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Case No: A2/2005/2155

Neutral Citation Number: [2006] EWCA Civ 825
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
EAT/0066/05/DM

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 29th June 2006

Before :

LORD JUSTICE BROOKE
Vice President of the Court of Appeal (Civil Division)
LORD JUSTICE LAWS
and
LORD JUSTICE SCOTT BAKER

- -

Between :

Unison	**Claimant/Respondent**
- and -	
Leicestershire County Council	**Respondent/Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Elizabeth Slade QC and Mark Wyatt (instructed by **Legal Services for Leicestershire County Council**) for the **Appellant**
John Cavanagh QC and Helen Gower (instructed by **Legal Services for Unison**) for the **Respondent**

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Judgment
As Approved by the Court

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Lord Justice Laws:

1. This is an appeal by the Leicestershire County Council against a decision of the Employment Appeal Tribunal ("the EAT"), presided over by His Honour Judge McMullen QC, given on 2 September 2005. The EAT dismissed the council's appeal against the judgment of the Leicester Employment Tribunal ("the ET") registered on 14 December 2004 to the effect that a protective award of 90 days be made in respect of a group of employees referred to as the "downgraded group". As regards another group, the "enhancement group", the EAT allowed the council's appeal but only to the extent of reducing from 20 days to 10 days the protective award which was made in respect of them. Permission to appeal to this court was refused on consideration of the papers by Janet Smith LJ on 9 November 2005. Permission was however granted on 21 December 2005 by Pill and Tuckey LJJ after a hearing. Then on 7 February 2006 Tuckey LJ granted permission on the papers to the respondents, the trade union Unison, to cross-appeal against the council's partial success in relation to the enhancement group, and also to support the EAT's conclusion regarding the downgraded group by reference to a new argument. It will make for clarity if I refer to the appellants as "the council" and the respondents as "Unison".

2. The facts of the case have been fully and clearly described by the ET, much of whose account has been replicated by the EAT. I do not think we can do better in this court. The ET introduced the matter thus:

> "1. The trade union Unison, which is recognised by the respondent as representing a substantial number of its employees, complains that, in implementing the results of a job evaluation scheme by the process of dismissing all employees whose terms and conditions of employment were to be changed to their disadvantage and simultaneously offering them re-engagement on the new, less favourable terms, the respondent was in breach of its obligation to consult with them imposed by section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. It seeks a protective award in respect of three descriptions of employees: the downgraded group, said to number about 800 who, as a result of the job evaluation exercise were to be placed in a lower grading in the pay structure: the bonus group, said to number about 300, whose bonus payments were adversely affected by the exercise; and the enhancement group, said to number 1550, whose rights to such things as unsocial hours and weekend working supplements and overtime were adversely affected. Because of the way the scheme was implemented, the downgraded and bonus groups can conveniently be dealt with together and they will be referred to hereafter as the downgraded group."

3. Section 188, to which I shall come shortly, imposes a duty of consultation where an employer is proposing to dismiss as redundant at least 20 employees at one establishment. However the process of dismissal in this case did not constitute a situation of redundancy as the term is ordinarily understood: there was no intention to reduce the size of the workforce. Section 188 applies to the case by force of section 195(1):

> "(1) In this Chapter references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."

4. Pared to the barest outline, Unison's complaint in relation to the downgraded group was that there was no consultation at all as required by the statute, and that was the result of a policy decision by the council. As regards the enhancement group, the complaint which is relevant for our purposes, and which the ET upheld, was that consultation had not begun in "good time" as required by section 188(1A).

5. The relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 are as follows:

> "188(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.
>
> (1A) The consultation shall begin in good time and in any event –
>
> > (a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and
> >
> > (b) otherwise, at least 30 days,
>
> before the first of the dismissals takes effect.
>
> (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.
>
> …
>
> (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…"

Section 188(1A) (and some other provisions in the current text of the statute) was introduced by statutory instrument to give effect to the United Kingdom's obligations arising under Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. Both the Directive and the Act had legislative predecessors, and our attention was directed to some of the provisions there contained. However for reasons I shall give I do not find it necessary to set out or describe those measures.

