THE INDUSTRIAL TRIBUNALS

CASE REF: Various

CLAIMANTS:	**All the persons whose names and case reference numbers are referred to in the First Schedule to this decision**
RESPONDENT:	**Lagan Construction Group Ltd (In Administration)**
NOTICE PARTY:	**Department for the Economy**

DECISION

In each of the cases of all of the claimants referred to above ("these claimants"), our liability Decision is as follows:

> That particular complaint, under Article 217 of the Employment Rights (Northern Ireland) Order 1996 ("ERO"), is well-founded.

In each of the cases of these claimants, our remedies Decisions are as set out below.

In the cases of each of the "Excepted Claimants" (who are referred to in the Second Schedule to this Decision), we have decided not to make a protective award.

In each of the cases of all of these claimants, other than the Excepted Claimants, our remedies Decision is as follows:

(A) We have decided to make a protective award in respect of the descriptions of employees who are specified in the Third Schedule below.

(B) It is ordered that the respondent shall pay remuneration for the protected period.

(C) The protected period began on 8 March 2018 and lasted for 90 days.

The attention of the parties is drawn to the Recoupment Statement below. The address of the respondent is:-

C/O KPMG, The Soloist Building
1 Lanyon Place
BELFAST
BT1 3LP

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Buggy**

Members: **Ms M O'Kane**
Mr T Wells

APPEARANCES:

The claimants were represented by Mr Mark Mason.

The respondent was not represented.

The Department was represented by Mr J Rafferty, Barrister-at-Law.

REASONS

1. Originally, there were 52 cases, in which the claimant made a complaint, pursuant to Article 217 of the Employment Rights (Northern Ireland) Order 1996 ("ERO") against this respondent, Lagan Construction Group Ltd. (Below, this respondent is referred to as "Construction Group").

2. Now there are only 51 of those cases, because one of the 52 complainants withdrew his complaint. Below, we refer to the 51 pending cases as "these cases"; and we refer to the claimants in these cases as "these claimants".

3. Construction Group was mainly concerned with the construction of civil engineering projects, including roads, bridges and tunnels. It operated both in Northern Ireland and in other parts of the United Kingdom. It also operated, to some extent, in the Republic of Ireland.

4. All of these claimants, as well many other staff of Construction Group, were made redundant by Construction Group with effect from 8 March 2018.

5. Construction Group, Lagan Building Contractors Ltd ("Building Contractors"), Lagan Construction Group Holdings Ltd and Lagan Water Ltd are all companies within the Lagan Group of companies.

6. Construction Group went into administration on 5 March 2018. On the same date, Building Contractors and Lagan Water Ltd also went into administration.

7. This is our decision in relation to all of the pending Article 217 complaints which have been made by 51 ex-employees of Construction Group. The industrial tribunal case reference numbers of those 51 Construction Group cases are within the range of 5827/18-5877/18 (both case reference numbers inclusive).

8. Building Contractors' ex-employees (35 of them) have also brought Article 217 complaints. The latter sub-group brought their complaints against Building Contractors.

9. The Construction Group and Building Contractors cases were heard together. It was agreed by all the participating parties that:

   (1) evidence given in any Construction Group case was to be treated as constituting evidence in all of the other Construction Group cases and in all of the Building Contractors cases; and

   (2) evidence given in any Building Contractors case was to be treated as evidence in all of the other Building Contractors cases and in all of the Construction Group cases.

10. This Decision deals only with the Article 217 complaints which have been made against Construction Group.

11. A separate Decision is being issued simultaneously with this Decision. That separate Decision relates to all of the pending Article 217 claims which have been made against Building Contractors. The two Decisions could usefully be read together.

Dempsey

12. We refer to the Decision of a tribunal in *Dempsey and Others v David Patton and Sons (NI) Ltd (In Administration)* [case reference number 947/13 and Others, Decision issued on 4 April 2014]. In these cases, we have adopted and applied the statements of legal principle which were set out in *Dempsey*, to the extent that those principles are relevant in the context of the present cases.

The collective consultation legislation

13. Article 216 of the ERO imposes duties upon an employer, in some circumstances, to collectively consult with certain workforce representatives.

14. Article 217 provides for the making of a complaint, to a tribunal, in respect of a failure, on the part of the employer, to comply with it Article 216 duties.

The context

15. Each of these claimants, and other staff, were employed by this respondent company ("the Employer"). Each of these claimants, and several other employees of the Employer, were dismissed, by reason of redundancy, with effect from 8 March 2018.

The claims

16. The effect of Article 216 of the ERO can be usefully be summarised in the following terms:

   (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, that employer must consult, about those proposed dismissals, "the appropriate representatives" of any of the employees who may be affected by the proposed dismissals (regardless of whether or not those "affected

employees" belong to that particular establishment).

(2) For the purposes of Article 216, the appropriate representatives of any affected employees, if those employees are not of a description in respect of which an independent trade union is recognised by their employer, is whichever of the following employee representatives the employer chooses:

(i) employee representatives appointed, or elected, by the affected employees otherwise then for the purposes of Article 216 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; or

(ii) employee representatives elected by the affected employees, specifically for the purposes of Article 216.

17. In the context of these cases:

(1) It is agreed that none of these claimants, and none of those affected employees, was of a description in respect of which an independent trade union was recognised by the Employer.

(2) Nobody contends that there were any employee representatives appointed or elected in the manner envisaged in paragraph 16(2)(i) above, or that there were any employee representatives who were elected by the affected employees in the manner which is contemplated at paragraph 16(2)(ii) above.

18. In these proceedings, each complainant contends that, in breach of Article 216 of ERO, no relevant collective consultation, of the types which are envisaged in Article 216, took place, with appropriate representatives of any of the employees who were made redundant.

The course of the proceedings

19. In each of these cases, the administrators have granted the complainant permission to bring these proceedings.

20. The Administrators did put in a response in these proceedings. Throughout a lengthy period, Construction Group was legally represented in these proceedings. However, by the time of the main hearing, Construction Group was no longer legally represented. Construction Group did not participate in the main hearing, apparently because of costs considerations.

21. We are glad that the Department has participated in these proceedings.

22. In this case, as in many similar cases, it is not expected that the Employer will have sufficient funds to pay any protective award. In those circumstances, an employer has no economic incentive to participate in Article 217 proceedings, and will be economically unaffected by the outcome of those proceedings. On the other hand, the Department, in its role as the statutory guarantor in respect of certain

employment debts, including protective awards, does have an economic incentive to participate in the proceedings. In this case, the Department has participated in two respects. First, it has made written enquiries, with the administrators, in respect of various relevant factual matters. Secondly, it has been represented, by Mr John Rafferty, during the course of the main hearing.

