



Neutral Citation Number: [2010] EWCA Civ 1223

Case No: A2/2009/1179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mrs Justice Slade, Mr D. Norman and Mrs R. Chapman
Case Nos: UKEAT/0328/08/CEA; UKEAT/0329/08/CEA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2010

Before :

LORD JUSTICE LAWS
LORD JUSTICE HOOPER
and
LORD JUSTICE RIMER

Between :

THE UNITED STATES OF AMERICA
- and -
CHRISTINE NOLAN

Appellant

Respondent

Mr John Cavanagh QC (instructed by **Nabarro LLP**) for the **Appellant**
Mr Richard Lissack QC and **Mr Mark Mullins** (instructed by **Thompsons, Solicitors**) for
the **Respondent**

Hearing dates: 24 and 25 March 2010

Approved Judgment

Lord Justice Rimer :

Introduction

1. This is the judgment of the court.
2. The appellant is the United States of America ('the USA'). The respondent is Christine Nolan. The proceedings arose out of a decision by the Secretary of the US Army to close a US Army base at Hythe, Hampshire known as RSA Hythe. The activity formerly carried on there was the repair of watercraft and other equipment used by US Forces on military operations. The closure took place on 30 September 2006 and resulted in the redundancy of some 200 civilian employees.
3. Mrs Nolan was one of them. She brought proceedings against the USA in the Southampton Employment Tribunal under the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act') for compensation by way of a 'protective award'. She claimed to sue as an 'employee representative' on behalf of the redundant employees. Her complaint was that the USA had failed to consult with representatives of the civilian workforce in accordance with its obligations under section 188 of the 1992 Act; in particular, that it had not so consulted before, and about, taking the operational decision to close the Base.
4. By a liability judgment sent to the parties on 6 February 2008, the employment tribunal (Employment Judge Guyer, Mrs S. Foulser and Mr W.M. Heckford) upheld both (i) Mrs Nolan's claim to be an 'employee representative' for the purposes of the 1992 Act and (ii) her claim that the USA had failed to discharge its consultation obligations. By a remedy judgment sent to the parties on 16 April 2008, the tribunal made a protective award in respect of all United Kingdom citizens who were civilian employees at the Base on 29 June 2006 (when the redundancy notices were issued) and set the protected period at 30 days.
5. The USA appealed to the Employment Appeal Tribunal against both limbs of the liability decision and also against the remedy decision. Its arguments on liability were (a) that as a foreign sovereign government it had no obligation, in advance of a decision to close a military base, to consult with the civilian workforce about the reasons for its closure; and (b) that the tribunal had anyway been wrong to find that Mrs Nolan was an 'employee representative' entitled to bring the claim. By its order of 15 May 2009, the appeal tribunal (Slade J, Mr D. Norman and Mrs R. Chapman) allowed the appeal under point (b) to the extent of remitting to the same tribunal for re-hearing the question of Mrs Nolan's entitlement to bring the claim. It otherwise upheld the tribunal's decisions on liability and remedy.
6. The USA's appeal to us is against the appeal tribunal's order. It repeated the argument that, as a foreign sovereign state, it had no such consultation obligation as the tribunals below had held. It also sought to pre-empt the need for that argument by raising (without objection) the new point, said to be supported by a decision of the Court of Justice of the European Union ('the ECJ') in 2009, that anyway no employer has an obligation to consult with its employees about a proposed operational decision to close a workplace that will lead to redundancies: it is said that the consultation obligation only arises *after* the employer has made such decision and is then proposing to dismiss the employees as redundant. If wrong on both points then, as to

Mrs Nolan's status to bring the claims, the USA argued that the appeal tribunal should itself have decided that she was not an 'employee representative'; alternatively, that any remission of that question should not have been to the same tribunal but to a differently constituted one.

7. The remainder of this judgment is in seven sections which will (i) set out the material provisions of the Collective Redundancies Directive; (ii) set out the material provisions of the 1992 Act which gave domestic effect to that Directive; (iii) summarise the facts found by the employment tribunal; (iv) explain the course of the proceedings before the employment tribunal and its reasoning in its liability and remedy judgments; (v) summarise the appeal tribunal's decision; (vi) summarise the decision of the Employment Appeal Tribunal in *UK Coal Mining Ltd v. National Union of Mineworkers (Northumberland Area) and another* [2008] ICR 163; and (vii) discuss the arguments on the appeal.
8. The USA was represented before us by Mr John Cavanagh QC, who also appeared before the appeal tribunal, although not before the employment tribunal, where the USA was represented by Mr Lyndon James, a solicitor. Mrs Nolan was represented by Mr Richard Lissack QC and Mr Mark Mullins. Mr Mullins also appeared for her at the appeal tribunal, although not before the employment tribunal where she appeared in person.
9. We say straight away that we have come to the conclusion that we cannot decide this appeal without first making a reference to the ECJ on the new point taken by the USA to which we have referred in [6] above. We record that Mr Cavanagh indicated at the oral hearing that the USA did not wish any such reference to be made. Our consideration of the issues after we had reserved judgment led us to the provisional view that we ought to make a reference, and we sought further submissions on that matter from the parties. Having taken instructions on the matter, which required some weeks, Mr Cavanagh repeated that the USA did not want a reference to be made, but wished this court (which has no obligation to make a reference even if an applicable point of European Union law is not *acte clair*) to decide the point itself. We have of course had regard to the USA's position in that respect, and have given anxious consideration to what we should do, but have nevertheless reached the decision we have indicated. The remainder of this judgment explains the story and how and why we have reached that decision.

(i) The Collective Redundancies Directive

10. Directive 98/59/EC, the Collective Redundancies Directive ('the Directive'), is essentially a consolidation of Directive 75/129/EEC as amended by Directive 92/56/EEC. Recital 2 recites the importance '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.' Article 1.1(a) defines 'collective redundancies' as meaning 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) over a period of 30 days, various minimum numbers of redundancies varying according to the total numbers of employees (the details do not matter); and (ii) over a period of 90 days, at least 20 redundancies whatever the number of workers normally employed in the relevant establishments. Article 1.1(b) defines 'workers'

representatives' as meaning the workers' representatives provided for by the laws or practices of the Member States. Article 1.2 provides that the Directive is not to apply to 'workers employed by public administrative bodies or by establishments governed by public law (or, in Member States where this concept is unknown, by equivalent bodies)', an exception that Mr Cavanagh accepted did not extend to workers employed by a foreign sovereign state such as the USA.