6. Section 189 confers a right (exercisable by individuals or a trade union, in circumstances defined in section 189(1)) to complain to the ET of failure by an employer to comply with a requirement of section 188. If such a complaint is well founded, the ET must by force of section 189(2) so declare. It then possesses a discretion to make what is called a protective award, which orders the employer to pay remuneration for the protected period. Section 189(4) provides:

> "(4) The protected period-
>
> (a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and
>
> (b) is of such length as the tribunal determines to be just equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188…"

7. The ET described the factual background as follows:

> "**7.**1 In 1997, an agreement known as the Single Status Agreement, applicable to all local authorities, was negotiated at national level. It required each local authority to review the pay and grading structures of its administrative, professional, technical and clerical grades on the one hand and its manual grades on the other, and produce a single unified pay structure covering both. This required each job to be evaluated under a

recognised job evaluation scheme and placed within the single structure.

7.2 In consequence of this process, some employees were likely to be upgraded, some downgraded – that is placed in a lower salary band than at present – and some would stay the same. As part of the negotiations, at least at Leicestershire, other elements of the pay package, such as unsocial hours payments, overtime, bonuses and the like were also discussed. Other than bonus payments, these can conveniently be described collectively as enhancements. The respondent was anxious to reduce the amount it spent on enhancements, particularly in its Social Services Department.

7.3 Discussions about applying the Single Status Agreement began in 1999. The original intention was that the new grading structure would be implemented by 1st April 2001. This proved impossible and the date was changed to the autumn of that year and then to 1st September 2002, this date being announced by the then Leader of the Council at a Council Meeting in March 2002.

7.4 Between July 1999 and May 2002 there were 16 meetings between the management and union sides (seven trade unions were involved) for the purpose of keeping the union side informed of progress on the technically complex task of evaluating some 9000 jobs, the union having decided not to involve themselves in the actual process of evaluation. By June 2002 the majority of jobs with the Council (other than school based jobs) had been evaluated and the respondent's attention therefore turned to a range of related industrial relations issues which would have to be addressed before the outcomes of the evaluation process could be implemented. These included, the proposed unified grading structure; grading outcomes and pay scale; phasing in the cost of upgrading staff (about 50% of the workforce would be upgraded); the protection period for those to be downgraded; harmonisation of enhancements; outstanding grading reviews and an appeals process; back-dating; a support programme for down graded staff; and the difficult issue of market premia, that is uplifts to reflect the going market rate for certain posts.

7.5 Despite a further 14 meetings, by mid-October no agreement had been reached on the main points and both sides were becoming increasingly disenchanted with the behaviour and attitude of the other. The respondent felt that confidentiality had been breached on more than one occasion and unrealistic demands for information were being made and unrealistic positions being adopted. The unions felt that the respondent was withholding information for collective bargaining purposes in breach of section 181 of the 1992 Act

> which culminated in a reference to the Central Arbitration Committee under section 183 and a formal failure to agree to the East Midlands Regional Joint Council for Local Government Services. Both of these followed the respondent's decision at its Employment Committee meeting of the 16th October, to break off the negotiations. The meeting requested '*further reports from the officers with a view to the implementation of the … job evaluation scheme at the earliest feasible date*'.

8. As the EAT noted (paragraph 14, page 44) one of the issues for the ET was to decide when the obligation to consult with Unison arose. The ET observed (paragraph 9.2) that the duty to consult arises upon the proposal to dismiss being made: that, they say, is implicit in Section 188(1). Then they state (9.2):

> "The statutory scheme, imprecise though it is can in our judgment mean only that once the duty to consult arises consultation must begin in good time, (ie speedily) <u>after</u> that date rather than in good time, <u>before</u> what might still be a far distant end date."

9. This construction of the phrase "in good time" in section 188(1A) is sought to be challenged by the council. They propose a different construction, namely that 'in good time' does not merely mean "speedily": it means in good time before the proposed dismissals take effect. But no such submission was made to the ET. In those circumstances the EAT declined to allow the council to take the point before it. The first ground of appeal consists in a compendious submission that the EAT should have allowed the point to be taken, and that the council's construction of the "in good time" provision is the right one.