23. Mr Rafferty's involvement in this case has been very helpful in clarifying the issues.

24. The main hearing of all of these cases, and the main hearing of the Building Contractors Article 217 cases, took place on 30 April 2019 and 9 August 2019. It was agreed by the participating parties that all of these cases should be heard together.

25. During the course of that hearing, we received sworn oral testimony from several witnesses. During the course of the main hearing, our attention was drawn to the contents of various documents.

The arguments

26. When the response was initially presented, the defence of Construction Group (to each of the Article 217 complaints) was, in essence, limited to the contention that it was not reasonably practicable for this employer to comply with any requirement of Article 216 and that the employer took all such steps towards compliance with all such requirements as were reasonably practicable in the circumstances.

27. However, pursuant to leave which I granted during a Pre-Hearing Review which was held in December 2018, the Employer was granted leave to amend its response form so as to include all the proposed amendments which were set out or referred to in an email which this respondent's solicitor sent to the Office of the Industrial Tribunals in November 2018.

28. Those amendments (the amendments which are referred to in the last paragraph above) are detailed at paragraphs 29, 32 and 33 below.

29. First, in the cases of many of these claimants, it was contended by the respondent that the Article 216 duties did not arise at all, because (according to the Employer), at the relevant time, that particular claimant was not assigned to an establishment at which 20 or more Construction Group staff were based. In each relevant case, we have construed that amended defence as including an assertion that the relevant claimant is not entitled to be included within the personal scope of any protective award because the Employer had no duty to comply with any requirement of Article 216 in respect of his/her own actual or proposed dismissal. (See sub-paragraph (b) of paragraph (3) of Article 217).

30. Ultimately, as a result of discussions between the claimants' representative and the Department, and as a result of enquiries which the Department made with the administrators, the Department decided that it was only appropriate to pursue that particular argument ("the quantitative criterion argument") in the cases of eleven of these claimants. Subsequently, one of those eleven claimants withdrew his Article 217 complaint. In relation to each of the ten remaining claimants (among that group of eleven claimants), the Department has continued to pursue the quantitative criterion argument.

31. In this Decision, we refer to those ten claimants as "the Excepted Claimants". The names of the Excepted Claimants are as follows:

Chris Adair
Pamela Ward
Peter McAleer
Steven Godfrey
Conor McKeever
Damian Meenagh
Keith Magee
Sean Brannigan
Hugh McAlary
Emmett Feeney

32. Secondly, pursuant to the November 2018 amendments, Construction Group contended that Hugh McAlary was also not entitled to be within the personal scope of any relevant protective award because he was on a career break at the time of the dismissals and accordingly, during the relevant period, was not assigned to any specific workplace.

33. Thirdly, pursuant to the November amendments, the respondent also contended that there had been no failure to comply with the Article 216 collective consultation requirements, in any of the following cases, because each of the following staff was retained by the Joint Administrators for a period following the appointment of the Administrators and, during that period of further employment, there had been "ongoing consultation" with that particular employee, in relation to his//her redundancy date. The claimants who fall with the scope of the latter amended defence were the following:

Fearghal Delaney
David Marley
Gavin McKevitt

The liability issues, the facts and our conclusions

34. In our view, in each of these cases, the main liability issues are as follows:

(1) Was the complaint made in time?

(2) Has the complainant the standing to make his/her Article 217 complaint?

(3) Was an Article 216 duty owed at all, in light of the legislative quantitative criterion (as described below)?

(4) Was any such Article 216 duty complied with?

(5) Were there special circumstances which rendered it not reasonably practicable for the Employer to comply with any requirement of Article 216?

(6) If it was not reasonably practicable for the Employer to comply with any Article 216 requirement, did the employer take all such steps towards compliance as were reasonably practicable in the circumstances?

(7) Was any relevant failure to collectively consult (in relation to any contemplated dismissals within a particular establishment to which that particular claimant was assigned at the time of any redundancy dismissals) within the legislative grasp of Articles 216 and 217 of the ERO?

35. First, it is clear that each of the Constructive Group complaints was made in time. The first of the relevant dismissals took place in March 2018 and each of the Construction Group Article 217 complaints was presented in a form which was received by the Office of the Industrial Tribunals on 17 May 2018.

36. The second issue is whether, in each instance, the complainant has the standing to make his/her Article 217 complaint. We are satisfied that each complainant does have the standing to make his/her Article 217 complaint, because: (1) no complainant is of a description in respect of which an independent trade union was recognised by the employer. (2) There were no employee representatives appointed or elected by the affected employees whose appointment/election fell within the scope of sub-paragraph (i) of paragraph 16(2) above. (3) No employee representatives were elected by the affected employees in an election which satisfied the requirements of Article 216A(1).

37. Accordingly, each complainant, as an individual, has the standing to make his/her Article 217 complaint (See sub-paragraphs (a) and (d) of paragraph (1) of Article 217).

38. The third issue is whether, in respect of representatives of each of these claimants, an Article 216 duty was owed at all. We are sure that such a duty was indeed owed. In March 2018, the Employer did dismiss, as redundant, more than 20 employees, in at least one particular establishment in Northern Ireland: If an Article 216 duty is triggered in respect of redundancies of an employer's employees who were assigned to any particular establishment, there is a duty to collectively consult, with the appropriate representatives of all of the employees of the respondent employer who are affected by the actual or proposed redundancies at that particular "triggering" establishment, as distinct from there being only a duty to consult with the representatives of employees of that employer who were assigned to the "triggering" establishment (the establishment in which 20 employees were being made redundant at the relevant time). In light of the factual context of these cases, it is obvious that all of the employees of Construction Group, in all of its establishments, will have been affected by redundancies at any triggering establishment.

39. The fourth liability issue is whether the Article 216 duties were complied with.

40. We are sure that the relevant Article 216 duties were not complied with at all:

(1) There was no collective consultation in relation to the dismissals which took place on 8 March 2018.

(2) There was also no collective consultation in relation to the three dismissals which took place subsequently; furthermore, in relation to each of those latter three dismissals, any individual consultation related only to the timing of those particular dismissals, as distinct from relating to broader issues. (See

paragraph 33 above).

41. The fifth liability issue is whether there were special circumstances which rendered it not reasonably practicable for the Employer to comply with any requirement of Article 216.

42. We note that the effect of paragraph (6) of Article 217 is as follows. If, on a complaint under Article 217, a question arises as to whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of Article 216, it is for the employer to show that there were.

43. On the basis of the evidence which was made available to us, we are not satisfied that there were special circumstances which rendered it not reasonably practicable for the employer to comply with any particular requirement of Article 217. We note that, in relation to that issue, the Department does not present any argument which is opposed to the argument of the claimants.

44. The sixth liability issue relates to the taking of "all such steps towards compliance" as were reasonably practicable in the circumstances.

