Neutral Citation: [2013] IEHC 622

THE HIGH COURT

[2012 No. 245 MCA]

IN THE MATTER OF THE EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYMENT) REGULATIONS 2000

AND

IN THE MATTER OF THE PROTECTION OF EMPLOYMENT ACT 1977

BETWEEN

BRIAN TANGNEY AND TWENTY SEVEN OTHERS

APPELLANTS

AND

DELL PRODUCTS, LIMERICK

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 26th day of June 2013

1. This matter comes before the Court by way of an appeal from a determination of the Employment Appeals Tribunal (hereinafter "EAT") dated 5th June, 2012. That decision had dismissed a complaint on behalf of the applicant and twenty seven others that the respondent had breached the terms of section 9 of the Protection of Employment Act, 1977 as amended. The decision of the EAT was itself reached on an appeal from a decision of the Rights Commissioner dated the 12th November, 2009 which had concluded that the respondent had breached section 9 of the Protection of Employment Act 1977. Under section 8(4)(b) of the Employment (Information) Act 1994, provision is made for an appeal from a determination of the EAT to the High Court on a point of law, but the determination of the High Court is final and conclusive.

The factual background

2. Dell Products, Limerick (Dell) is one of the largest multi-national companies active in Ireland. In 2009 it embarked on a worldwide rationalisation and re-organisation of its activities which saw the cessation of manufacturing in Ireland which had previously been carried on at its premises at Raheen Business Park in Limerick.

3. On 8th January, 2009 the appellants and other employees received a written communication from their employer furnishing information as to the employer's plan. On the same day a staff meeting was held at which employees were briefed by senior management figures. In essence the case that has been made by the applicants throughout is that what occurred on 8th January, 2009 (the written communication and the briefing at the staff meeting) constituted a notice of dismissal and accordingly that any discussion that took place thereafter came too late to be effective. It is the case that following on from what occurred on 8th January, 2009, Dell engaged in a consultation and discussion process with its employees and their designated representatives. Discussions took place with a representative group known as the Site Communication Team (SCT) and with an *ad hoc* group styled as the Dell Employees Representative Committee (DERC).

4. In the course of argument I have been told by counsel for the respondent that the fact that the redundancy package was modified at an additional cost to the employer of approximately €9 million euro shows that the consultation process that occurred was a meaningful, worthwhile and effective one.

5. I will return to the communications of 8th January, 2009 in greater detail but at this stage it will be evident that the core issue in this appeal is whether a notice of dismissal took place on 8th January, 2009, and that accordingly whatever consultations took place thereafter came too late, or whether, as contended by Dell, what occurred on 8th January, 2009 and thereafter was sufficient to comply in full with all statutory obligations.

Legislation

6. It is convenient to refer at this stage to the Irish and European legislation that appears in issue. The Irish legislation with which we are concerned is the Protection of Employment Act 1977, as amended and in particular Part 2 thereof. Section 9 provides as follows:

> Obligation on Employer to Consult Employees Representatives.
>
> 9 – (1) Where an employer proposes to create collective redundancies he shall, with a view to reaching an agreement, initiate consultations with employees' representatives
>
> (2) Consultations under this section shall include the following matters –
>
> > (a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or, mitigating their consequences by recourse to accompanying social measures, aimed, *inter alia*, at aid for redeploying or retraining employees made redundant
> >
> > (b) the basis on which it will be decided which particular employees will be made redundant.
>
> (3) Consultations under this section shall be initiated at the earliest opportunity and in any event at least 30 days before the first notice of dismissal is givenf

10 - (1) For the purpose of consultations under section 9, the employer concerned shall supply the employees' representatives with all relevant information relating to the proposed redundancies.

(2) Without prejudice to the generality of subsection (1), information supplied under this section shall include the following, of which details shall be given in writing –

(a) the reasons for the proposed redundancies.

(b) the number, and description of categories, of employees whom it is proposed to make redundant,

(c) the number of employees, and description of categories, normally employed

(cc)

(i) the number (if any) of agency workers to which the protection of Employees (Temporary Agency Work) Act 2012 applies engaged to work for the employer,

(ii) those parts of the employer's business in which those agency workers are, for the time being, working, and

(iii) the type of work that those agency workers are engaged to do and

(d) the period during which it is proposed to effect the proposed redundancies,

(e) the criteria proposed for the selection of the workers to be made redundant and,

(f) the method of calculating any redundancy payments other than those methods set out in the Redundancy Payments Act 1967 to 2007 or any other relevant enactment for the time being in force or, subject thereto, in practice.

(3) An employer shall as soon as possible supply the minister with copies of all information supplied in writing under subsection (2).

7. It may be noted that this Act was designed to satisfy Ireland's obligations under Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies consolidating earlier directives. The relevant portions of the directive are to be found at section (ii) and section (iii).

Section (ii) Information and Consultation

Article 2(1)

(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' representations 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 proposed redundancies;

(ii) The number of 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 therefore upon the employer and

(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), subpoints (i) to (v).

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

> In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.

8. Section (iii) deals with the procedures for collective redundancies. It requires employers to notify competent public authorities in writing of any projected collective redundancies. Article 4 provides that projective collective redundancies shall take effect not earlier than 30 days after the notification to the competent public authority.

The decision under appeal
9. The question is whether the consultation process required by the 1977 Act commenced, as it ought to on 8th January, 2009 or whether a breach of section 9 of the 1977 Act occurred by reason of the fact that the respondent made a decision to terminate the employment of the applicant prior to 8th January, 2009, and on that occasion merely communicated a decision already taken, a decision which had been taken in the absence of consultation.

10. The Rights Commissioner had concluded that the specific terms of the individual letters that issued on 8th January, 2009, made it impossible for the employer to comply with section 9.

11. The appeal submitted to the Employment Appeals Tribunal was very specific in contending that the Rights Commissioner had misinterpreted the letters of 8th January, 2009 as a notice of termination of employment, when in fact the letters were no more than an indication to employees of the terms that would apply if they were made redundant. In its determination it recited the opening remarks of counsel for the employer. Of note is that reference is made to the fact that counsel had referred to two cases *Junk v. Kühnel (Case C-188/03)* [2005] E.C.R. I-855 and also *Akavan Erityisalojen Keskusliitto AEK ry v. Fujitsu Siemens Computers Oy (Case C-44/08)* [2009] E.C.R. I-8163. Counsel is quoted as saying that the Fujitsu decision "is clear whether it is too early to consult" and "it is also incorrect to conflict the strategic decision and the delivery of a decision". The comment is added:-

> "The point counsel makes from the authorities is that it is clear whether it is too late to consult employees or too early to consult".

Then, reference is made in the determination in these terms to the submissions that had been made in regard to section 9:-

> "The submission is that regarding s. 9 the employer ticks all of the requirements of s. 9.
>
> (1) The employer did not start the consultation too late.
>
> (2) By reference to the *Fujitsu* case there was no question of the employer having to consult any earlier because of the strategic to migrate was the employer [*sic*] decision and
>
> (3) There is no prohibition in the employer dismissing employees whilst the consultative process is on-going provided .....The RC [Rights Commissioner] wrongly decided that the employer started to dismiss before consultation".

I have set out this section of the determination in full and exactly as it appears there as in my view it serves to clarify the operative part of the determination. Thereafter, the appellant's case (Dell), the respondents' case and the closing arguments of counsel for the respondent employees are recited.

12. The operative part of the determination, the actual decision is particularly brief. It is convenient to quote it in full.

> "***Determination***
>
> Having heard all the evidence and submissions of the parties, including Mr. G.H. who was self-represented, the Tribunal makes the following Determination.
>
> Regarding S.10 of the Act, the Tribunal upholds the Decision of the Rights Commissioner.
>
> Regarding S. 9 the employer is entitled to make a strategic decision and the Tribunal is satisfied that the meeting of 08th January 2009 was the commencement of this process. The Tribunal unanimously determines that the complaint by the Respondent is not well founded and the appellant employer is not in breach of S. 9 of the Act. Accordingly the Rights Commissioners [sic] decision is upset".

13. Dell has asserted that the purported appeal to the High Court does not raise any valid point of law arising from adjudication of the EAT. Rather, it is said, that the appellants are seeking a further appeal on the facts, something that is not permissible. Dell contends that the EAT was confronted with the need for a simple factual determination as to whether the communications of 8th January, 2009 constituted a notice of dismissal, and concluded that was not so. While the determination of the EAT may well involve a finding of fact, it seems to me that one cannot lose sight of the fact that the notice of appeal purports to raise issues of law. In particular it is contended by the notice of appeal that the EAT's interpretation of the requirement for consultation as provided for under section 9 of the Protection of Employment Act 1977, the Protection of Employment Regulations 2000 and the *jurisprudence* of the European Court of Justice was incorrect in law. More particularly it is contended that the EAT erred in its conclusions as to when the obligation to consult arose. It seems to me that in these circumstances it would not be appropriate to dispose of the appeal in a summary fashion as suggested by Dell. Rather, it is appropriate to identify what was the threshold that the EAT was applying and consider whether that was appropriate. It may nonetheless be the case that on closer examination it will emerge that the determination was in reality a finding of fact and that an appeal does not lie.

The Authorities
14. The question of when the obligation to consult arises has been the subject of a number of decisions of the European Court of Justice (hereinafter "ECJ") and of the British Courts. So far as the ECJ decisions are concerned the starting point for consideration of this issue is *Junk v. Kühnel (Case C-188/03)* [2005] E.C.R. I-855. The background to that case was that Mrs. Junk had been employed as a care assistant and domestic carer by a company referred to as A.W.O. On 31st January, 2002 A.W.O. lodged a request for the opening of insolvency proceedings on grounds of financial difficulties. With effect from 1st February, 2002, it released all its employees from the obligation to work and did not pay them any remuneration for January, 2002. On 5th February, 2002, insolvency proceedings were opened, followed on 1st May, 2002, by liquidation proceedings. Mr. Kühnel was appointed liquidator. By letter of the

19th June, 2002, Mr. Kühnel informed the chairman of the works council in the company that because of the closure of the company he intended to terminate all remaining contracts of employment, including that of Mrs. Junk, with effect from 30th September, 2002 and to carry out a collective redundancy. Mrs. Junk submitted before the Arbeitsgericht (or Labour Tribunal) that her redundancy was ineffective. Significantly the Arbeitsgericht pointed out that according to the view which had been dominant in German Law, the provisions applicable in cases of collective redundancies do not refer to the termination of the contracts of employment but to the date on which the workers actually leave the undertaking, that is to say generally on the expiry of their periods of notice of redundancy. The ECJ at paragraph 31 interpreted the first question submitted to it as in substance seeking to ascertain whether Articles 2 and 4 of the directive are to be construed as meaning that the event constituting redundancy consists of the expression by the employer of his intention to put an end of the contract of employment or of the actual cessation of the employment relationship on the expiry of the period in the notice of redundancy.

15. Having referred to certain technical terms that appeared in the German language version of the directive, the ECJ at paragraph 35 observed as follows:

> "Next, it must be noted that Article 2(1) of the directive imposes an obligation on the employer to begin consultations with the workers' representatives in good time in the case where he 'is contemplating collective redundancies'. Article 3 (1) requires the employer to notify the competent public authority of 'any projected collective redundancies'."

The ECJ in the following paragraphs went on to comment as follows:

> (36) The case in which the employer 'is contemplating' collective redundancies and has drawn up a 'project' to that end corresponds to a situation in which no decision has yet been taken. By contrast, the notification to a worker that his or her contract of employment has been terminated is the expression of a decision to sever the employment relationship, and the actual cessation of that relationship on the expiry of the period of notice is no more than the effect of that decision.
>
> (37) Thus, the terms used by the Community legislature indicate that the obligations to consult and to notify arise prior to any decision by the employer to terminate contracts of employment.
>
> (38) Finally, this interpretation is confirmed, in regard to the procedure for consultation of workers' representatives, by the purpose of the directive, as set out in Article 2(2), which is to avoid terminations of contracts of employment or to reduce the number of such terminations. The achievement of that purpose would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision.
>
> (39) The answer to the first question must therefore be that Articles 2 to 4 of the directive must be construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.

16. The ECJ returned to the issue in case *Akavan v. Fujitsu Siemens Computers Oy (Case C-44/08)* [2009] E.C.R. I–8163. This is the decision that the Employment Appeals Tribunal was referring to as *Fujitsu Siemens*. For convenience I will adopt the same abbreviation.

17. The background to the matter coming before the ECJ is that following the merger of certain information technology businesses of Fujitsu Limited and Siemens AG into a joint undertaking. The Fujitsu Siemens computer group started trading in October, 1999. FSC was a subsidiary of Fujitsu Siemens Computers (Holdings) BV (the parent company), a company established in the Netherlands. At the time the group had a production plant in Espoo in Finland and a number of plants in Germany.

18. At a meeting held on 7th December, 1999, the executive counsel of the parent company, which consisted of the executive members of its board of directors, decided to make a proposal to the board of directors to dispose of the Espoo facility. At a meeting held a week later, on 14th December, 1999, the board of directors decided to support the proposal, but no specific decision was taken in relation to that factory. On the same day FSC proposed consultations and those took place between 20th December, 1999 and 31st January, 2000. On 1st February, 2000, FSC's board of directors, mainly consisting of directors of the group and chaired by the deputy chairman of the parent company's board of directors took a decision to terminate FSC's operations in Finland with the exception of computer sales. On 8th February, 2000, FSC began making employees redundant. Some employees claimed that FSC had infringed the law on cooperation and commenced proceedings. During the course of those proceedings it was contended on behalf of the employees that a final decision to run down the activities of the Espoo factory and to separate it from the group's activities before transferring it to Germany had in fact been taken by the parent company's board of directors by 14th December, 1999 at the latest. According to the employees, the real decisions had been taken on or before the 14th December, before the consultations with the workforce required by law had taken place. When the matter made its way to the Finnish Supreme Court six questions were submitted to the ECJ, the first two of which were as follows:-

> (1) Is Article 2(1) of Directive 98/59/EC 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 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 capacity or a concentration of production, as a consequence of which a need for collective redundancies is to be expected?
>
> (2) Having regard to the fact that the first subparagraph of Article 2(3) of Directive 98/59 refers to the supply of information in good time during the course of the consultations, is Article 2(1) of [that] directive to be interpreted as meaning that the obligation under that provision to start consultations when "contemplating" collective redundancies and "in good time" requires consultations to be started already before the employer's intentions have reached the stage at which the employer is required to identify and supply to the employees the information specified in Article 2(3)(b) [of that directive]?

These questions were answered as follows:-

> (1) Article 2(1) of Council Directive 98/59/EC of 20th July, 1988 on the approximation of the laws of the Member States relating to collective redundancies 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 hold consultations with workers' representatives.

(2) Whether the obligation has arisen for the employer to start consultations on the collective redundancies contemplated does not depend on whether the employer is already able to supply to the workers' representatives all the information required in Article 2(3) (b) of Directive 98/59.

The discussion at paragraphs 38 to 49 as to how question 1 was to be answered is of considerable interest. It is convenient to set out those paragraphs which are of particular importance at this stage.

> "38. In that regard, it must be recalled that, as is clear from the wording of Articles 2(1) and 3(1) of Directive 98/59, the obligations of consultation and notification imposed on the employer come into being prior to the employer's decision to terminate employment contracts (see, to that effect Case C-188/03 *Junk* [2005] ECR I-885 paragraphs 36 and 37). In such a case there is a still a possibility of avoiding or at least reducing collective redundancies, or of mitigating the consequences.
>
> 39. Under Article 2(1) of Directive 98/59, the employer has the obligation to start consultations with the workers' representatives in good time if he is "contemplating collective redundancies". As stated by the Advocate General in points 48 and 49 of his Opinion, it is clear from comparison of various language versions of that provision that the Community legislature envisaged that the obligation at issue to hold consultations would arise in connection with the existence of an intention on the part of the employer to make collective redundancies.
>
> 40. The references in Articles 3 and 4 of Directive 98/59 to "projected" collected redundancies confirm that the existence of such an intention is the factor which triggers the obligations laid down by that directive, in particular by Article 2.
>
> 41. It follows that the obligation to hold consultations laid down in Article 2 of Directive 98/59 is deemed to arise where the employer is contemplating collective redundancies or is drawing up a plan for collective redundancies (see, to that effect, Case 284/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark* [1985] ECR 553, paragraph 17).
>
> 42. It must however be added that, as is clear from the actual wording, the obligations laid down by Directive 98/59, in particular the obligation to hold consultations laid down in Article 2, are also triggered in situations where the prospect of collective redundancies is not directly the choice of the employer.
>
> 43. Under Article 2(4) of that directive, the employer is responsible for compliance with the information and consultation requirements stemming from that directive, even if the decision on collective redundancies is made not by the employer, but by the undertaking controlling the employer, and even though the employer may not have been immediately and properly informed of that decision.
>
> 44. Against an economic background marked by the increasing presence of groups of undertakings, that provision serves to ensure, where one undertaking is controlled by another, that the purpose of Directive 98/59, which, as is stated in recital 2 of its preamble, seeks to promote greater protection for workers in the event of collective redundancies, is actually achieved (Case C 270/05 *Athinaïki Chartopoïa* [2007] ECR I 1499, paragraph 25).
>
> 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 presuppose 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*, 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.

19. The reference in the judgment with apparent approval to the arguments that had been advanced on behalf of the government of the United Kingdom about the dangers of premature consultation is instructive. I have discussed the approach taken by the ECJ in the *Fujitsu Siemens* case at some length because it seems to me that the EAT was seeking to apply this decision when it reached the conclusion that it did. It is for this reason that I have referred to the recital of the arguments of counsel for the employer in the body of the determination.

20. Still greater clarity, if that was required, might have been provided by *United States of America v. Christine Nolan (Case C-583/10)* (Judgment of the Court, Third Chamber, of 18th October, 2012) but unfortunately the ECJ, faced with the very unusual situation of a dispute involving a civilian employee working at US air force base in Britain, concluded that it did not have jurisdiction to

reply to questions which had been submitted to it by the Court of Appeal.

21. The factual background to that case could hardly have been more unusual and indeed the notion of a sovereign government engaging in consultation before closing a military base for strategic reasons raises eyebrows. However, what is of interest is that the United States argued by reference to the *Fujitsu Siemens* case that the consultation obligation was not triggered by a proposed business decision to close a plant, but that the consultation obligation only arose at a later stage when the business decision had already been made and the intention to make the employer redundant had been formed. In a situation where it was clear that if the interpretation being placed on the ECJ decision in *Fujitsu Siemens* was correct that this meant that a decision of a divisional court in *R. v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Vardy and ors* [1993] IRLR 104 had been wrongly decided, the Court of Appeal decided to submit certain questions to the ECJ. By way of further background it should be noted that in the Nolan case the EAT had found against the government of the United States. In doing so it was following a decision of the EAT in *UK Coal Mining Limited v. National Union of Mineworkers (Northumberland Area)* [2008] IRLR 4 which had held that the consultation obligation arose when the mine closure was proposed, or at least when it was contemplated that the closure would give rise to redundancies and that the consultation should concern the reasons for the closure. That decision, it may be noted, was departing from earlier EAT decisions such as *Middlesbrough Borough Council v. Transport and General Workers Union* [2002] IRLR 332 and *Securicor Omega Express v. G.M.B.* [2004] IRLR 9. The Court of Appeal in *Nolan* ([2010] EWCA Civ 1223) felt that the interpretation of the ECJ decision in *Fujitsu Siemens* was not straightforward. In the course of its consideration the Court of Appeal quoted the first question that had been referred by the Finnish Supreme Court. I referred to that question earlier but it is convenient to set it out once more and to do so as the Court of Appeal did. The question was as follows:-

> "Is Article 2(1) of Directive 98/59... to be interpreted as meaning that the obligation under the 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 change in production or concentration of production, *as a consequence of which a need for collective redundancies is to be expected."* (Emphasis as provided by the Court of Appeal).

The Court of Appeal then put the Finnish question in the context of its domestic *jurisprudence* and suggested that the first sub question was asking whether the approach in *Middlesbrough* and *Securicor* was correct while the second sub question was asking whether the *UK Coal Mining* line of authority was correct.

22. The Court of Appeal then went on to conduct a forensic analysis of the opinion of the Advocate General and then of the judgment of the ECJ. The Court of Appeal commented that they had to say with respect that they found the reasoning of the Advocate General quite difficult to follow and that they did not find the interpretation of the ECJ's decision on the first question straightforward. The Court of Appeal having conducted that exercise commented that it proposed to venture no further views on the true interpretation of the judgment which it respectfully regarded as unclear. While not spelled out by the Court of Appeal it does seem to me implicit in its judgment that the Court was of the view that as between the two options offered, option 1 being that the obligation arose when the employer was proposing, but had not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies and option 2 that the obligation arose only when that decision had actually been made and the employer was then proposing consequential redundancies, that option 2 was more likely the correct interpretation but that the matter was sufficiently uncertain that a reference was appropriate.

23. In a situation where the Court of Appeal has expressed the view that the decision of the ECJ is unclear, I have to give serious consideration to the question of whether a reference is necessary. In particular, I must think long and hard if the matter is not to be referred, given that by virtue of Terms of Employment (Information) Act, 1994 there is no appeal from my decision.

24. I have paid particular attention to the opinion of Advocate General Mengozzi in *United States of America v. Nolan* given that he was also the Advocate General in the *Fujitsu Siemens* case his opinion is particularly influential. He felt that the European Court of Justice was being asked to determine the trigger point for the employer's obligation of prior consultation in the case of collective redundancy and more specifically that the referring court was uncertain whether that obligation arose when the employer was planning to make a strategic or operational decision which, foreseeably or inevitably, will lead to collective redundancies or only when that decision had actually been made and the employer is planning to proceed with the consequential redundancies. As between the position argued for by Mrs. Nolan which was that only the first possibility ensured the effectiveness of the directive and the position adopted by the Commission and the EFTA Surveillance Authority who argued that in light of *Fujitsu Siemens* and the facts of the case of the referring court that the employer's obligation to begin consultations concerning collective redundancies arises when a strategic or commercial decision is taken which compels the employer to contemplate or to plan collective redundancies, the Advocate General indicated that he agreed with the interpretation contended for by the Commission and the EFTA Surveillance Authority. His subsequent analysis shows clearly the extent to which this was an area where facts had to be found and where he saw this as the critical exercise to be undertaken. He observed, at paragraph 49,:-

> "In my view, the method to be used by the referring court should be to identify which of the events mentioned in the order for reference which occurred before 5th June 2006 was in the nature of a strategic decision and exerted compelling force on the employer for the purposes of giving effect to the consultation obligation, and the date on which that decision was made."

25. Returning then to the decision of the Employment Appeals Tribunal in the present case it does seem to me that the determination approached the controversy before it as essentially one of fact and decided as a matter of fact that the communication by Dell on 8th January, 2009 did not constitute notice of dismissal and that the employer had commenced the consultation process at an appropriate stage. It seems to me that the reference to the entitlement of the employer to make a strategic decision in the concluding paragraph of the determination must mean that the Employment Appeals Tribunal was taking the view that the employer had, as it was obliged to do, embarked on consultation when a strategic or commercial decision compelling it to contemplate or plan for collective redundancies had been taken. If one looks at what happened subsequent to 8th January, 2009, further evidence emerges that the letters of 8th January, 2009 were not simply the communication of what was a *fait accompli*. Many of the matters of substance contained in the letter of 8th January changed between that date and the end of the consultation period on 27th March. A number of employees were redeployed and as a result their employment was never terminated, the actual leaving dates for several production lines were different from the dates suggested in the initial letters and there was a significant improvement in the severance package available to employees.

26. Further support for the view that what emerged on 8th January, 2009, was not the communication of a finalised decision is to be found in the text of the letter of 8th January itself. The letter contains a specific statement that the content of the letter is for

information purposes only and does not constitute contractual terms or conditions. The section on "Leaving Dates" refers to estimated ranges of leaving dates associated with individual production lines. Again, the section on severance payments refers to estimated severance payments and stresses that the calculations set out are estimates only. However, I do acknowledge that the letter contains a significant amount of detail and certainly does not suggest that the employer has an open mind, or that the employees are being provided with a blank sheet. However, it seems to me one has to recognise that a communication couched in generalities would be of little assistance to employees, and would likely be not well received.

27. In these circumstances I do not believe that a point of law has been identified which would provide a basis for overturning the decision of the Employment Appeals Tribunal and accordingly I dismiss the appeal.