10. In order to see how this issue bites on the events which happened, and also for the purpose of explaining the other points that arise, it is necessary to cite further passages from the ET's account of the facts. Immediately after setting out their construction on the 'in good time' provision they proceed as follows:

> "9.3 That the formal political decision to proceed by way of dismissal and re-engagement was taken at a meeting of the Employment Committee on the 12th December 2002 seems clear. But there is every reason to suppose that in reality the decision had already been taken for all practical purposes. Mr Shipton told us that by that date the great bulk of the work necessary to carry out the decision had already been done. The Christmas holidays were not far away, and the letters to employees – some 2650 – were to be sent on the 30th December. Given the amount of officer time this would have required and the cost involved in preparing the letters, there can have been little if any doubt about what the political decision would be. The contemporary documents support this view.
>
> 9.4 In his report to the Employment Committee of the 18th November, Mr Shipton reported that:

> 'The County Council is now considering proposals to implement job evaluation following the failure to reach an agreement with the trade unions. This will mean that the Council will be required to give employees (who are downgraded or subject to a reduction in enhancement payments) notice terminating their current contract of employment and simultaneously offering a new contract of employment… Since this is a dismissal, individual members of staff would be entitled to pursue unfair dismissal claims...'

The report was noted.

9.5 In a letter of the 14th November from John Legrys, the Secretary to the union side, the County Solicitor was asked:

> '3. Revocation of existing employment contracts and the issue of new contracts. It is understood that from discussions at Departmental level preparations are now being made for the issue of these notices in January 2003. Can you please confirm when the notices are to be issued?
>
> In addition for the avoidance of doubt the Trade Union side will not accept or agree to a notice being place [sic] on the back of a 'Staff Bulletin' …. Each individual employee must be given formal notice in accordance to [sic] legislation.'

9.6 In her reply dated the 25th November, the County Solicitor, Elizabeth McCalla, replied:

> '3. I can confirm that, where staff are being downgraded, the intention is to issue notices early in the New Year. Each notice will have to address the employee's individual circumstances… The timing does, however, depend on discussions taking place at regional level arising out of the failure to agree and final decisions being taken by the Employment Committee.'

9.7 The reference to '*final*' decisions of the Employment Committee which would affect the '*timing*' is instructive, as is the absence of any suggestion that, timing apart, nothing is yet certain. Read together with Mr Legrys' letter to which it is a reply, and the considerable level of activity already underway to implement the strategy, there can be little doubt that, if section 188(1) does require a decision to dismiss to have been taken before the duty to consult arises (which in our judgment it does not) then, for all practical purposes such a decision had been taken. All that took place on the 12th December was the

announcement of a decision already arrived at. Quite clearly, given the tenor of the County Solicitor's letter and the background activity, any proposal to dismiss was as much that of the elected members as the officers. The duty to consult was therefore triggered by mid- November at the latest.

9.8 On the 13th December Mr Shipton wrote to Mr Legrys informing him of the formal decision of the committee of the previous day *'to proceed with imposing job evaluation'* but not explaining how it was to be done. On the 20th December a document describing itself as a consultation notice under section 195 of the 1992 Act and purporting to contain the information required by section 188(4) was sent to Nasima Sarang the local Unison Branch Secretary. The covering letter simply invited her *'to discuss this notice'*.

9.9 In our judgment, the timing of the formal announcement to the union that dismissals were to take place – which was the notice of 20th December rather than the letter of the 13th December – coming as it did at least a month after the decision, places the respondent in clear breach of their duty under section 188(1) and (2) to consult *'in good time'*."

11. The ET also made the following findings:

(1) There was a failure to consult the downgraded group in accordance with section 188(2). This failure was a consequence of a policy decision not to do so: ET judgment paragraphs 11.4, 14.1.

(2) After 12 December 2002 the council were willing to consult with Unison with a view to reaching agreement about ways of avoiding dismissals of members of the enhancement group, reducing the numbers to be dismissed, and mitigating the consequences of dismissals: ET judgment paragraphs 12.1, 12.2.