45. Because of our conclusions in relation to the "special circumstances" issue, we do not need, for the purpose of deciding whether or not there has been a breach of Article 216, to determine whether the employer "took all such steps towards compliance … as were reasonably practicable in the circumstances" (See sub-paragraph (b) of paragraph (6) of Article 217).

46. The seventh, and final, liability issue is the "legislative grasp" issue.

47. In these cases, the Department is not contending that anybody other than Emmett Feeney was assigned to an establishment which was located outside the United Kingdom. In a helpful written submission ("the Department's Submission"), Mr Rafferty, on behalf of the Department, has explained the Department's position on the "legislative grasp" issue in relation to claimants who were assigned to a workplace in Great Britain; that position is as set out at paragraphs 32-37 of the Department's Submission, in the following terms:

> "32. If the LCG Claimants' updated table of assignments to establishments is preferred, the Tribunal is presented with 8 establishments of which 3 have 20 or more assigned employees (A19, Beddington and Rosemount House). A19 and Beddington are in Great Britain, leading to the question of whether the Tribunal in Northern Ireland can make a protective award for those employees assigned to establishment beyond Northern Ireland.
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> 33. The Department notes the contents of Radaovits .v. Abbey National PLC [2009] EWCA Civ 1346 in respect of the Tribunal's jurisdiction as well as the both the content of Article 253 of the 1996 Order and the Redundancy Payments Reciprocal Arrangements Regulations 1965.
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> 34. The Department of Economy has liaised with its colleagues in Great Britain. It is the Department's case that, while it does not have formal

arrangements with its counterparts in Great Britain to operate a united or single system for regulating protective award claims, there is a relationship between the Departments where businesses (such as the current Respondents) are involved. This will involve, in particular, confirmation that a Claimant has not sought to recover in 2 jurisdictions. The Tribunal could find that there are arrangements in place that satisfy the meaning of Article 253 of the 1996 Order.

35. The Department also relies upon Schedule 1 of the 1965 Regulations. Paragraph 1 of Schedule 1 confers jurisdiction on Acts of Parliament relating to redundancy in place at the time of the 1965 Regulations *"as amended, modified, adapted, extended or supplemented by any subsequent enactment or by any order or regulations …"*

36. Paragraph 2 of Schedule 1 confirms that the legislation *"having effect … in one country shall have a corresponding effect for all or any of those purposes in the other country."*

37. The Department submits that Article 216 and 217 of the 1996 Order does, at least, supplement the 1965 Regulations (which remain in force). The effect of Paragraph 2 of Schedule 1 is submitted to be that whether a Claimant or employee of LCG should claim in Great Britain or Northern Ireland is an inconsequential question given the legislation under which that person should be treated to apply in the other jurisdiction. In particular, Paragraph 2 of Schedule 1 concludes *"… Provided that, this article shall not confer a right to double payment in respect of the same act, omission or event"* which underlines the effective reciprocity created by the 1965 Regulations."

48. We are content with the Department's approach (as set out in the last preceding paragraph above). On the basis of that approach, we are accepting that, in each of these cases in which the claimant was assigned, at the relevant time, to an establishment in Great Britain, the subject-matter of the particular collective consultation complaint is within the legislative grasp of Articles 216 and 217 of the ERO.

49. Under the Collective Redundancies Directive, the United Kingdom, pursuant to obligation which it accepted in its role as a Member State of the European Union, was under an obligation to make sure that the relevant legislative provisions of that Directive apply to any dismissals, at any particular establishment, in any part of the United Kingdom, if the quantitative criterion, in respect of the dismissals at that establishment, was met. In those circumstances, as long as there is no "double-payment", it is of limited practical significance, within the content of collective redundancies at any particular UK establishment, whether the relevant duties under the Directive are met though the application of Articles 216 and 217 of the ERO, or through the application of the GB equivalent of those Articles).

50. In arriving at the foregoing conclusions, we have applied the principle which was set out at paragraph 22 of the decision of Elias L J in *Radakovits v Abbey National plc* [2010] IRLR 307. In that case, in which the three members of the English Court of Appeal included Mummery LJ as well as Elias LJ, the latter Lord Justice, on behalf

of a unanimous Court of Appeal, made the following point, at paragraph 22 of his judgment:

> "I would, however, draw the attention of employment tribunals to three matters which arise out of this case. The first is this. It is true that a tribunal cannot exercise jurisdiction by concession and equally in, in an appropriate case, the tribunal will be obliged to raise the issue of jurisdiction even though it has not been identified by the employers … But [tribunals] are not bloodhounds who have to sniff out potential grounds on which jurisdiction can be refused. If the parties agree that a particular claimant is an employee, for example, then I think there would have to be good reason for the tribunal to doubt that that was the case and to require a preliminary hearing to investigate the matter. If, on the face of it, it appears that the tribunal does have jurisdiction … then the tribunal can properly act on that. It does not have to explore fully every case where a jurisdictional issue could potentially arise".

51. We have noted, of course, that, in the circumstances of this case, the question of whether a particular failure to comply with a duty to collectively consult is inside or outside the legislative grasp of Article 217 of ERO is, strictly speaking, not a jurisdictional issue: Northern Ireland tribunals always have jurisdiction to entertain a claim against an employer which is based in Northern Ireland, even if the relevant act or omission (the omission which forms the basis for the claim) is outside the legislative grasp of Northern Ireland law. If any such claim is outside the legislative grasp of Northern Ireland law, the claim in a Northern Ireland tribunal will indeed fail, but not because a Northern Ireland tribunal does not, because of that situation, lack jurisdiction to entertain the claim. (In those circumstances, the claim will fail only because the relevant employer had no obligation to comply with the duty which had been imposed by the relevant Northern Ireland enactment).

52. During the course of the Department's Submission, there was reference to a potential contention, on the part of the Department, that this tribunal's options, in relation to these claims, were limited by the outcomes of similar claims which, had been brought, against Lagan companies, in employment tribunals in Great Britain, (pursuant to the GB equivalent of Article 217 of the ERO). During the course of the main hearing, that potential contention was not in fact pursued. In our respectful view, the Department was right not to pursue that particular argument, because it would not have been a convincing argument.

53. We are satisfied that, at the relevant time, the claimant Emmett Feeney was assigned to an establishment which was located in Inishowen, County Donegal. Accordingly, Mr Feeney's dismissal is not a dismissal in respect of which the Employer was under any obligation to comply with a requirement of Article 216.

54. Our reasons for deciding that Mr Feeney, at the relevant time, was assigned to an Inishowen establishment are set out later in this Decision.