11. Article 2 provides, so far as material:

‘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.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, *inter alia*, at aid for redeploying or retraining workers made redundant.

Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations –

(a) supply them with all relevant information and

(b) in any event notify them in writing of –

(i) the reasons for the projected redundancies;

(ii) the number and categories of workers to be made redundant;

(iii) the number and categories of workers normally employed;

(iv) the period over which the projected redundancies are to be effected;

(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer;

(vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice.

The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), sub-points (i) to (v)....’

12. Article 5 provides:

‘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.’

(ii) The Trade Union and Labour Relations (Consolidation) Act 1992

13. The 1992 Act was in part enacted to give domestic effect to the Directive. The relevant provisions are in Chapter II (comprising sections 188 to 198) of Part IV, headed ‘Procedure for Handling Redundancies’. The material provisions are these:

‘188. Duty of employer to consult ... representatives

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

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

- (a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and
- (b) otherwise, at least 30 days,

before the first of the dismissals takes effect.

(1B) For the purposes of this section the appropriate representatives of any affected employees are –

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or
- (b) in any other case, whichever of the following employee representatives the employer chooses: -

- (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;

- (ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(i).

(2) The consultation shall include consultation about ways of –

- (a) avoiding the dismissals,

- (b) reducing the numbers of employees to be dismissed, and
- (c) mitigating the consequences of the dismissals,

and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(3) ...

(4) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives –

- (a) the reasons for his proposals,
- (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,
- (c) the total number of employees of any such description employed by the employer at the establishment in question,
- (d) the proposed method of selecting the employees who may be dismissed;
- (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect and
- (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with any obligation imposed by or by virtue of any enactment) to employees who may be dismissed.

(5) ...

(5A) ...

(6) ...

(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (1A), (2) or (4), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. ...

Section 189(6) provides that, in any case in which a question arises under section 188(7) as to whether there were any such special circumstances or whether the employer had taken all such steps, it is for the employer to show that there were and that he did.

14. Section 188A prescribes requirements for the election of ‘employee representatives’ under section 188(1B)(b)(ii), but I need not explain them. It is not suggested that Mrs Nolan was elected under that sub-paragraph. The issue is whether she was elected under the provisions of section 188(1B)(b)(i).

15. Section 189 deals with the remedies available in a case where the employer has failed to comply with a requirement of sections 188 or 188A. So far as material, it provides:

‘189. Complaint ... and protective award

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

- (a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;
- (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related,
- (c) in the case of any other failure relating to employee representatives of a trade union, by the trade union, and
- (d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.

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

(1B) ...

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(3) A protective award is an award in respect of one or more descriptions of employees –

- (a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and
- (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

(4) The protected period –

- (a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, which is the earlier, and
- (b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer’s default in complying with any requirements of section 188;

but shall not exceed 90 days’

16. Section 190 provides that where a tribunal has made a protective award, every employee of a description to which the award relates is, subject to the further provisions of section 190 and to section 191, to be paid remuneration by his employer for the protected period. Section 193 imposes a duty upon an employer to notify the Secretary of State of collective redundancies and to provide certain prescribed information. Section 273, in Part VII (headed ‘Miscellaneous and General’), provides that, subject to prescribed exceptions, the 1992 Act has effect in relation to Crown employment and persons in such employment. One such exception is the provisions of Chapter II of Part IV (procedure for handling redundancies).

(iii) The facts

17. I take these from the employment tribunal’s liability judgment. Personnel at RSA Hythe (RSA stands for Reserved Storage Activity) repaired watercraft and other equipment. From time to time they were sent overseas to assist US forces that were operational in other countries. About 200 civilians were employed at the Base. They were represented by the Local National Executive Council (‘LNEC’).
18. Since at least early 2004 consideration had been given to the closure of the Base. In early 2006 an audit was conducted into its operations. That led to a report entitled ‘Acquisition Strategy for Sustainment of APS Watercraft Assets’. It was presented on 13 March 2006 to Major General Johnson, the commander of the Base’s higher headquarters located at Rock Island, Illinois. It showed that a decision had by then been taken to close the Base. The decision was made in the USA by the Secretary of the US Army and was approved by the Secretary of Defense. It was to the effect that operations would cease by the end of September 2006.
19. In early April 2006 the Ministry of Defence (‘MoD’) police complement at the Base was informed by management of the closure proposal. The US Government was obliged to notify the United Kingdom Government of its intention to vacate any United Kingdom premises before making any public announcement of such intentions; and in April confidential discussions about such intention took place between representatives of both Governments. There was a BBC news item about the closure on 21 April. A local press article about it followed on 22 April. On 24 April the Commanding Officer of the Base (Colonel Binder, a US Army Officer) called a meeting of the workforce partly in order to explain the decision to close the Base and partly to apologise for the way the news about the closure had become public. Following that meeting, and on the same day, the Chairman of the LNEC, Mr Holmequest, convened an *ad hoc* meeting of the LNEC, which was attended by about half the workforce. The purpose of the meeting was to consider Colonel Binder’s information about the closure proposal. Mrs Nolan, an employee at the Base, was voted on to the LNEC by a show of hands, having been proposed as additional member by the Chairman. The employment tribunal found that her election to the LNEC was valid.
20. By a letter of, and delivered on, 9 May the US Government formally notified the MoD that the Base would close and that the US facilities at Hythe would be returned to the United Kingdom on 30 September 2006. Shortly after 9 May, Mr Schoenstein went to the Base and had informal discussions with members of the LNEC. He was a

human resources specialist for labour relations at the HQ USAREUR office of the Deputy Chief of Staff (USA) in Mannheim, Germany. A memorandum prepared for and provided to the LNEC members in June stated that all employees at the Base would be made redundant and that it was proposed to issue all redundancy notices simultaneously on about 30 June, with the effective date of termination of all employment contracts being 29 September 2006. The formal decision on the termination of employment was made in Mannheim. Consultation with the LNEC commenced on 5 June.

21. At a meeting between Mr Schoenstein and the LNEC on 14 June, a question was raised about the consultation period. The answer was reflected in a memorandum dated 28 June from the Base Commander. It recorded that management considered the beginning date of the consultation to be 5 June (the USA's formal position), when 'the elected representatives were informed in writing about the potential personnel impact cause by the Army's decision to close' the Base. The memorandum continued:

'... This total closure will probably cause all employees on base to be excess to the Army's needs causing redundancy procedures to be invoked. The decision to close the base was taken far above the head of the Local Commander, and we have informed you that we do not have the authority to change, modify or repeal this decision and therefore cannot entertain any discussions in that respect. We also informed you that subject to matters arising out of the consultation, it is management's intent to make final decisions in respect of the workforce on about 30 June 2006.'