12. The council puts forward two grounds of appeal. The first is the compendious ground relating to the "in good time" provision which I have already summarised. The second is that in relation to the downgraded group, in order to decide what was the proper period of a protective award, the ET should have taken account of meetings and exchanges of information taking place before the proposals to dismiss; but they declined to do so. Had they taken those matters into account, they could not properly or reasonably have concluded that the maximum protective award of 90 days was appropriate.

THE FIRST GROUND

13. I turn then to the first ground. It is not disputed that such consultation as there was (with the enhancement group) began on 20 December 2002, and the first notices of termination went out on 30 December 2002. Subject to a point as to the correct date in law to be taken as the date when the dismissals took effect, it is also agreed (see paragraph 5.1 of the ET judgment) that the consultation was begun more than 90 days before the first dismissals took effect.

14. As I have said, there is comprehended within the first ground an issue whether the EAT should have allowed the "in good time" point to be taken.

Was the EAT right to refuse to allow the point to be taken?

15. The EAT referred to well established jurisprudence (in particular *Jones v Burdett Coutts* [1999] ECR 38, to which I will refer shortly) to the effect that the EAT should only allow a new point of law to be taken before it in exceptional circumstances. Such a point is not to be taken merely because it seems to be – or is even shown to be – a good one. In declining to entertain the new argument as to "in good time" the EAT cited (paragraph 37) their own previous decision in *Blackpool Fylde and Wyre Society for the Blind* (UKEAT/0035/05), which referred to the earlier learning including *Jones*, and then said this:

> "38. The high value of the claim and the fact that it involves construction of a domestic statute against a European Directive are not, in themselves, exceptional circumstances. It was never argued below that the words 'in good time' fix a time with reference to the contemplated redundancy date. There is plainly a public interest in the finality of litigation, particularly this litigation, which is ongoing three years after the relevant events. Unison has been deprived of a judgment by the Employment Tribunal on this issue and thus is facing the point at the EAT for the first time. It is not simply a construction point: issues of fact would need to be determined and the Tribunal would be required to address the construction contended for in the light of its findings…"

16. Miss Slade QC (who did not appear for the ET) for the council submits that the EAT fell into error and should have held that there were exceptional circumstances here, and that accordingly the council should have been allowed to argue the new construction point. She advances three arguments in support of that submission. (1) The point is an important one and it is in the public interest that this court should decide it. (2) The value of the award, depending as it does in large measure on this construction point, is a relevant consideration when considering special circumstances. This is a high value case which may cost the council (and thus their council tax payers) a seven figure sum; the precise amount depends upon which of various hypotheses is correct. (3) If the construction of "in good time" went in the council's favour, then contrary to the view of the EAT new findings of fact would not be required in order to resolve the case, which could accordingly be concluded in this court without the necessity for a remittal to the ET. Alternatively, any remittal would only be required so that the expert tribunal could make a judgment, in light of the true construction of "in good time", on the basis of facts already found.

17. Miss Slade submits that if her interpretation of "in good time" is right, the ET would on the facts be bound to conclude that the consultations relating to the enhancement group were indeed in good time. Here is paragraph 22 of her skeleton argument:

> "The Appellant invites the Court of Appeal to exercise its discretion to permit the 'in good time' point to be argued. The circumstances are exceptional: the point is one purely of

> construction requiring no further evidence and is capable of application by an appellate court as by an ET to the agreed, undisputed and found facts, it will not cause any additional delay, it is material to the quantum of the protective awards made and pursuing it is proportionate in this case in which the award of a considerable amount of public money may be dependant upon this point…."

18. Mr Cavanagh QC for Unison says that if this point is allowed to be argued, and were to find favour in this court, there would have to be a remittal to the ET to undertake a further analysis of the question whether the consultation began in good time. Such a question would be a matter of fact and degree, and no judgment about it has yet been made by any tribunal. Unison submit also that if (but only if) the court allows the council to canvass the "in good time" point, then they too have a new argument which they would wish to raise. This is the additional point which as I have said Tuckey LJ gave permission to argue on 7 February 2006. I have already referred to it in passing. It concerns the correct date in law to be taken as the date when the dismissals took effect. The submission would be that by force of the decision of the European Court of Justice in *Junk v Kuhnel* [2005] IRLR 310 the date when a dismissal takes effect for the purposes of section 188(1A) is the date when notice of termination is given, rather than when the notice expires and the employment is in fact terminated (see paragraph 16 of counsel's skeleton argument).