55. However, although Mr Feeney's <u>own</u> dismissal was not a dismissal in respect of which collective consultation, pursuant to Article 216 was required, his Article 217 claim is nonetheless within the legislative grasp of Articles 216 and 217, because he was a person who was "affected" by the proposed dismissals, in Northern Ireland, of persons, other than himself, within at least one establishment in respect of which

the quantitative criterion was met. (For a definition of the "quantitative criterion", see paragraph 98 below).

56. Having arrived at the foregoing conclusions, in respect of each of the foregoing liability issues, it is clear to us, in each case, that the Article 217 complaint is well-founded.

The remedies issues, the facts and our conclusions

57. In each of these cases, the remedies issues can be summarised as follows:

(1) Should we make a declaration?

(2) Does that particular claimant's dismissal meet the requirements of "the quantitative criterion"?

(3) Should we make a protective award?

(4) When should any protective award begin?

(5) In respect of whom should the protective award be made?

(6) What should be the duration of the protective award?

58. First, in each of these cases, the effect of paragraph (2) of Article 217 is that we are under an obligation to make a declaration that the relevant Article 217 complaint is well-founded.

59. Accordingly, in each of these cases, we hereby make that declaration.

60. Because of the particular significance, in the circumstances of these cases, of the "quantitative criterion" issue (which is the second remedies issue), we have dealt with that particular issue under a separate heading below.

61. In each of these cases, the third remedies issue is whether we should make a protective award pursuant to that particular complaint.

62. In the factual context of each of these cases, we have carefully noted the statements of principle which were set out at paragraph 75-81 of *Dempsey*, and we have applied those principles within the factual context of this case.

63. In light of those principles, and in light of the factual context of each relevant case, we have concluded that:

(1) We should not make a protective award in any of the cases of "the Excepted Claimants" (see paragraph 31 above).

(2) We should make a protective in all of the rest of these cases.

64. The fourth remedies issue is the following: When should the protected period begin?

65. The effect of sub-paragraph (a) of paragraph (4) of Article 217 is that the protected period must begin with the date on which the first of the relevant dismissals (the dismissals to which the complaint relates) takes effect.

66. In these cases, the first of the relevant dismissals took effect on 8 March 2018. Accordingly, the protected period must begin on that date.

67. The fifth remedies issue is as follows: What should be the personal scope of the protective award?

68. In arriving at our conclusions in respect of the "personal scope" issue in this case, we have had regard to the statements of principle which are set out at paragraphs 267-309 of *Dempsey*, and have applied those principles.

69. In arriving at conclusions in respect of that particular issue, we have also had regard to the statements of principle which were set out at paragraphs 13-20 of my own Remedies Decision in *William Glendinning* v *Mivan (No 1) Ltd (In Administration)* [case reference number 470/14, Decision issued on 10 December 2014], and we have applied those principles.

70. In the circumstances of these cases, the effect of paragraph (3) of Article 217 is that a protective award cannot be made in respect of a claimant unless both of the following sub-conditions apply to him:

    (1) He or she was dismissed as redundant.

    (2) He or she was one of a group of employees in respect of whose dismissals the employer failed to comply with a requirement of Article 216.

71. In each of these cases, we have decided that the protective award applies to all of the individuals who are specified in the Third Schedule to this Decision.

The duration of the protective award

72. Under this heading, we have set out:

    (1) findings of fact which are particularly relevant to the duration issue;

    (2) a statement which sets out, or refers to, legal principles which are particularly relevant to the duration issue and

    (3) those of our conclusions which are particularly relevant to the duration issue.

73. There was no consultation whatsoever in respect of the redundancies which took place on 8 March 2018.

74. In relation to the three dismissals which occurred after the date on which most of the dismissals took place, there was no collective consultation whatsoever.

75. In relation to the three redundancies which took place after 8 March 2018:

(1) There was no meaningful consultation of any kind, other than consultation about the timing of these three subsequent dismissals.

(2) Furthermore, Article 216 is concerned with consultation with worker's representatives (as distinct from consultation with the workers themselves).

76. In deciding on the duration of the protective award in this case, we have considered and applied the principles which were set out at paragraphs 84-87 of *Dempsey*.

77. In arriving at conclusions on this issue, we have also had regard to the statements of principle which are set out at paragraphs 1168-1202 of "Harvey on Industrial Relations and Employment Law" [Division E/Chapter 4/P]. In particular, we note the following:

(1) At paragraph 1173, Harvey points out the following:

> "In a case where there has been a complete absence of consultation then, if there are no mitigating factors, the normal consequence should be a protective award for the maximum 90 days …".

(2) At paragraph 1187, Harvey states the following:

> "Where there has been a complete failure to consult, it is clear that the burden is on the employer if it wishes to establish that anything other than the maximum period should be awarded … [Where] a tribunal has sufficient evidence placed before it, whether by the employer or employee, to conclude that there has been a breach of [the GB equivalent of Article 216], it ought to be able to form a judgement based on that material of what protective award is just and equitable".

78. We are sure that, in each of these cases, there was a complete absence of meaningful consultation, with appropriate representatives, of the types which are envisaged in Article 216.

79. On the basis of the evidence available to us, we are sure that it would have been practicable for the respondent, within the space of a single day:

(1) to set up and implement an electoral mechanism of the type which is contemplated in Article 216, and

(2) immediately afterwards, to organise a half day's consultation with whichever representatives were elected pursuant to that mechanism.

80. Against that background, and for those reasons, we have decided that the protected period is to be a period of 90 days.

The quantitative criterion issue

81. Under this heading, we have set out:

(1) findings of fact which are particularly relevant to the quantitative criterion issue;

(2) a statement which sets out, or refers to, legal principles which are particularly relevant to that issue and

(3) those of our conclusions which are particularly relevant to that issue.

82. Part XIII of the ERO (as amended) is the Northern Ireland legislation which is relevant to these Article 217 complaints; Part XIII consists of Article 216 to Article 226 inclusive.

83. The relevant corresponding legislation in Great Britain is Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA"), as amended. That Chapter consists of Sections 188-198 inclusive.

84. We are sure that the provisions of Part XIII of ERO are practically identical to the provisions of Chapter II of Part IV of TULRA.

85. Both of those two sets of provisions are intended to implement the requirements of the Collective Redundancies Directive 1998 ("the 1998 Directive"). Both of those two sets of provisions have to be construed in light of the requirements of the Directive.

86. The 1998 Directive is a consolidation of two earlier Directives, Council Directive 75/129 EC ("the 1975 Directive") and a subsequent Directive which amended the 1975 Directive.

87. Article 1 of the 1998 Directive defines its scope. In the context of the present case, Article 1 of the 1998 Directive can be treated as being identical, for all practical purposes, to the provisions of Article 1 of the 1975 Directive.

