essence, a disguised perversity appeal which does not cross the high threshold for such a challenge.

104. The fourth sub-ground is that on the ET's own findings the Claimant stood no more than a "small chance" of obtaining the consolidated role - see §86 of the ET's reasons - so that the ET substituted its views on the need for a pool. Mr Milsom submitted that it was "overwhelmingly likely" that Mr De Nazareth would be retained if the Respondent had included him in a "pool" of those at risk of redundancy, so that the employer could reasonably have taken the view that it would be futile to require the creation of such a pool: see ***Duffy v Yeomans & Partners*** Ltd [1995] ICR 83 per Sir Roger Parker at 10.

105. The speeches of Lord Mackay and Lord Bridge in ***Polkey*** provide the foundation for this submission; they indicate that a tribunal might decide that a reasonable employer could decide that a procedural step which would normally be appropriate would be utterly useless or futile and could therefore dispense with it: see Lord Mackay at 153E-G, Lord Bridge at 162-3. But the decision whether a particular procedural step is useless or futile is very much a question

for the employment tribunal. As it was put by Lord Mackay this "is a matter for the [employment] tribunal to consider in light of the circumstances known to the employer at the time" (153F-G).

106. Even assuming that the Claimant stood only a "small chance" of obtaining the consolidated role in the event that the Respondent had adopted a fair pool and applied a fair selection process to a pool of two, that falls far short of showing that it was impermissible of the ET to decide that such a step ought reasonably to have been taken for the purpose of s.98(4). It provides no sufficient basis for contending that the ET was bound to have found that it was an "utterly useless" or "futile" procedure to have adopted. A 10% chance is far from a foregone conclusion, the information before the Respondent at the time was that one stakeholder considered the Claimant was the better candidate and no objective selection process had taken place. In those circumstances the ET was entitled to decide that not placing Mr De Nazareth in a pool of those at risk of redundancy fell outside the range of reasonable responses.

Ground 4: Errors in Approach to Inadequate Consultation

107. This is challenge to the ET's second reason for finding the Claimant's dismissal to be unfair, that the Respondent did not adequately consult with the Claimant. It is contended that this finding "was infected by the same errors as Ground Three and/or inadequately reasoned".

108. Individual consultation is almost invariably an aspect of fairness in redundancy exercises, as underlined by Lord Bridge in ***Polkey***. It takes on increased importance where there is no collective consultation, as here. For this purpose, fair consultation bears close similarity with the parallel public law concept. It means (i) consultation should take place when proposals are at a formative stage, (ii) adequate information upon which to respond; (iii) adequate time in which to respond; and (iv) conscientious consideration by the decision-maker of the responses (see Glidewell LJ in ***R v British Coal Corporation ex parte Price*** [1994] IRLR 72 at §24, cited by the ET at §69). Individual consultation in a redundancy exercise should ordinarily meet those standards: see ***Rowell v Hubbard Group Services Ltd*** [1995] IRLR 195 at §§15-16. However, it is ultimately a question of fact and degree for the tribunal to assess whether, examining the overall picture, consultation was so inadequate as to render the dismissal unfair: ***Mugford v Midland Bank*** [1997] ICR 399 at 406F-407A.

109. No criticism is made of the ET's summary of the legal principles at §§67-70 of its reasons. The ET's reasons for finding the consultation to be unfair are set out at §§78-79, cited above at §22. It decided, for example, that the decision that the Claimant would be made redundant was made before a meeting between him and Mr Luthersson on 17 January 2022, following Mr Luthersson's decision that Mr De Nazareth would lead the consolidated team, so that there was no consultation at a formative stage. It made other criticisms of the consultation process at §79, such as that the Claimant had no adequate information about the selection process or how the decision had been made, with the consequence that he could not meaningfully respond in the process.

110. The first element of this ground is parasitic on ground 3 above, which I have rejected and so it falls away. In any case, I consider ET's reasons at §§78-79 about the inadequacy of the consultation were reasons independent of its conclusions on the pool for finding the Claimant's dismissal to be unfair.

111. Nor is there anything in the second aspect of this ground, that the ET's reasons were inadequate. The fact that a number of meetings took place with the Claimant at which he was given some information, and to which the ET referred at §§50-63 of its factual findings, does not begin to undermine the ET's reasons at §§78-79 for concluding that the consultation was inadequate. Nor was the ET required to refer to all the evidence about what was said at those meetings as part of its duty to give reasons. The Respondent knows why it lost on this point, as clearly explained by the ET at §§78-79 of its reasons.

Conclusion and Disposal

112. My conclusions are as follows:

(1) I allow the appeal on amended ground 1(i) on the basis that the ET misdirected itself at §39 and §43 when it interpreted ***Marclean*** as meaning it should "look backwards as well as forwards" when assessing whether the Respondent was proposing to dismiss 20 or more employees in a period of 90 days for the purpose of s.188. Had the ET correctly directed itself and focused on the statutory question of whether the Respondent at some stage was "proposing" the threshold number of dismissals within the relevant time, it is possible the ET would have reached a different result, meaning this matter needs to be remitted.

(2) I allow the appeal on ground 1(ii): at §§43-44 of its reasons, the ET wrongly considered whether the Respondent was operating as the "de facto" employer, when it should have focused only on those employees who had contracts of employment with the Respondent and whom it was proposed to dismiss. It cannot be said that no other result was possible, so this question too will need to be remitted.

(3) All other grounds of appeal are dismissed.

113. When a copy of this judgment was sent to the parties in draft, they were asked for brief submissions on remission. The parties are agreed that the grounds upon which this appeal has been allowed should be remitted to the same ET. It will be for the ET to decide how to address the two remitted issues under s.188 TULRCA, including whether it considers new evidence is necessary or appropriate on those questions.

114. The only disagreement between the parties concerns the scope of the remission. The Claimant contends that the ET should only decide whether the duty under s.188 was triggered or not. If the duty was triggered, the existing 90-day protective award made by the ET should stand; to allow otherwise would undermine my rejection of ground 2 of the appeal against the quantum of the protective award. Against that, the Respondent submits that, in the event the ET decides

the s.188 duty was triggered, it should be allowed to reassess quantum in light of its findings. It might decide, for example, that the number of employees whom the Respondent proposed to dismiss was lower than it originally held or it might reassess the Respondent's argument that it reasonably believed the threshold was not met.

115. Mr Milsom does not seek to contest on remission the ET's finding, based on agreement between the parties, that no collective consultation as required by s.188 took place (§45). Nor does he seek to challenge the ET's conclusion at §91, that without reliable witness evidence from the Respondent the ET was not prepared to find the Respondent had a genuine and reasonable belief that the thresholds in s.188 had not been met. However, in assessing the length of the "protected period" in s.189(4), tribunals have a discretion to do what is just and equitable and must focus on the seriousness of the employer's default. While the judgment in ***Susie Radin*** confirms that "a proper approach" where there has been no consultation is to start with the maximum period and only reduce it is there are mitigating circumstances justifying a reduction, Peter Gibson LJ also emphasised the "wide discretion" tribunals have in this area (§45). In that light, if the ET decides the Respondent was in breach of s.188 TULRCA on remission, it is possible that its new findings might affect the exercise of its discretion as to the appropriate protective period and it is not inevitable it would reach the same conclusion. Accordingly, in those circumstances, I consider it is fair and appropriate that the ET should reassess the length of the protected period in accordance with s.189(4) of TULRCA and the guidance in cases such as ***Susie Radin*** and following submissions from the parties.