The memorandum pointed out that that because of 'the massive downsizing of the US forces presence in the United Kingdom, job opportunities are sparse to non-existent.' Dismissal notices were issued on 30 June, specifying termination of employment on 29 or 30 September 2006.

(iv) The proceedings in the employment tribunal

(a) The liability proceedings

22. The tribunal proceedings on liability were argued on 11 June 2007 and 28 January 2008. The explanation for the double hearing is that, following the conclusion of the argument on 11 June 2007, when the tribunal reserved its judgment, the tribunal became concerned as to whether it had jurisdiction to entertain the protective award claim at the suit of Mrs Nolan, a matter that had not been argued. The tribunal's concern was prompted by its consideration of a recent decision of the Employment Appeal Tribunal (*Northgate HR Limited v. Mercy* EAT/0466/06). On 11 July 2007 the tribunal raised its concern by letters to the parties and later gave directions for the filing of further evidence. That led to the resumed hearing on 28 January 2008, which the tribunal's written reasons later described as devoted to two points: (i) whether Mrs Nolan was a member of the LNEC, and (ii) if she was, whether she was entitled to bring the claim without express authority from the LNEC. In addition, by the time of the resumed hearing in January 2008, there had been an important development, namely the decision on 28 September 2007 of the Employment Appeal Tribunal in *UK Coal Mining Ltd v. National Union of Mineworkers (Northumberland Area) and another* [2008] ICR 163, a judgment written by Elias J (the President), as he then was.

If Mrs Nolan was entitled to bring the claim, *UK Coal* was relevant to the scope of the consultation obligation that the USA should have conducted.

23. As for the jurisdiction issue, the tribunal found (and recorded as common ground) that ‘the appropriate representatives’ whom the USA was required to consult for the purposes of section 188(1) were the members of the LNEC. I have already recorded its finding that Mrs Nolan became a validly appointed member of the LNEC on 24 April 2006. It further found that there were no ‘employee representatives’ within the meaning of section 188(1B)(b)(ii). As to whether Mrs Nolan, as a member of the LNEC, was entitled to bring her claim despite the absence of any resolution of the LNEC authorising her to do so, the tribunal referred to section 189(1) and held that she was qualified to do so under section 189(1)(b). It drew support for that from paragraph [15] of the judgment of Maurice Kay LJ in *Northgate HR Ltd v. Mercy* [2007] EWCA Civ 1304; [2008] IRLR 222, a decision of this court of 13 December 2007 upholding the decision of the Employment Appeal Tribunal to which I have referred. The tribunal therefore concluded that it had jurisdiction to entertain Mrs Nolan’s claim for a protective award.
24. The tribunal turned to consider whether there had been proper consultation. This was a case in which the employer was proposing to dismiss more than 100 employees so that section 188(1) required the consultation to begin ‘in good time and in any event ... at least 90 days’ before the first of the dismissals was to take effect. Section 188(2) described the nature of the required consultation – including consultation about ways of ‘avoiding the dismissals’ - and the tribunal pointed out that these obligations derived from the Directive. It found (as is accepted) that the consultation only began on 5 June 2006. By then, however, there was no scope for any meaningful consultation about the closure of the Base – and the mass dismissals which it would inevitably involve - because the closure decision had been taken by 13 March 2006. The tribunal referred to the absence of any evidence as to why consultation had not commenced before 13 March 2006, or at the latest by 9 May 2006 (when the US Government formally notified the MoD of the proposed closure of the Base). It recorded, and rejected, a submission by Mr James that it was unrealistic to expect the USA to consult about a strategic decision to close a military base. The tribunal’s view was that once the closure decision had been made, the issue of the dismissal notices did not represent a separate decision to dismiss: it was simply the processing of the inevitable consequence of the closure decision. The tribunal recorded Mr James’s disclaimer of any argument that section 188(7) (‘special circumstances’) excused the USA from consulting about the closure, a disclaimer the tribunal described as inevitable in the absence of supporting evidence.
25. The tribunal’s conclusions were:
 - ‘62. It is clear to us that sometime prior to 13th March 2006, a decision at a sufficiently high level had been made by [the USA] to close the RSA. The inevitable consequence of that decision was that almost all, if not all the civilian employees there, would be dismissed having regard to the withdrawal by the US Forces from their UK bases. There was a possibility that some arrangements could be made for avoiding a small number of redundancies. In the circumstances of this case, a decision to close the RSA was a decision to dismiss most, if not all the employees and certainly [the USA] was “proposing to dismiss”. The consultations as described did not begin until 5th June 2006. At the time of the

consultations, we have noted that it was not open to the LNEC to have a meaningful consultation as to the closure of the base which meant it was not in reality possible to have a meaningful consultation about avoiding mass dismissals.

63. Section 188(2) ... requires the consultation to include consultation about *avoiding the dismissals*. The restraints imposed by [the USA] as to what could be discussed meant in our view that there was no possibility of having fully meaningful consultations in accordance with s.188 ... about avoiding dismissals.

64. In any event, there was no evidence as to why there was delay in commencing consultation either from a date prior to 13th March 2006 or from 24th April 2006 or from a public announcement of 9th May 2006 until 5th June 2006 when the formal consultation began. It was submitted by Mr James that the treaty of obligations [sic] to which we have referred somehow restricted the employer from engaging in consultations. The letter of 9th May 2006 refers to the formal notification to cease operations. Mr Schoenstein said that [the USA] was obliged to notify HM Government of intentions to vacate any premises prior to making any public notification of those intentions.

65. That obligation does not appear to us to impede discussions having taken place in April 2006, if not earlier, with the representatives of the workforce since quite clearly at the very least, notification could have been given to the Government earlier than it was. In any event, it is clear that the MoD Police who we presume provide a security facility to the base were notified in April, in any event.

66. Since our deliberations in June 2007, there has been the decision in the UK Coal Mining case which reinforces our view that our decision on lack of consultation is correct. *“The obligation to consult over avoiding the proposed redundancy inevitably involves engaging with the reasons for dismissal and that in turn requires consultation over the reasons for the closure. Strictly, of course, it is the proposed dismissals that are the subject of consultation, and not the closure itself. Accordingly, if an employer planned a closure but believed that redundancies will nonetheless be avoided, there would be no need to consult over the closure strategically itself, at least not pursuant to the obligations under the 1992 Act. Where closure and dismissals are inextricably interlinked, the duty to consult over the reasons arises.”* (Paragraph 87)

67. The last sentence we have quoted from UK Coal describes the situation in this case and as referred to in paragraph 63 of these reasons.