88. Article 1.1 of the 1998 Directive provides as follows:

> "1. For the purposes of this Directive:
>
> (a) 'collective redundancies` means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is:
>
> (i) either, over a period of 30 days:
>
> - at least 10 in establishments normally employing more than 20 and less than 100 workers,
> - at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
> - at least 30 in establishments normally employing 300 workers or more,

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

..."

89. Accordingly, Article 1 of the 1998 Directive (like Article 1 of the 1975 Directive) offered Member States two options.

90. Most Member States took the option provided in Article 1.1(a)(i). The United Kingdom chose the option provided for in Article 1.1(a)(ii).

91. Article 216(1) of ERO, in effect, identifies the limits of the situations in which, pursuant to Article 1 of the 1998 Directive, Northern Ireland law requires that a particular group of proposed dismissals is to be the subject-matter, pursuant to that Article, of collective consultation. Article 216(1) provides as follows:

> "(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; …"

92. As already noted (at paragraph 38 above), for liability purposes, it is unnecessary to decide whether the particular dismissal, of a particular Article 216 complainant, was, or was not, part of a group of actual or proposed dismissals in respect of which Article 216 imposed an obligation to consult.

93. However, in deciding the remedies issue of whether or not a particular complainant can be included within the scope of any Article 217 protective award, it is essential to answer that quantitative criterion question.

94. Why, for that purpose, is that essential? Because the effect of sub-paragraph (b) of paragraph (3) of Article 217 is that an ex-employee cannot be included within the personal scope of a protective award unless that ex-employee's actual, or proposed, dismissal was one in respect of which the employer was obliged to comply with a collective consultation requirement of Article 216.

95. So that leads us back to the following question: In what circumstances can a particular complainant's dismissal be treated as being a dismissal which is a part of a group of actual or proposed dismissals in circumstances in which the employer "… is proposing to dismiss as redundant 20 or more employees <u>at one establishment</u> within a period of 90 days or less"? [Our emphasis].

96. Paragraph (1) of Article 216 imposes two criteria, which have to be met if a particular individual's actual or proposed dismissal is to be treated as falling within a group of actual or proposed dismissals in respect of which Article 216 imposes a collective consultation duty.

97. One of those criteria is a temporal criterion: The focus is on what happens within a particular period of 90 days.

98. The other criterion is a quantitative criterion: A particular actual or proposed dismissal falls within the criteria which are imposed by Article 216(1) only if it is one of a number of actual or proposed dismissals whereby an employer "… is proposing to dismiss as redundant 20 or more employees at one establishment". [Our emphasis].

99. The criterion which is described in the last preceding paragraph is the "quantitative criterion" which is referred to in various other paragraphs (both above and below) of this Decision.

100. In relation to each of the Excepted Claimants (see paragraph 31 above), the Department contends that that employee's dismissal cannot be within the scope of a protective award because his/her dismissal or proposed dismissal was not within any group of actual or proposed dismissals in respect of which this employer had a duty to collectively consult.

101. In relation to each particular Excepted Claimant, we now have to decide whether that contention (the contention referred to in the last preceding paragraph) is correct or incorrect.

102. In relation to each Excepted Claimant, in order to make that decision, it is necessary in order for us to arrive at conclusions in respect of each of the following questions:

(1) At the relevant time, what was the establishment to which that claimant belonged?

(2) Did the employer propose to dismiss as redundant, within the relevant period, 20 or more employees, at that establishment?

Within the context of any particular complainant's complaint, the second of those two questions obviously has to be answered in the negative, if, during the relevant period, fewer than 20 employees were "at" that establishment.

103. The quantitative criterion, as described in the preceding paragraphs, has to be construed in light of the requirements of the 1998 Directive.

104. So, in relation to "Option 2(ii)", what are the relevant requirements of sub-paragraph (a) of paragraph (1) of Article 1 of the 1998 Directive?

105. It will be recalled that, for the purposes of Option 2(ii), a redundancy does not fall within the scope of the term "collective redundancies" if the quantitative criterion (as set out in sub-sub-paragraph (ii) of sub-paragraph (a) of paragraph (1) of Article 1 of the 1998 Directive) is not met.

106. That criterion is that the number of relevant redundancies must be "… at least 20, whatever the number of workers normally employed in the establishments in question".

107. The meaning of the phrase which we have quoted in the last paragraph above has recently been the subject of detailed consideration by the CJEU in two cases: See, in particular, *USDAW v WW Realisation 1 Ltd* [2015] IRLR 577. (That case is usually referred to as the Woolworths case). In the present context, the Opinion of Advocate General Wahl in that case is also of significance.

108. Within the course of his Opinion in the Woolworths case, Advocate General Wahl made several comments which, within the context of these claims, are relevant to the quantitative criterion issue. In particular, at paragraph 49 of his Opinion, he concluded that the definition in both Article 1(a)(i) and Article 1(1)(a)(ii) of the 1998 Directive requires that account be taken of the dismissals effected in each establishment considered separately (for the purpose of determining, within the context of any particular dismissal, whether the quantitative criterion has been met).

109. The outcomes of the Woolworths case can be summarised as follows. The CJEU decided that:

(1) Article 1(a)(ii) of the 1998 Directive has to be interpreted as not precluding national legislation (such as the GB equivalent of Article 216 of the ERO) which lays down an obligation to inform and consult workers, pursuant to the Directive, only in the event of the dismissal, within a period of 90 days of at least 20 workers from a <u>particular</u> establishment of an undertaking (as distinct from requiring such consultation where the aggregate number of dismissals across all of the establishments, or across some of the establishments, of an undertaking, over the same period, reaches or exceeds the threshold of 20 workers).

(2) For the purposes of Article (1)(a)(ii) of the 1998 Directive, where an undertaking comprises several entities, each of which is an establishment, it is the establishment to which the workers made redundant are assigned to carry out their duties that constitutes the relevant "establishment" within the context of their dismissal, for the purposes of Article 1(a) of the 1998 Directive.

110. At paragraphs 47, 49, 51 and 52 of its judgment in the Woolworths case the CJEU confirmed, or clarified, the meaning, within the context of Article 1 of the 1998 Directive, of the term "establishment":

(1) At paragraph 47 of its judgment, the Court confirmed that:

> "…an employment relationship is essentially categorised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties. The [CJEU] therefore decided [in a previous case] that the term "establishment" in Article 1(1)(a) [of the 1998 Directive] must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties".

(2) In the same paragraph of that judgment, the Court also confirmed that:

> "It is not essential in order for there to be an "establishment" that the unit in question is endowed with a management that can

independently effect collective redundancies".

(3) At paragraph 49 of its judgement, the Court noted that, in earlier judgments, within the context of Article 1 of the 1998 Directive, the CJEU had:

> "… further clarified the term "establishment" inter alia by holding … that, for the purposes of the application of [the 1998 Directive], an "establishment", in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks".