19. On the question whether the council should in fact be allowed to raise their new construction point, it is submitted in Mr Cavanagh's skeleton argument (paragraph 24) that the judgment of the EAT that there were not here any exceptional circumstances such as might justify the new point being taken was an exercise of discretion. Accordingly it can only be challenged in this court if it is shown to be perverse, or (Mr Cavanagh would no doubt accept) to have been arrived at on some other mistaken legal basis. But, he submits, the EAT have done no more nor less than apply well established principles and there is nothing in their conclusion which could conceivably be categorised as perverse.

20. In *Jones v Burdett Coutts*, which may fairly be said to be the leading authority, Robert Walker LJ as he then was attached particular importance to the prospect of fresh factual issues having to be determined. After citing earlier cases he said (44B-F):

> "These authorities show that, although the appeal tribunal has a discretion to allow a new point of law to be raised or a conceded point to be reopened, the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which, because the point was not in issue, were not sufficiently investigated before the industrial tribunal… In *Secretary of State for Employment v Newcastle City Council* the appeal tribunal presided over by Talbot J said that it was wrong in principle to allow new points to be raised, or conceded points to be reopened, if further factual matters would have to be investigated. In *Hellyer Brothers Ltd v Mcleod* this court, in a judgment of the court delivered by Slade LJ which fully reviewed the authorities, was inclined to the view that the test

> in the appeal tribunal should not be more stringent than it is when a comparable point arises on an ordinary appeal to the Court of Appeal… In this case the appeal tribunal… recognised that the consequence of allowing Mr Jones's appeal would be a new hearing with fresh evidence… It was therefore a case in which the appeal tribunal would have had to have exceptionally compelling reasons for taking such an unusual course."

21. In my judgment nothing has been shown to demonstrate that this case is of an exceptional nature; certainly nothing to suggest that a reasonable EAT was bound to hold that it was. The high value of the claim cannot make it so. I accept that there might be a case in which there was a pressing public interest to have a particular point decided, and that might prevail as an exceptional circumstance. Indeed such an instance may be the paradigm of an exceptional circumstance. In this case, of course I do not say that the construction of section 188(1A) – "in good time" – is not important. But the council's claim that there is an overriding public interest that it be decided is, I think, greatly undermined if Unison are right to submit that a decision in the council's favour on the construction issue would require the case to be remitted for further consideration by the ET. And it seems to me that Unison are right so to submit. Whether consultation took place in good time is a matter of fact and degree. Even if all necessary primary facts are already found, the judgment whether the consultation here would have been begun in good time on the basis of the council's construction must require a weighing, an evaluation, of the detailed facts which has not yet been undertaken. It could only properly be undertaken by the specialist first instance tribunal; certainly not by this court. And it could only fairly be done taking into account the correct resolution of Unison's point on *Junk v Kuhnel*, which has not had to be canvassed as matters have so far stood.

22. I conclude that in the circumstances of the present case the EAT was quite right to decline to allow the fresh construction point to be taken. Indeed I would hold that to allow it would have been unjustified on authority. I would dismiss this part of the appeal on that ground. That being so, there is no basis on which it would be proper for this court now to consider and determine the true construction of the "in good time" provision in section 188(1A) of the 1992 Act. It is an exercise which would have required some consideration of the provisions of Council Directive 98/59/EC and also, I think, predecessor measures in the same field which preceded both the Directive and the current text of the 1992 Act. Not only that: as I understand it the *vires* for the introduction of section 188(1A) into the statute by subordinate legislation was (and was only) section 2 of the European Communities Act 1972, and in that case, as my Lord Brooke LJ pointed out in the course of argument, the amending measure (and thus section 188(1A) itself) is only lawful if it implements the Community law obligation and does no more. It is possible that this circumstance might have raised problematic questions; I emphasise that I express no view. At all events, given my conclusion that the EAT's decision not to allow the council to raise their construction argument was in my judgment correct in principle, it would in my judgment be quite wrong for this court now to offer a gratuitous opinion upon the subject. It follows also that there is no purpose in pursuing Unison's point on *Junk v Kuhnel.*