68. We find the failures as to consultation to be as follows:

68.1. The notices to the workforce were issued on 30th June 2006 and consultation did not start until 5th June 2006 which is far short of the 90 day period.

68.2. The LNEC was told that the RSA would close and that there could be no discussions about such closure and as a result there was no consultation on that subject.’

(b) *The remedy proceedings*

26. The same tribunal heard the remedy proceedings on 17 March 2008 and reserved judgment. The tribunal sent its reasons to the parties on 16 April 2008. It made a protective award in respect of all persons who on 29 June 2006 were United Kingdom citizens and civilian employees at the Base. It ordered the USA to pay such employees remuneration for a protected period of 30 days beginning on 29 September 2006.
27. In paragraph 3 of its reasons, the tribunal referred to paragraph 68.1 of its liability reasons (quoted above) and said that it considered it was 'implicit in paragraph 68.1 ... that we are saying that the dates [sic] from which the ninety day consultation period should be measured was 5 June 2006 being the date when the notice of termination was issued.' As it seems to us, section 188(1A) required the consultation to commence 'in good time and in any event ... at least 90 days' before 29 September 2006, that being the date when all the dismissals took effect. It is accepted that consultation started on 5 June 2006, which was more than such 90 days. There was, therefore – contrary to what the tribunal appears to have held in paragraph 68.1 - no breach of the 90-day minimum. The real bite of the tribunal's liability decision was, however, in paragraph 68.2, to the effect that the USA had failed in its consultation obligations by not consulting about the prior operational decision to close the Base, one made by 13 March 2006. The tribunal's reasoning in its remedy decision is not at every point easy to follow, but we read it as conveying that, in deciding upon the appropriate protective award, it relied not on its paragraph 68.1 conclusion, but solely on its paragraph 68.2 conclusion, upon which it expanded in paragraphs 60 and 61 of its reasons, which we shall quote below.
28. We should refer to an important development at the remedy hearing. Mr James, for the USA, raised a last-minute argument that the USA, as a sovereign state, enjoyed state immunity against Mrs Nolan's claim to fix it with a protective award. It was common ground before us that the USA would have been entitled to raise such a plea in response to Mrs Nolan's claim when it was originally issued and that, had it done so, such plea would have brought her claim to a full stop. The problem facing Mr James in the belated raising of the point on 17 March 2008 was that by then the USA had unequivocally submitted to the tribunal's jurisdiction over the claim and had defended the liability proceedings on the merits. The tribunal concluded that in those circumstances it was too late for the USA to raise a plea of sovereign immunity and it rejected such plea.
29. It was not argued before us that the tribunal was wrong in so concluding: that was not a ground of appeal. We ought, in fairness to Mr James, to explain that at the time that the USA did so submit to the jurisdiction, it either did not foresee, or may not have foreseen, that the focus of the argument at the liability hearing would ultimately be on whether there was a duty to consult about the proposed closure of the Base, a matter which the tribunal found to be an exercise by the USA of an act of state - a *jus imperii* - about which the USA would legitimately want to be defensive: it is self-evident why a sovereign state would not wish to consult a workforce about a possibly sensitive strategic decision to close a military base. The reason that the USA either did not have, or may not have had, such foresight is that it was only the promulgation of the decision in *UK Coal* in September 2007 (following the first liability hearing) that made it clear that the consultation duty extended to requiring consultation about an

operational proposal to close a workplace that will carry with it inevitable redundancies. Before that decision the thrust of the domestic authorities was to the effect that, even in a case such as the present, the consultation obligation would only arise once the closure decision had been made. If that was the limit of the consultation obligation, it is not suggested that the USA did not embark upon it in good time when it commenced its consultation on 5 June 2006; and the inference is that the USA did not, at the time of the institution of Mrs Nolan's proceedings, foresee that the proceedings might lead to the raising of matters in respect of which it might, with hindsight, have wanted to raise a plea of sovereign immunity.

30. That, however, all changed with the raising of the point made clear by *UK Coal*, although even then the USA delayed until 17 March 2008 before raising its sovereign immunity plea. There was limited discussion before us as to whether a change of circumstances in mid-proceedings such as happened in this case might enable the raising of a plea of sovereign immunity at the point of such change even though there had originally been a submission. As we have said, we do not have to decide that question.
31. After dealing with the sovereign immunity point, the tribunal dealt with and rejected another submission by Mr James that it had no jurisdiction to make a protective award against the USA, a submission not repeated to us. It concluded that it did have jurisdiction to make an award and it explained why it made the award it did. As promised, we quote two paragraphs of its reasons:

‘60. On any view of the matter there appears to be no impediment to having started a consultation process almost immediately after HMG had been notified on 9 May 2006. The process of consultation did not start until 5 June 2006. Indeed this period is still well after a decision to close the base had been made.

61. Taking account of both the delay in any consultation and of the failure to consult on the reasons for closure we think it reasonable and proper to reduce the award from 90 days, which must be the starting point in considering any protective award, to one of 30 days.’

(v) The appeal tribunal's decision

32. The appeal tribunal set out the facts found by and conclusions of the tribunal. As for the two issues now raised by the appeal to this court, it recorded that Mr Cavanagh did not question the correctness of the decision in *UK Coal*. His primary submission was that, accepting that *UK Coal* decided that in appropriate cases there will be a section 188 duty upon an employer to consult about the proposed closure of a workplace that will inevitably lead to redundancies, such duty cannot, upon the true construction of section 188, require such consultation when such proposed closure is an act of state. He submitted that *UK Coal* could be distinguished upon the basis that it applied only to commercial decisions to close a workplace, not to those involving questions of public policy. There was an issue as to whether that had been argued before the employment tribunal, but no objection was raised to its being argued before the appeal tribunal. The appeal tribunal gave full reasons for rejecting it.
33. Mr Cavanagh's second submission went to whether Mrs Nolan was an appropriate representative of the civilian employees at the Base. Referring to section

188(1B)(b)(i), he said that she was not ‘elected ... otherwise than for the purposes of’ section 188. His point was that the key question was the *purpose* of her election to the LNEC. He said the inference was that she was elected specifically to deal with the redundancy process, since at that stage in the history of the Base nothing remained to be done except to consult about redundancy. If so, her election was purportedly under section 188(1B)(b)(ii) but was invalid for want of satisfaction of the requirements of section 188A(1). The appeal tribunal’s view was that, whilst it was likely that the LNEC’s work as from 24 April 2006 (when Mrs Nolan was elected) would be concerned with redundancies, it did not follow that such work would be confined to consultations about them. It may have ranged more widely. The problem was that the tribunal had made no finding as to whether Mrs Nolan had been elected to the LNEC ‘otherwise than for the purposes of’ section 188. It was the answer to that question that would determine whether she was an ‘appropriate representative’ for the purposes of section 188. The appeal tribunal remitted that question for decision to the same tribunal.