(4) At paragraph 51 of the judgment, the Court reiterated that, for the purposes of Article 1 of the 1998 Directive:

> "… the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an establishment".

111. At paragraph 52 of its judgment in the Woolworths case, the Court stated the following:

> "Consequently, according to the case law of [the CJEU], where an "undertaking" comprises several entities meeting the criteria set out at paragraphs 47, 49 and 51 above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the "establishment" for the purposes of Article 1(1)(a) of [the 1998 Directive].

112. At paragraph 64 of its judgment in the Woolworths case, the CJEU provided the following rationalisation for that court's relatively narrow interpretation of the scope of the term "establishment":

> "It should be added that [an interpretation which would allow all the redundancies, across all of the undertaking's establishments, to be taken into account in deciding whether or not the quantitative criterion is met] would bring within the scope of [the 1998 Directive] not only a group of workers affected by collective redundancy but also, in some circumstances, a single worker of an establishment – possibly of an establishment located in a town separate and distinct from the other establishments of the same undertaking – which would be contrary to the ordinary meaning of the term "collective redundancy". In addition, the dismissal of the single worker could trigger the information and consultation procedures referred to in the provisions of [the 1998 Directive], provisions that are not appropriate in such an individual case".

At paragraph 49 of his Opinion in the Woolworths case, Advocate General Wahl had provided a similar rationale for that relatively narrow interpretation:

> "What is more, it has not escaped my attention … that [the CJEU] has been at pains to stress the socio-economic effects which collective redundancies may have *in a given local context and social environment*. The Court therefore interpreted the concept at issue as relating to "the unit to which the workers made redundant are assigned to carry out their duties"; in other words, *the local employment unit*. For it is precisely the local community that may wither and fade away without protection from collective redundancies. Conversely, Directive-relevant local dismissals which are below the threshold do not pose the same threat to the survival of local communities. Although the aggregate number of dismissals effected in a restructuring process might be high on the national scale, that does not say anything about how those effects are felt locally. Local jobseekers might, where there are not many, more readily be reabsorbed into the employment market".

113. It might be thought that, within the context of a group of associated companies, in deciding whether the quantitative criterion is met (in relation to any particular establishment, in any particular case), one should take account of all of the dismissals, within the relevant period, which are proposed by <u>all</u> of the companies within that group of companies, as distinct from taking account only of the dismissals which are proposed by a particular employee's <u>own</u> employer. However, unfortunately, that would be an incorrect way of applying the relevant criterion. We have arrived at the latter conclusion, for two reasons.

    (1) "Harvey on Industrial Relations and Employment Law" [in Division E/4/E, at paragraph 855] points out:

> "If several associated employers all operate from one set of premises, even if their combined operation can be regarded as one establishment, nevertheless each employer's batch of redundancies must be considered separately ….. The result is that two sister companies may each declare 19 redundancies without giving rise to any duty on any of them to consult under [TULRA]. The group as a whole might have declared more than 20 redundancies at the same establishment, but no single employer has declared 20 or more redundancies at that establishment".

    (2) At paragraph 54 of his Opinion in the *Woolworths* case, Advocate General Wahl made the following comments:

> "[If] one looks at the *context* of [the 1998 Directive] the [CJEU] has previously held that the procedural obligations set out in Articles 2 and 3 of [the 1998 Directive] are incumbent *only on an employing subsidiary and not on a parent company* even if the decision to proceed with collective redundancies is made by the latter, as the parent company does not have the status of employer".

114. Within the context of the particular circumstances of each of the Excepted Claimants, we must now apply those legal principles.

115. In considering the cases of the Excepted Claimants which have been referred to at paragraph 31 above and, in particular, in each instance, in considering whether the quantitative criterion has been met, we have of course taken account only of the actual or proposed dismissals within a particular establishment, of Construction Group staff. We have confined our considerations, in that connection, to the Construction Group dismissals (as distinct from including consideration of dismissals effected by sister companies of Construction Group), because of the legal principles which have been set out at paragraph 113 above.

116. As already noted at paragraph 31 above, the Excepted Claimants consist of the following:

Chris Adair
Pamela Ward
Peter McAleer
Steven Godfrey
Conor McKeever
Damian Meenagh
Keith Magee
Sean Brannigan
Hugh McAlary
Emmett Feeney

117. In a written submission ("the Claimants' Submission"), which he supplemented with oral argument, Mr Mason set out arguments, on behalf of each of the Excepted Claimants, in respect of the quantitative criterion issue. In that connection, his primary argument was to the following effect: Each Construction Group claimant should be treated as having been assigned (within the meaning of the 1998 Directive), throughout the relevant period, to the Belfast Head Office of Construction Group. (The Department had accepted that there were enough redundancies at Head Office to trigger an obligation to collectively consult, in relation to every Head Office proposed or actual dismissal).

118. In our view, that primary argument is not valid, mainly for two reasons.

119. First, each relevant claimant's contract of employment refers to that claimant's "Place of Work" in the following terms:

> "Your normal place of work will be determined by the project on which you are assigned.
>
> However due to your role you may be required from time to time to attend at other Company addresses as necessitated by your function.
>
> The Company reserves the right to relocate its operations and/or establish further operations and you may be required to transfer to another department and/or place of work".

120. In other words, according to the contract, at any given time, a particular employee's actual work location is the place to which that particular employee is currently contractually "assigned". (We have not of course made the mistake of assuming that, in any relevant Lagan contract, the term "assigned" has the same meaning as

it has in the CJEU collective redundancies case law).

121. Secondly, we are sure that, within the context of the relevant case law of the CJEU:

(1) During any particular period, any particular member of staff belongs to a particular establishment if, during that period, he/she is actually mainly "assigned" to that particular establishment.

(2) In that context, one is assigned to a particular workplace, if that is the workplace to which one is (mainly) actually sent to do one's work.

122. Throughout the relevant period, each Excepted Claimant was mainly working at some work unit which was not located at the Belfast Head Office of Construction Group.

123. In relation to the "establishment" and "assignment" issues, Mr Mason's primary argument, on behalf of all the Excepted Claimants was as set out above. We have rejected his primary argument in relation to those issues. His secondary argument in relation to those issues, which (in light of evidence which was given by claimants during the course of the main hearing) was accepted by the Department, was set out at paragraphs 17 and 18 of the Claimants' Submission, in the following terms:

> "17. It is noted and appreciated that, subject to the matter being confirmed in sworn evidence, the Department takes no issue with the Claimant's alternative tabular evidence regarding where employees were based at the time of the redundancies.
>
> 18. It should be stressed however that the claimant's primary argument is [as referred to at paragraph 117 above]. Only if this argument fails does the issue of which sites individuals were working at become live. It is submitted that, if the Tribunal decides that there was more than one establishment at which the Claimants were based, it should accept the Claimants' evidence and find that the assignments were as set out at pages 420-423 of the bundle …".