THE SECOND GROUND

23. I turn then to the second ground of appeal. As I have indicated this relates to the downgraded group, and the contention is that, in considering the amount of the protective award, the ET erred in law in declining to take into account meetings and exchanges of information which took place before the proposals to dismiss were made. Had they done so, it is said that they could not properly or reasonably have concluded that the maximum protective award of 90 days was appropriate. The EAT upheld the ET's approach and decision and it is submitted that they were wrong to do so.

24. I may deal with this point quite shortly without injustice to the council. The ET had to make a judgment of the merits of the matter. They held in terms that the previous discussions were on different issues from those that fell to be canvassed in a section 188 consultation: see paragraphs 8.7.6, 11.4, 14.1 and 14.2. This was a matter of concession by the council: at paragraph 8.2 the ET recorded:

> "… [A]s Mr Shipton, the respondent's head of human resources readily conceded, none of the issues which the respondent was required to consult with the unions about once their section 188 duty had been triggered had as yet been discussed."

Mr Shipton's concession was referred to again at paragraph 14.2:

> "The flow of information to individual employees and the union side and the number of meetings are all irrelevant given Mr Shipton's concession that none of the section 188 issues were addressed."

25. That was a factual judgment which could only be impugned before the EAT by way of a conventional *Wednesbury* challenge. The EAT cited (paragraph 40) the guidance given by Peter Gibson LJ in *Susie Radin* [2004] IRLR 400, which included these observations (paragraph 45):

> "(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of the breach.
>
> (2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.
>
> …
>
> (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."

The EAT continued:

> "41. The Tribunal clearly had in mind this guidance. We accept the submission that any 'consultation' prior to the making of the proposal to dismiss cannot be taken into account. The Tribunal has a discretion as to the amount of time to be awarded within the protected period and begins with the maximum and works down, if appropriate. The fact that the employer here achieved partial compliance with the requirement to provide information does not mean that there should be an automatic reduction. The Tribunal had in mind that provision. It is a separate provision from the duty to consult, although it arises with a view to achieving meaningful consultation. In other words, without information consultation will not be effective. As to the downgraded group, the Tribunal was entitled to be condign in its criticisms, for this was a case of deliberate refusal, intentionally carried out. We see no error in law so as to criticise the Tribunal for being manifestly excessive or wrong in principle which is the test we are asked to apply."

26. Miss Slade submits that the ET was not entitled to disregard the earlier communications, because in doing so they ignored their own findings, set out especially at paragraphs 7.4 and 7.5 which I have cited, as to the amplitude of those discussions. But there is no contradiction between 7.4 and 7.5 (which I will not repeat) on the one hand and 8.7.6, 11.4, 14.1 and 14.2 on the other.

27. Miss Slade's argument on this part of the case is with respect to her an appeal to the merits dressed up as law, and there is nothing in it.

28. For all these reasons I would dismiss the appeal.

THE CROSS-APPEAL

29. As I have said, the ET made a protective award of 20 days in respect of the enhancement group. The EAT reduced it to 10 days. Unison say there was no basis upon which they could properly do so. The EAT's jurisdiction is as to law only. Accordingly they were only entitled to overturn the ET's decision as to the quantum of the protective award on grounds of error of law. In fixing the protective award the ET were of course obliged to follow the guidelines set out in *Susie Radin.* Those require a wide discretionary approach to be taken to the task. The EAT took the view (I shall set out the passage shortly) that the ET did not decide the case in accordance with the guidelines because they failed to pay attention to an aspect of the mitigation available to the council in respect of their breach of the duty to consult. Mr Cavanagh says there was no such failure; absent an actual misunderstanding of the evidence, such a judgment of the EAT would have to be based on a finding of perversity, and there was none.