(vi) *The decision in UK Coal*

34. We turn to *UK Coal Mining Ltd v. National Union of Mineworkers (Northumberland Area) and another* [2008] ICR 163, which was central to the employment tribunal’s decision. The USA did not question its correctness before the appeal tribunal, although it sought to distinguish it.
35. UK Coal owned a mine at which it employed 329 employees. A decision was made to close it, which led to dismissals for redundancy. In a claim for a protective award because of a failure by UK Coal to consult, the employment tribunal held that there was no duty to consult over the *closure* of the mine but that UK Coal had anyway failed to discharge its consultation obligations about the matters relating to the redundancies. The appeal tribunal dismissed UK Coal’s appeal as to the latter holding and allowed the unions’ appeal against the former holding that there had been no duty to consult about the closure.
36. In delivering the judgment of the appeal tribunal, Elias J referred to the Divisional Court’s decision in *R v. British Coal Corporation, Ex parte Vardy and Others* [1993] ICR 720. That recognised that the Directive (more accurately, its 1975 predecessor, 75/129EEC) required consultations in good time when an employer was ‘contemplating’ collective redundancies; and that it also required such consultations ‘at least, [to] cover ways and means of avoiding’ such redundancies (compare article 2.2 of the Directive, cited above). The Directive therefore required consultation on ways of avoiding redundancies by not closing the particular establishment, if that was what the employer had in mind. The Divisional Court’s view was, however, that section 188’s domestic incorporation of the consultation obligations did not go as far as the Directive. As then enacted (identically to the predecessor provisions in the Employment Protection Act 1975), section 188 merely imposed a consultation obligation if the employer was ‘proposing’ to dismiss an employee as redundant; and such consultation was only required to be ‘about the dismissal’, not about the reason for the redundancy, including whether or not a plant should close. In the Divisional Court’s view section 188 could not be read compatibly with the Directive:

‘... the Directive envisages consultation at an early stage when the employer is first envisaging the possibility that he may have to make employers redundant.

Section 188 applies when he has decided that, whether because he has to close the plant or for some other reason, it is his intention, however reluctant, to make employees redundant. Moreover, section 188 ... contains no words equivalent to those contained in [what is now in substance article 2.2 of the Directive].’ ([1993] ICR 720, at 753D, per Glidewell LJ)

37. The Divisional Court’s approach in *Vardy* as to the limit of section 188’s scope was applied by the Employment Appeal Tribunal in *Middlesbrough Council v. Transport and General Workers’ Union* [2002] IRLR 332 even though by then what is now section 188(2) had been introduced so as to provide (inter alia) that the consultation shall include consultation about ways of ‘avoiding the dismissals’ (an amendment introduced by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995/2587). The appeal tribunal, in a judgment delivered by His Honour Judge Peter Clark, held in paragraph [33] and repeated in paragraph [45] that *Vardy* showed that an employer was not obliged to consult as to his reasons for proposing redundancies (in that case, financial reasons). Both *Vardy* and *Middlesbrough* were followed and applied by the Employment Appeal Tribunal (Burton J presiding) in *Securicor Omega Express Ltd v. GMB* [2004] IRLR 9.
38. In *UK Coal* the appeal tribunal was presented with a head-on challenge to the correctness of the decisions in *Middlesbrough* and *Securicor* insofar as they repeated and held that the section 188 obligation does not extend to consultation about the reasons for the redundancies, including whether or not a plant should close. Both sides in *UK Coal* recognised that the Directive *did* require such consultation and that if article 2.2 of the Directive were properly implemented into domestic law, such law would also require consultation about closure. Elias J said at paragraph [82] that the point was made that it had not been sufficiently transposed when *Vardy* was decided because section 188 did not then include what is now section 188(2): at that stage the consultation obligation was limited to consultation ‘about the dismissal’. At paragraph [83], he recorded UK Coal’s submission that the section 188(2) amendment did not sufficiently fill the gap exposed in *Vardy* because the consultation duty was still limited to the case where the dismissals are ‘proposed’, in contrast to that under the Directive where they are ‘contemplated’.
39. Elias J preferred and accepted the unions’ submissions. He was in no doubt that the court in *Vardy* was correct to say that under European law the obligation under article 2.2 of the Directive required consultation over a decision to close a plant. He continued:

‘85. The issue, however, is whether it is possible to give effect to section 188 so as to achieve that result. One way potentially would be to read “proposed” so that it means “contemplated”. That would bring domestic law wholly in line with the Directive. However, as we have indicated above, both the Divisional Court in *Vardy* [1993] ICR 720 and the Employment Appeal Tribunal in *MSF v. Refuge Assurance plc* [2002] ICR 1365 have expressed the view that, even given the generous scope for interpreting rules compatibly with European law, this would step beyond the legitimate parameters. We have some reservations about that conclusion, but in an area where that assessment is very much a matter of impression, we feel that it would be wrong for a court at this level to depart from those established decisions.

86. The question is, therefore, whether the limitation imposed by the word “proposed”, when contrasted with “contemplated”, prevents the consultation obligations extending to consultations over closures leading to redundancies. We do not think that it does. In our judgment, in a closure context where it is recognised that dismissals will inevitably, or almost inevitably, result from the closure, dismissals are proposed at the point when the closure is proposed. The difference between proposed and contemplated will still impact on the point at which the duty to consult arises – it will not be when the closure is mooted as a possibility but only when it is fixed as a clear, albeit provisional, intention.

87. But the obligation to consult over avoiding the proposed redundancies inevitably involves engaging with the reasons for the dismissals, and that in turn requires consultation over the reasons for the closure. Strictly, of course, it is the proposed dismissals that are the subject of consultation, and not the closure itself. Accordingly, if an employer planned a closure but believed that redundancies would none the less be avoided, there would be no need to consult over the closure decision itself, at least not pursuant to the obligation under the 1992 Act. In the context of a closure, that is likely to be a very exceptional case. Where closure and dismissals are inextricably interlinked, the duty to consult over the reasons arises.