In light of the oral testimony which we received, in light of the unsworn statements which we received, and in light of the documentary evidence which we received, we do accept that the establishments and assignments were indeed as set out at pages 420-423 of the trial bundle.

124. The Department says that a protective award cannot be made in respect of Chris Adair and Pamela Ward (because, at the relevant time, they were assigned to the "M8" establishment, to which far fewer than 20 Construction Group employees were then assigned).

125. With regret, we agree with that proposition, for the following reasons:

(1) We are sure that, during the relevant period, the M8 project was an establishment.

(2) It is not in contention, between the claimant and the Department, that, if M8 was an establishment, there were far fewer employees than 20 who were assigned to it.

(3) We are sure that, throughout the relevant period, the M8 establishment was the workplace of Chris Adair and Pamela Ward.

126. The Department says that a protective award in respect of Peter McAleer cannot be made because (the Department argues), at the relevant time, he was assigned to an establishment - NIW Framework – in which he was the only Construction Group employee.

127. With regret, we agree with that contention. We are sure that Construction Group had no Article 216 collective consultation obligations in respect of Mr McAleer's dismissal because:

(1) throughout the relevant period, the NIW Framework was an "establishment" for the purposes of Article 216;

(2) throughout the relevant period, that was the establishment to which Mr McAleer was assigned; and

(3) throughout that period, Mr McAleer was the only Construction Group employee who was assigned to that establishment.

128. The Department says that a protective award cannot be made in respect of Steven Godfrey because, throughout the relevant period, he was assigned to an establishment (Teeside) to which fewer than 20 Construction Group staff were then assigned.

129. We regretfully agree with that contention, for the following reasons:

(1) We are sure, that throughout the relevant period, "Teeside" was a separate establishment.

(2) We are also sure that there were fewer than 20 Construction Group staff assigned to that establishment at the relevant time;

(3) We are sure that, at the relevant time, that was Mr Godfrey's permanent workplace.

130. The Department says that none of the following people can properly be regarded as being within the scope of any protective award because; at the relevant time, each of them was assigned to a "Watermain Rehab" establishment, and fewer than 20 Construction Group staff were assigned to that establishment at that time:

Conor McKeever
Damian Meenagh
Keith Magee
Sean Brannigan

131. We regretfully accept that contention, for the following reasons:

(1) We are sure, at the relevant time, there was a "Watermain Rehab" establishment;

(2) We are sure that only 17 Construction Group staff were assigned to that establishment at the relevant time.

(3) We are sure that, at the relevant time, each of the persons named in the last preceding paragraph above was assigned to that establishment, for the purpose of carrying out his duties.

132. The Department says that a protective award in respect of Hugh McAlary is not appropriate, because he was on a career break at the time he was made redundant.

133. We have regretfully concluded that the Department's position in relation to that matter is correct. We have arrived at that conclusion for the following reasons:

(1) First, because he was on a career break, Mr McAlary was not, at the relevant time, assigned to any establishment.

(2) Secondly, if (contrary to the view which has been expressed in the last sentence), Mr McAlary can be deemed to have been assigned, throughout his career break, to the establishment to which he had been assigned immediately prior to his career break, he still could not be brought within the scope of the relevant protective award. Why not? Because the last establishment to which he was assigned immediately prior to going on his career break was an establishment to which fewer than 20 Construction Group staff were assigned at the time which is relevant for the purpose of his Article 217 claim.

134. The Department says that a protective award cannot be made in respect of Emmett Feeney, for two reasons. According to the Department:

(1) During the relevant period, Mr Feeney was assigned to an establishment in Inishowen, County Donegal.

(2) At that time, that establishment consisted of far fewer than 20 staff.

135. We accept the accuracy of both of those two assertions.

136. First, we are sure, that throughout the relevant period, Mr Feeney was assigned, within the meaning of the collective redundancy legislation, to the Inishowen project. Because that project was carried out in the Republic of Ireland, any failure to collectively consult in respect of Mr Feeney's own dismissal would be outside the legislative grasp of Article 216 of the ERO.

137. Secondly, if the "legislative grasp" issue had not been a problem within the context of Mr Feeney's case, we would inevitably have concluded that Mr Feeney could not be brought within the scope of a protective award because:

(1) At the relevant time, the Inishowen project constituted an "establishment" for the purposes of Article 216.

(2) At that time, Mr Feeney was assigned to that establishment.

(3) At that time, far fewer than 20 Construction Group staff were assigned to that establishment.

138. Towards the end of the last day of the main hearing of these complaints, it became obvious that the claims of the Excepted Claimants were unlikely to succeed. Some of the Excepted Claimants were present at that hearing. Some of those claimants (some of the Excepted Claimants who were present at the hearing) expressed views about the alleged unfairness of these likely outcomes. Our comments in relation to those matters are as follows:

(1) We agree that a feeling of unfairness is very understandable if you have been dismissed, like other workers, and those other workers get a protective award merely because they belonged to a work unit which consisted of 20 or more staff, and you get none merely because your work unit was a unit to which fewer than 20 relevant staff belonged.

(2) We know that, in some situations, the question of whether or not a particular unit constitutes an establishment is a question which involves borderline value-judgments; and that, in those situations, different honest and diligent people can arrive at different conclusions. However, we are far from sure that any such borderline situations have arisen within the context of the protective award claims of the Excepted Claimants.

(3) We realise that some of the Excepted Claimants may consider that some of the people whose protective award claims were not opposed (on a quantitative criterion ground) by the Department, may not, in reality have met the quantitative criterion. However, we see no reason to embark on a detailed examination, in relation to any particular claimant, as to whether he or she did, or did not, meet the quantitative criterion, in circumstances in which the claimant's representative and the Department are both agreed, on the basis of discussions and of their enquires, and on the basis of the evidence known to them, that that claimant's dismissal did satisfy the quantitative criterion.

(4) We have noted that Mr Mason has conducted this litigation with the diligence, proportionality and intelligence which is typical of the way in which he presents his cases in the tribunals generally.

(5) In those instances in which the Department has been willing to accept the contention that a particular claimant satisfied the quantitative criterion, we are sure that that was done in the wake of a proportionate examination of the available contentions and evidence.

(6) We are aware that some of the Excepted Claimants have contrasted the way in which, in Northern Ireland, the question of whether they met the quantitative criterion has been approached, with the way in which that issue was dealt with in some of the GB cases in which collective consultation claims were made (pursuant to the GB equivalent of Article 217) by other Lagan staff. However, our duty is to do our best, on the basis of the

information that has become available to us. In our view, it is likely that, in respect of the Excepted Claimants, in relation to the quantitative criterion issue, we have more information than was available to the relevant GB tribunals in relation to the cases of other claimants, in GB tribunals, in cases in which there may, or may not have been, a quantitative criterion issue.