30. I have already referred to the ET's conclusion that after 12 December 2002 the council were willing to consult with Unison with a view to reaching agreement about ways of avoiding dismissals of members of the enhancement group, reducing the

numbers to be dismissed, and mitigating the consequences of dismissals (ET judgment paragraphs 12.1, 12.2). In light of the EAT's criticisms the terms of paragraphs 12.1 – 12.3 are of some importance:

> "12.1 The meeting proposed for the 9th January did not take place, nor did any other meeting to discuss the question of enhancements during the 90 day period. Had such a meeting taken place, given the [appellants'] express desire to resolve this part of the dispute, there is little reason to doubt… that it would have been held with a view to reaching agreement about ways of avoiding the dismissals (as required by subsection 2(a)) and reducing the number of employees to be dismissed (subsection 2(b)). Miss Gower [sc. acting for Unison] does however submit that there would have been no attempt to comply with 2(c), mitigating the consequences of the dismissals because pay protection had been ruled out from further discussions.
>
> 12.2 There is simply no evidential basis for that submission. The contemporary documents show that the Employment Committee were anxious to discuss with the union side and reach agreement on the issue of enhancements…
>
> 12.3 It is important to understand why this offer of negotiations on the enhancements package, which would have inevitably addressed section 188(2) issues, was not followed up… Mr Clinch [Unison's legal officer] seems to have been unaware of the letter of the 13th December from Mr Shipton confirming the respondent's continuing desire to consult on enhancements and, more surprising perhaps, the consultation notice sent to Miss Sarang on the 20th December."

31. It is plain from these sub-paragraphs that there was no failure by the ET to have regard to the council's willingness to consult pursuant to s.188(2); and this was an important dimension in the council's case. Before coming to the EAT's criticisms I should cite the ET's conclusions relating to the enhancement group at 15.2 – 15.4:

> "15.2… Once the decision was taken to enforce the changes in enhancements by dismissal and re-engagement, compliance with section 188(2) was only possible by a willingness to negotiate about those enhancements with a view to reaching agreement which could have included an alternative method of implementation, thus avoiding the dismissals.
>
> 15.3 By far the greater degree of culpability falls upon the trade union side who simply did not pick up the respondent's invitation to consult. The only criticism of the respondent, and it is a slight one in the circumstances, is that they could perhaps have repeated the invitation at a somewhat earlier stage. That they remained sincere in their desire to discuss and reach an agreement is not in question.

> 15.4 There remain the failures in respect of the late notification of the proposal and the shortcomings in the information provided. These are relatively minor and in our judgment it would be just and equitable to confine the protected period for the enhancement group to 20 days."

32. After stating (paragraph 42) that "[t]he Union was itself to blame in its failure to respond effectively", and citing paragraphs 12.1 and 12.3 of the ET judgment, the EAT proceed to say this (paragraph 43):

> "This was not a case, at least in respect of the enhancement group, of a total failure to consult, but simply of lateness. The primary finding of the Employment Tribunal is that there would have been full negotiations with the trade union to resolve the issue which would have included all matters under section 188(2), substantially the prospect of avoiding the dismissals as a way of achieving change. Failure to consider that as mitigation, is an error, with respect."

33. Mr Cavanagh referred to *Yeboah v Crofton* [2002] IRLR 634, [2002] EWCA Civ 794, in which at paragraph 12 Mummery LJ emphasised the limited role of the EAT in dealing with appeals from the ET on questions of law. But with respect authority is hardly needed. The EAT's limited role, dealing with law only, is plain and obvious.

34. That being so, I cannot see that the ET fell into any kind of error justiciable in the EAT. I accept that another constitution of the ET might have fixed on a protective award of 10 days rather than 20, and not fallen foul of the *Susie Radin* guidelines. Neither view – 10 or 20 – is perverse. On any reasonable approach to the facts it cannot in my judgment be said that the ET in this case misunderstood the evidence or arrived at a perverse conclusion. I do not consider that they failed to recognise as mitigation anything that should reasonably have been treated as mitigating the council's breach. So far as the EAT at paragraph 43 concluded otherwise, I think they were in error. The ET were quite entitled to conclude as they did at paragraph in relation to the enhancement group.

35. For these reasons I would allow the cross-appeal and restore the ET's award of 20 days protective award.

Lord Justice Scott Baker:

36. I agree.

Lord Justice Brooke:

37. I also agree.