88. We should add that the lay members do not believe that in practice this will alter arrangements very much. Most employers will already inform union representatives why they are considering the need to close a plant and will respond to any union observations, even if they do not feel themselves legally obliged to do so.

89. We recognise that we are departing from two relatively recent decisions of the Employment Appeal Tribunal, but they were simply following the observations in *R v. British Coal Corpn, Ex p Vardy* [1993] ICR 720, and in neither was it argued that the decision in *Vardy* was dictated by the different statutory provisions then in force.’

40. The essence of the decision was, therefore, that there is no doubt that – as was said in *Vardy* - the Directive required consultation over the formation of a clear, albeit provisional, intention to close a plant, at any rate when such closure was contemplated as giving rise to collective redundancies; and so now does section 188, whose current form differs materially from its form at the time of the decision in *Vardy*.

(vii) The arguments on the appeal

41. Mr Cavanagh’s primary submission to us was premised on the basis that *UK Coal* was correctly decided in the respect just discussed and was to the effect that under the Directive and section 188 a consultation obligation can in principle kick in once a mooted closure (with inevitable consequential redundancies) has moved to the valley of provisional decision. He submitted, however, that a foreign sovereign state is nevertheless to be regarded as implicitly exempt from the section 188 requirement to engage in consultation at such stage. There is, he said, an implied exception in section 188 exempting a foreign sovereign state from requiring it to consult about an operational decision which will foreseeably lead to collective insolvencies in any case where such decision is in the nature of a *jus imperii*. Any conclusion otherwise would,

he said, be absurd since it would be inconsistent with the principles underpinning the law of state immunity. More particularly, the submission was that the natural interpretation of the Directive and section 188 precluded the conclusion that their reach imposed any such consultation obligations upon a sovereign state.

42. With respect to Mr Cavanagh's careful argument, the court was not persuaded that there is any substance in it. There is no warrant anywhere in the legislation for reading into it the special exemption for which Mr Cavanagh contended. Nor is there a need to search for one: the sovereign state's interests are fully protected by its ability to claim sovereign immunity. In addition, we would consider (although we do not decide) that a decision not to consult over an operational decision of military sensitivity would probably enable the sovereign state to plead the section 188(7) 'special circumstances' defence, although the USA did not advance that defence in this case.
43. Mr Cavanagh also addressed us on whether Mrs Nolan was entitled to bring the claim. He submitted that, on the employment tribunal's findings, Mrs Nolan could only have been elected to the LNEC for section 188 purposes, in which event her appointment was ineffective for want of satisfaction of section 188A(1). He said that we could and should decide that point ourselves. Alternatively, he submitted that the appeal tribunal was wrong to remit that issue for a re-hearing by the same tribunal: he said it should have been remitted to a differently constituted tribunal. We would also reject both of these submissions. The appeal tribunal was, in our judgment, right to conclude that the employment tribunal had made inadequate findings for the resolution of this issue and we are in no position to make the necessary findings of fact ourselves; it was therefore also right to remit the question for a re-hearing; and its decision to remit it to the same tribunal was one properly within its discretion that it is not open to this court to disturb.
44. If these had been the only matters argued by the USA, the court would simply have dismissed the appeal. Mr Cavanagh's further submission, however, was that the decision of the ECJ in *Akavan Erityisalojen Keskusliitto Alek RY and others v. Fujitsu Siemens Computers OY* Case C-44/08; [2009] IRLR 944 (a decision of 10 September 2009, post-dating the decision of the appeal tribunal) is authority for the conclusion that, upon the true interpretation of the Directive, the consultation obligation is *not* triggered by a proposed business decision to effect the closure of a plant; and that the consultation obligation only arises at the later stage when the business decision has been made and the intention to make the employees redundant has been formed. The submission was that the Divisional Court in *Vardy* had therefore misstated the nature of the consultation obligation under the Directive; that the consultation obligations under section 188 should be interpreted harmoniously with the Directive; and that insofar as *UK Coal* interpreted them as being more extensive than those prescribed by the Directive, it went too far, was wrong not to follow *Middlesbrough* and *Securicor* and was decided in error.
45. If *Fujitsu* is authority for a narrower interpretation of the Directive than that divined by *Vardy* and *UK Coal*, then in agreement with Mr Cavanagh we consider that it must be our duty to interpret section 188 accordingly and, so far as necessary, to depart from *UK Coal*, which is anyway not binding on us. We turn therefore to *Fujitsu*. Mr Cavanagh did not put his submission so high as to suggest that *Fujitsu* unquestioningly supports it. Mr Lissack, for his part, submitted that, far from

undermining *UK Coal*, *Fujitsu* positively supported it, although in his oral argument he did no more than list, without discussion, those paragraphs in *Fujitsu* that he said did so.

46. The facts were these. The respondent, Fujitsu, was the subsidiary of a company we will call Holdings. The group had a production plant in Kilo, Finland. On 7 December 1999 Holdings' executive council decided to make a proposal to Holdings' board to disengage from, or divest, the Kilo factory. Any such disengagement, or divesting, would be likely to lead to redundancies. On 14 December 1999 the Holdings board decided to support the proposal, but (according to the minutes) made no specific decision to do so. On the same day Fujitsu proposed consultations with the employees' unions, which continued for six weeks from 20 December 1999 to 31 January 2000. On 1 February 2000 Fujitsu's board decided to terminate its operations in Finland, with the exception of computer sales activities. On 8 February 2000 it started dismissing employees and dismissed some 450 out of a total of 490. Some complained of infringements by Fujitsu of the Finnish law on co-operation within undertakings ('yhteistoiminnasta yrittäjissä annettu laki') and assigned their claims to the claimant, a large trade union in Finland. The union claimed that the final decision to disengage the Kilo plant had been taken by the Holdings board on 14 December 1999 at the latest, which was before the consultations with the workforce had started. Its complaint was, therefore, Fujitsu had breached its consultation obligations.
47. The Finnish court dismissed the claim. It found that the decision to terminate the Kilo operation was taken by Fujitsu on 1 February 2000 after it had proved impossible to find other alternatives and that the consultations had been genuine. The Helsinki court of appeal upheld its decision. The Finnish Supreme Court, however, considered that there were 'differences of structure and content between the provisions of Directive 98/59 and the Law on co-operation' and decided to refer five questions to the ECJ, of which the first is the one relevant to the issues before us.
48. Question 1 was as follows:

‘Is Article 2(1) of Directive 98/59 ... to be interpreted as meaning that the obligation under that provision to embark on consultations when “contemplating collective redundancies” of employees and “in good time” requires consultations to be started *when it is established from the strategic decisions or changes that have been made relating to the activity that a need for collective redundancies of employees follows?* Or is the provision in question to be interpreted as meaning that the obligation to start consultations *already arises on the basis of the employer contemplating measures or changes affecting the activity, such as a change in production or a concentration of production, as a consequence of which a need for collective redundancies is to be expected?*’ (Emphasis supplied)
49. We have added the emphases to clarify our understanding of the essential difference between those two sub-questions. Put shortly, and relating it to the domestic authorities in relation to section 188 to which we have referred, we understand the first sub-question to ask whether the approach in *Middlesbrough* and *Securicor* is what the Directive requires; and that the second sub-question asks whether the approach in *UK Coal* is what it requires. We are not, however, confident that Advocate General Mengozzi interpreted the two sub-questions in quite the same way.

50. Referring first to the Advocate General’s Opinion, his view, at paragraph 49, was that it was clear that the consultation obligations under the Directive arise ‘from the existence of an intention on the part of an employer to make collective redundancies.’ He continued:

‘50. Such an interpretation of Article 2(1) of Directive 98/59 can be adopted in the light of the judgment in *Dansk Metalarbejderforbund and Specialarbejderforbundet I Danmark* Case 284/83; [1985] ECR 553 in which the Court ruled on the question whether Article 2(1) of Directive 75/129 is applicable where, because of his financial state, the employer ought to have contemplated collective redundancies but did not do so. The Court held that that provision applies only where the employer has in fact contemplated collective redundancies or has drawn up a plan for collective redundancies (ibid. paragraphs 12 to 17).’

51. The Advocate General’s observations in paragraphs 49 and 50 may tend, therefore, to the view that the consultation obligation only arises upon the formation by the employer of a positive *intention* to make collective redundancies. But he may perhaps have diluted that in paragraph 54 where he suggested that the consultation arises at the moment ‘that the employer intends to make collective redundancies *or, at least, that he already foresees the possibility of doing so as a consequence of the measures planned*’ (emphasis supplied), although that depends on whether he was using the words ‘*measures planned*’ as meaning *already* planned – and thus the subject of a decision – or as meaning ‘*measures proposed*’. However, he used the same phrase - *measures planned* - in paragraph 60, quoted below, where we incline to the view that he was using it in the former sense. In paragraph 55 he said, perhaps a little obscurely, that the ‘contemplation of redundancies’ (a reference to the language of the Directive) ‘occurs only where it is such as to give rise to consultations capable of being held in the form of negotiations with sufficiently specific subject matter.’

52. In the rest of his Opinion relevant to question 1, the Advocate General explained his views, why he considered that the referring court had not asked the right question and what his answer to the right question was. He said this:

‘56. Having regard to the purpose of the obligation to hold consultations and the need to establish the existence of an intention on the part of the employer to make collective redundancies, a decision which creates a probable need to make collective redundancies in the future is not covered by the term “contemplate”, since that function is characterised by a lack of intention on the part of the employer to make collective redundancies or a specific plan to do so.

57. Consequently, I am of the opinion that the first interpretation suggested by the referring court in its first question, concerning the situation where the employer takes measures as a result of which a need for collective redundancies of employees follows is akin to the situation where the employer should perhaps foresee collective redundancies but does not yet have the intention of proceeding with them. Taking into account the judgment in *Dansk Metalarbejderforbund and Specialarbejderforbundet I Danmark* and the meaning to be attributed to the term “contemplate” in the light of the function of the obligation to hold consultations, I take the view that Directive 98/59 is not yet applicable in such a situation. As I see it, the expression “a need ... follows” used by the national court refers to an

early stage at which the employer has not yet planned or foreseen collective redundancies.

58. That being the case, it must be noted that the second interpretation suggested by the referring court in its first question, to the effect that Article 2(1) of Directive 98/59 should be understood as meaning that the obligation to hold consultations arises where the employer contemplates measures as a consequence of which a need for collective redundancies of employees is to be expected, describes a situation which is even more remote than that contemplated in the first alternative. In such a situation, not only has the employer not yet planned or foreseen collective redundancies, but the occurrence of such an event is still within the realms of pure probability.’

59. It follows, in my view, that both the first and the second alternatives proposed in the first question reflect situations in which Directive 98/59 is not applicable.

60. In the light of the foregoing, I propose that the Court’s answer to the first question raised by the referring court should be that Article 2(1) of Directive 98/59 is to be interpreted as meaning that neither the situation where the employer takes measures as a result of which a need for collective redundancies of employees follows, nor that where the employer plans to adopt measures as a consequence of which a need for collective redundancies of employees is to be expected, is covered by the expression “contemplating collective redundancies”. *That expression must be understood as referring to the moment at which it is apparent that the employee intends to make collective redundancies or, at least, that he already foresees the possibility of doing so as a consequence of the measures planned.*’ (Emphasis supplied)

53. We have to say, with respect, that we find that reasoning quite difficult to follow. The kernel, however, is in the emphasised sentence in paragraph 60 and, as foreshadowed, we see force in interpreting its ‘measures planned’ as meaning ‘decisions taken’ rather than ‘decisions proposed’. If that is not the correct interpretation, we do not find it easy to see the distinction the Advocate General was drawing when earlier in the same paragraph rejecting the notion that the consultation obligation arises ‘where the employer plans to adopt measures as a consequence of which a need for collective redundancies ... is to be expected.’ We are therefore inclined to interpret the Advocate General as favouring the view that the consultation obligation only arises once the crucial operational decision is taken and the employer is then contemplating or intending the collective redundancies made necessary by that decision.

54. We move to the judgment of the ECJ, which translated the first question as seeking clarification of the expression ‘is contemplating collective redundancies’ in article 2.1 of Directive 98/59: i.e. as to when the consultation obligation starts. It said, in paragraph 36, that the question asked was:

‘... whether that obligation arises when it is established that strategic decisions or changes in the business of the undertaking will make collective redundancies of employees necessary, or when the adoption of such decisions or changes, as a result of which it is to be expected that such redundancies will become necessary, are contemplated.’

55. In paragraph 38 the ECJ made the point that the consultation obligations arise ‘prior to the employer’s decision to terminate employment contracts’. It explained that in such a case, there is ‘still a possibility of avoiding or at least reducing collective redundancies, or of mitigating the consequences.’ In paragraph 39 it endorsed the Advocate General’s view that a consultation obligation would arise ‘in connection with the existence of an intention on the part of the employer to make collective redundancies’; and in paragraph 40 it said much the same again. In paragraph 41 it observed that the consultation obligation will arise ‘where the employer is contemplating collective redundancies or is drawing up a plan for collective redundancies’. In paragraphs 42 to 44 it digressed to the collateral point that consultation obligations can also be triggered in cases where the prospect of collective redundancies is not directly the choice of the employer, but may perhaps have been made by the undertaking controlling the employer.
56. We quote the remainder of the Court’s decision on the first question:

‘45. Moreover, as the United Kingdom government rightly observes, a premature triggering of the obligation to hold consultations could lead to results contrary to the purpose of Directive 98/59, such as restricting the flexibility available to undertakings when restructuring, creating heavier administrative burdens and causing unnecessary uncertainty for workers about the safety of their jobs.

46. Lastly, the *raison d’être* and effectiveness of consultations with the workers’ representatives presupposes that the factors to be taken into account in the course of those consultations have been determined, given that it is impossible to undertake consultations in a manner which is appropriate and consistent with their objectives when there has been no definition of the factors which are of relevance with regard to the collective redundancies contemplated. Those objectives are, under Article 2(2) of Directive 98/59, to avoid termination of employment contracts or to reduce the number of workers affected, and to mitigate the consequences (see *Junk v. Kuhnel* C-188/03; [2005] IRLR 310, paragraph 38). However, where a decision deemed likely to lead to collective redundancies is merely contemplated and where, accordingly, such collective redundancies are only a probability and the relevant factors for the consultations are not known, those objectives cannot be achieved.

47. On the other hand, it is clear that to draw a link between the requirement to hold consultations arising under Article 2 of Directive 98/59 and the adoption of a strategic or commercial decision which makes the collective redundancies of workers necessary may deprive that requirement, in part, of its effectiveness. As is clear from the first subparagraph of that Article 2(2), the consultations must cover, *inter alia*, the possibility of avoiding or reducing the collective redundancies contemplated. A consultation which began when a decision making such collective redundancies necessary had already been taken could not usefully involve any examination of conceivable alternatives with the aim of avoiding them.

48. It must therefore be held that, in circumstances such as those of the case in the main proceedings, the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken.

49. In those circumstances, the answer to be given to the first question referred is that Article 2(1) of Directive 98/59 must be interpreted to mean that the adoption, within a group of undertakings, of strategic decisions or of changes in activities which compel the employer to contemplate or to plan for collective redundancies gives rise to an obligation on that employer to consult with workers' representatives.'

57. We have to say, again with respect, that we do not find the interpretation of the ECJ's decision on the first question straightforward. Putting in stark form the question arising in the present case, does the ECJ explain whether the consultation obligation arises (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or (ii) only when that decision has actually been made and he is then proposing consequential redundancies?
58. The ECJ's observations in paragraph 45 perhaps tend in favour of alternative (ii). We are inclined to interpret paragraph 46, in particular the last sentence, in the like sense. On the other hand, paragraph 47, in particular its last sentence, may be said to favour alternative (i). Paragraph 48 follows hard on paragraph 47 with an opening 'therefore', and so one might expect it also to favour alternative (i). Yet its language - note the '*once a strategic decision ... has been taken*' - may be said to support alternative (ii); and the same can be said about paragraph 49 (note that it is '*the adoption ...of strategic decisions etc*' that compels the contemplation or planning of collective redundancies).
59. So what is the effect of the ECJ's decision? Whilst Mr Cavanagh submitted that the true sense of the decision was that it favoured alternative (ii), Mr Lissack's argument was to the precisely contrary effect. Having considered the judgment further, the court proposes to venture no further views on its true interpretation, which it respectfully regards as unclear.
60. In our judgment, however, the determination of the true sense of the issue discussed in *Fujitsu* is crucial to the disposition of this appeal. If *Fujitsu* has clarified the scope of the consultation obligation under the Directive and has done so by holding that it does not arise at any point *prior* to the adoption by the employer of a strategic decision or other change that will compel him to contemplate or plan for collective redundancies, we consider that it must follow that insofar as the Divisional Court in *Vardy* interpreted the Directive as imposing a wider consultation obligation, it was in error. *UK Coal* did no more than hold that the introduction of section 188(2) enabled section 188 to be interpreted with the supposed wider meaning of the Directive. Whilst section 188 could have imposed a wider consultation obligation than the Directive, we do not consider that it purported to do so. The ordinary rule of interpretation requires section 188 to be interpreted so far as possible in a way conforming with the obligations required by the Directive (*Litster and others v. Forth Dry Dock & Engineering Co. Ltd. (in receivership) and Another* [1989] ICR 341, per Lord Templeman, at 353C to F; and per Lord Oliver of Aylmerton, at 354D to F). If the true sense of the decision in *Fujitsu* was to favour what we have called alternative (ii), it would appear to us to follow that *Middlesbrough* and *Securicor* were correctly decided and that *UK Coal* was not. It would, we consider, further follow that the employment tribunal was wrong to have held that the USA had breached its consultation obligations in the present case.

61. In the circumstances explained, the court has concluded that it can only decide this appeal with the benefit of the further guidance from the ECJ as to the point at which, under the Directive, the consultation obligation arises. Whilst the court appreciates that the ECJ has already provided an answer to that question in *Fujitsu*, it regrets that it is left with material uncertainty as to what that answer is. The court therefore proposes to order the making of an appropriate reference and would ask counsel to produce a draft reference for its consideration.

62. The court has of course had careful regard to the USA's express unwillingness for any such reference to be made; and it recognises that it is not the court of last resort and so is not obliged to make a reference. The court is, however, also sensitive to the consideration that the issue upon which it requires guidance is important not just to the disposition of this litigation but also to industrial practice generally: employers need to understand the nature of their consultation obligations. If the court were to venture a view on the true interpretation of *Fujitsu* and decide the question of principle accordingly, its decision would be binding unless and until the Supreme Court were to hold otherwise in this or another case; and there can be no certainty that its decision in this case, whichever way it went, would be taken to the Supreme Court. In short, the court regards the point as too important for it to risk adopting the wrong interpretation of the decision in *Fujitsu*.