139. We of course recognise that, from a human point of view, a feeling of unfairness (and of being treated less well than people who are believed to belong to establishments to which 20 or more staff were assigned), on the part of Excepted Claimants, is entirely understandable. The comments in the last paragraph are not intended to be disrespectful to any Excepted Claimant who holds that opinion, in relation to that alleged unfairness.

Consequential directions

140. If the Department for the Economy ("the Department") makes payments to employees pursuant to this Decision, it will be doing so because payments of remuneration under a protective award constitute a debt to which Article 227 of ERO applies. In that context, the Department will hardly need to be reminded of its power to obtain information, pursuant to Article 235 of ERO, from the Employer.

141. In light of the provisions of Article 235, the Department may possibly wish to ask the administrators, pursuant to that Article, to provide the Department with a copy of the information which the administrators will in any event be providing (pursuant to regulation 6 of the Recoupment Regulations) to DfC.

142. Our current position is that we do not think that it is necessary or appropriate for us to name any non-claimants (individuals, other than the claimants whose complaints are the subject of this Decision) as individuals who are within the personal scope of this award. However, we are willing to reconsider that approach if the Department asks us to do so.

143. The attention of the parties is drawn to the Recoupment Statement which is set out below, and which constitutes part of this Decision.

FIRST SCHEDULE

The 51 claims which have the case reference numbers 5827/18 - 5877/18 which are pending Article 217 complaints, brought against this respondent, which complaints were presented on 17 May 2018. (The names of all of those individual claimants were appended to that claim form).

SECOND SCHEDULE

The claimants who are named at paragraph 31 above.

THIRD SCHEDULE

Each protective award applies to the following:

(1) All of the claimants to which all of the following conditions apply:

(a) He/she has a pending Article 217 claim against this respondent.

(b) He/she is not within the scope of any protective award which has been made by any tribunal in Great Britain.

(c) He/she is not an Excepted Claimant. (See paragraph 31 above).

(2) Any other ex-employee ("employee") of this respondent to whom all of the following conditions apply:

(a) That employee was dismissed, by reason of redundancy, by this respondent, in March 2018.

(b) At the time of that dismissal, that employee was assigned to a workplace within the United Kingdom.

(c) That employee did not present an Article 217 complaint to an industrial tribunal, which that employee subsequently withdrew.

(d) That employee did not present a complaint, under the GB equivalent of Article 217, to a GB employment tribunal, which that employee subsequently withdrew.

(e) That employee is not an Excepted Claimant (see paragraph 31 above).

(f) That employee is not a complainant, under the GB equivalent of Article 217, to a GB employment tribunal, in a case which is still pending.

(g) That employee is not within the scope of any protective award which has been made by an employment tribunal in Great Britain.

(h) During the period which is relevant within the context of any Article 217 complaint, that employee was assigned to an establishment of the respondent where the respondent was then dismissing, or proposing to dismiss, as redundant, 20 or more employees, within a period of 90 days or less.

Recoupment Statement

[1] In the context of this Statement:

(a) "the relevant benefits" are jobseeker's allowance, income-related employment and support allowance, universal credit and income support; and

(b) any reference to "the Regulations" is a reference to the Employment Protection (Recoupment of allowance and Income Support) Regulations (Northern Ireland) 1996 (as amended); and

(c) any reference to “the Department” is not a reference to the Department for the Economy and is a reference to the Department for Communities.

[2] Until a protective award is actually made, an employee who is out of work may legitimately claim relevant benefits because, at that time, he or she is not (yet) entitled to a protective award under an award of an industrial tribunal. However, if and when the tribunal makes a protective award, the Department for Communities ("the Department") can claim back from the employee the amount of any relevant benefit already paid to him or her; and it can do so by requiring the employer to pay that amount to the Department out of any money which would otherwise be due to be paid, to that employee, under the protective award, for the same period.

[3] When an industrial tribunal makes a protective award, the employer must send to the Department (within 10 days) full details of any employee involved (name, address, insurance number and the date, or proposed date, of termination of employment). That is a requirement of regulation 6 of the Regulations.

[4] The employer must not pay anything at all (under the protective award) to any such employee unless and until the Department has served on the employer a recoupment notice, or unless or until the Department has told the employer that it is not going to serve any such notice.

[5] When the employer receives a recoupment notice, the employer must pay the amount of that recoupment notice to the Department; and must then pay the balance (the remainder of the money due under the protective award) to the employee.

[6] Any such notice will tell the employer how much the Department is claiming from the protective award. The notice will claim, by way of total or partial recoupment of relevant benefits, the "appropriate amount", which will be computed under paragraph (3) of regulation 8 of the Regulations.

[7] In the present context, "the appropriate amount" is the lesser of the following two sums:

(a) the amount (less any tax or social security contributions which fall to be deducted from it by the employer) accrued due to the employee in respect of so much of the protected period as falls before the date on which the Department receives from the employer the information required under regulation 6 of the Regulations, or

(b) the amount paid by way of, or paid on account of, relevant benefits to the employee for any period which coincides with any part of the protected period falling before the date described in sub-paragraph (a) above.

[8] The Department must serve a recoupment notice on the employer, or notify the employer that it does not intend to serve such a notice, within "the period applicable" or as soon as practicable thereafter. (The period applicable is the period ending 21 days after the Department has received from the employer the information required under regulation 6).

[9] A recoupment notice served on an employer has the following legal effects. First, it operates as an instruction to the employer to pay (by way of deduction out of the sum due under the award) the recoupable amount to the Department; and it is the legal duty of the employer to comply with the notice. Secondly, the employer's duty to comply with the notice does not affect the employer's obligation to pay any balance (any amount which may be due to the claimant, under the protective award, after the employer has complied with its duties to account to the Department pursuant to the recoupment notice).

[10] Paragraph (9) of regulation 8 of the 1996 Regulations expressly provides that the duty imposed on the employer by service of the recoupment notice will not be discharged if the employer pays the recoupable amount to the employee, either:

(1) during the "postponement period" (see regulation 7 of the Regulations) or

(2) thereafter, if a recoupment notice is served on the employer during that postponement period.

[11] Paragraph (10) of regulation 8 of the 1996 Regulations provides that payment by the employer to the Department under Regulation 8 is to be a complete discharge, in favour of the employer as against the employee, in respect of any sum so paid, but "without prejudice to any rights of the employee under regulation 10 [of the Regulations]".

[12] Paragraph (11) of regulation 8 provides that the recoupable amount is to be recoverable by the Department from the employer as a debt.

Signed:

Date and place of hearing: 30 April 2019 and 9 August 2019, Belfast.

Date decision recorded in register and issued to parties: