AN INDEPENDENT REVIEW
OF
THE CIRCUMSTANCES LEADING UP TO THE EMPLOYMENT TRIBUNAL JUDGEMENT IN THE CASE OF UNIVERSITY AND COLLEGE UNION v ULSTER UNIVERSITY (CASE REF: 1717/16)

Review conducted and report prepared by

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EXECUTIVE SUMMARY

(i) This review is in the form of a Lessons Learned document commissioned by the University after the Employment Judgement issued in December 2017, wherein the Tribunal unanimously upheld the University and College Union (UCU)'s claim that Ulster University had failed to consult with UCU during its redundancy process (2015-2016). This review was commissioned to consider the decision-making process at Council and Senior Leadership level and the Budget Review Group (BRG) in the University, the strategy for consultation with Trade Unions and employees in 2015, the locus of accountability for Employee Relations in the University and the presence of checks and balances as assurance of how consultation was being handled.

(ii) The Tribunal granted UCU a declaration of a failure to consult and made a protective award of 90 days. This meant that Ulster University was obliged to pay compensation to each member of staff whom they had made redundant, including those staff made redundant under a so-called Voluntary Severance Scheme (VSS) in April 2016, amounting to a total of £1.6 million.

(iii) I was further specifically asked to assess the representation of the risks of the process undertaken by BRG and the subsequent redundancies in the University Risk Register considered at the Audit Committee and Resources Committee; and whether opportunities were ignored/missed that could have triggered the concern of Senior Leadership within the University and, if so, why these were ignored/missed.

(iv) The overall aim of the review is to determine what lessons can be learned from management's actions in this case and to make recommendations on proposed actions to ensure avoidance of a similar occurrence in the future.

(v) The methodology adopted was to identify all the decision-making committees that had been involved in the redundancy process - namely Council, Senate, Senior Executive Team (SET) and the Budget Review Working Group (BRG), and to analyse all respective terms of reference and minutes of meetings as evidence of their powers and what took place at these meetings. I also examined the Risk Register and conducted a comprehensive analysis of all documentation relating to the progress of the redundancy process, from November 2014 until October 2015, when UCU formally withdrew from a consultation process they deemed to be 'a sham'. Finally, I interviewed members of relevant committees, senior management, Trades Unions and staff involved.

(vi) The Director of Human Resources left Ulster University in 2016 and was not interviewed as part of this review. He was, however, given an opportunity to meet me to discuss my findings, in particular those that were critical of his part in the redundancy process up to and including the Tribunal proceedings. He declined the invitation.

(vii) My review concluded that all committees involved were aware that the work of SET and BRG was a direct and specific response to the budgetary cuts. Furthermore, the evidence reveals that both Council and Senate were being regularly briefed with more than enough information to know that job losses would be inevitable and yet there was no recorded challenge to the work of SET/BRG or any reference to Trade Unions and the need to consult them.

(viii) The overall conclusions are based on findings of governance concerns, emanating primarily from a failure of effective oversight by senior management.

(ix) In relation to oversight and exercise of the challenge function between March 2015 and July 2015, the acting Vice-Chancellor expressed to me his expectation that the Director of Human Resources would have carried out the responsibility of consulting with the Unions throughout that period, while the BRG was devising and developing the metrics for the inevitable redundancies.

(x) Other senior managers on these committees to whom I spoke also perceived the redundancy process to be the responsibility of, and driven by, the Human Resources Department and in particular the Director, and stated that they had not appreciated that it was part of their own role regularly to challenge and seek assurance of his work during the progress of an issue of such strategic importance.

(xi) This amounted to a failure by the senior leadership to ensure the delivery of a strategy for consultation and an oversight failure to ensure the proper management by Human Resources of the mandatory, statutory consultation process. It was the more regrettable that the monitoring and challenge safeguards were not in place or exercised, given the Human Resource Director's known shortcomings in conducting redundancy processes in the past, as referenced in very critical terms in the judgements of two previous Tribunal cases . In these circumstances, there was a greater onus on SET, BRG and the University's leadership to monitor and challenge him and they failed so to do.

(xii) Further, Ulster University's apparent support of the Director of Human Resources during the Tribunal process and staunch defence of the robustness of the so-called consultation process, (ultimately supported by their legal advices), of what UCU considered the indefensible, endorsed UCU's feeling of being side-lined, which further damaged the industrial relations working relationship.

(xiii) The review also identified concerns of poor communication between UCU and the Vice-Chancellor. An agreement with the Vice-Chancellor in November 2014 to keep UCU "in the loop" was not followed through either by him or his successors and letters sent by UCU to the Vice-Chancellor often went unanswered or were re-directed. The incumbent Vice-Chancellor stated that he had continued with the previous extant practice in the Vice-Chancellors' Office, whereby correspondence relating to human resource issues was automatically re-directed to the Human Resource department without checking with the Vice-Chancellor.

(xiv) This practice had two particular consequences, which represented two missed opportunities. The first was when, in January 2016, UCU's official Trade Union representative wrote directly to the Vice-Chancellor to appeal to him to meet/and consult her and the Union, as they believed the Director of Human Resources was keeping them in the dark. They requested pertinent information in relation to the redundancy process. They were also making a formal complaint about the Director himself and drawing the Vice-Chancellor's attention to comments made by Tribunal judges in relation to the Director's poor performance in previous redundancy processes.

(xv) The Vice-Chancellor stated that, in line with the practice in the Vice-Chancellor's Office, this email had been immediately forwarded by his Office to the Human Resources department and that he did not see it till a copy of it was produced by UCU in December 2018. The Union's request for information was thus stymied and their complaint against the Director went unanswered. If the email had been read at the time of its receipt, the Vice-Chancellor would have had the opportunity to investigate the complaint against the Director and appreciate UCU's concerns.

(xvi) The second consequence of thus forwarding UCU's correspondence to Human Resources for reply was that the Vice-Chancellor reinforced the culture of managing the relationship with UCU at Director of Human Resources level. This was perceived by UCU as rude, as a slight and a source of great frustration and stress; it also created a sense of helplessness in the representatives, in that they were prevented from properly supporting their members. It also represented a missed opportunity for the Vice-Chancellor to develop his own working relationship with UCU, particularly in the context of inevitable redundancies, where open discussions and trust-building might just have averted the Tribunal process.

(xvii) The review identified the regularly-emphasised need for confidentiality by senior management throughout the redundancy process and acknowledged that this may have been well-intentioned, to protect staff from speculation and stress. However, it had the effect of preventing members of the committees from "taking soundings", or having discussions about plans for redundancies in general, not specific to individuals, that might have given the members different perspectives to bring back to the committees. I concluded that the closed nature of the ruminations of the committees created an environment where there was a blind focus on strategy, without the benefit of critical challenge.

(xviii) Ulster University's rejection of an offer from UCU to settle the case for its members was a further significant missed opportunity. UCU offered to accept a figure of £200,000 as compensation for its affected members. Ulster University relied on the advice of their lawyers that the case was strong and defensible. However, there appears to have been little reflection on the potential costs of losing, which included the financial costs, the adverse effect on staff morale or the potential reputational damage for Ulster University.

(xix) The review also discovered that, to a large extent, the legal advices were based on information and perceptions provided to the lawyers by the Director of Human Resources on behalf of Ulster University, for example, the narrative that the work of SET from November 2014 until April 2015 was the usual annual academic planning and that the decisions as announced on the 31 August 2015 were still "proposals" which only then triggered the need for consultation. The Tribunal rejected this narrative and found that no-one in senior management had checked whether the information provided by the Director to the Legal Advisers was correct and that no-one checked/challenged the validity of the legal advices. This demonstrated a further failure to challenge or monitor the Director's work or to carry out senior management's oversight role.

(xx) The conclusions reached indicate a need for future industrial relations scenarios to be approached by senior management with greater reflection on risk management – To facilitate such reflection, it is recommended that new governance measures should be put in place to oversee the strategic direction of their work in delivering the University's aims in an appropriate and lawful manner. This would avoid the pitfalls that occurred in the facts under consideration.

(xxi) It is further recommended that Ulster University and UCU jointly develop a good Union-Management partnership, essential for the proper delivery of the university work and its strategic planning. This must include the development of an effective Industrial Relations Framework and a mutual commitment to a new culture of early and open communications, based on mutual trust and respect.

(xxii) This will require genuine and positive leadership, committed to active engagement at all levels of governance and management. A culture of joint working must be developed so that problems are anticipated and worked through jointly.

(xxiii) A further recommendation is that joint training is provided on good management-union communication and negotiating skills for senior managers and Trade Unions. In terms of all senior committees - including Council and Senate - there needs to be specific training on their obligations in relation to oversight of issues affecting employee relations, especially the relevant elements of employment law.

REVIEW OF THE CIRCUMSTANCES LEADING UP TO THE EMPLOYMENT TRIBUNAL JUDGEMENT

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INDEPENDENT REVIEW OF TRIBUNAL JUDGEMENT IN UCU AGAINST ULSTER UNIVERSITY

1.0 THE JUDGEMENT

1.0.1 In December 2017 an Employment Tribunal issued a judgement in the above case, unanimously upholding the University and College Union (UCU)'s claim that Ulster University had failed to consult with UCU during its redundancy process (2015-2016), resulting from substantial cuts in Government funding. The Tribunal granted UCU a declaration to that effect and made a protective award of 90 days. This meant that Ulster University was obliged to pay compensation to each member of staff whom they had made redundant, including those staff made redundant under a so-called Voluntary Severance Scheme (VSS) in April 2016.

1.1 UCU's Claim

1.1.1 In brief, UCU's case was that, from as early as 2014, Ulster University had been considering and, in some instances acting on, various scenarios/ proposals, including course closures, to manage the reduction in funding but that it was not until 31 August 2015 and after final proposals had been ratified by Council and Senate that same day, that Ulster University agreed to begin consultation. However, UCU formed the view that communication between Ulster University and them at that stage could not amount to consultation on the basis that the so-called "proposals" amounted to decisions that had already been taken.

1.1.2 This viewpoint was supported by the fact that the Voluntary Severance Scheme (VSS) opened on the 1 September 2015, with a deadline for applications of the 30 October 2015 with a view for completion by 30 April 2016.

1.1.3 UCU claimed that their exclusion from any discussions around the proposals for VSS and course closures both before and after the 31 August 2015 amounted to a failure to consult under the statutory provisions of Article 126 of the Employment Rights (Northern Ireland) Order 1996.

1.2 The University's Response

1.2.1 Ulster University's response to the claim was that they had, at least up until April 2015, been engaged in usual annual academic "scenario planning" and the trigger for consultation was the 31 August 2015 when Ulster University announced its proposals to manage the cuts through the VSS. Their position was also that UCU frustrated the consultation process by their refusal to engage thereafter.

1.3 The Tribunal's Findings

1.3.1 The Tribunal rejected Ulster University's evidence in its entirety. They upheld UCU's claim and made a declaration that Ulster University had failed in its statutory obligation to consult with UCU and ordered compensation. In reaching its judgement that there had been a failure to consult, the Tribunal referred to "egregious failures" made by senior management in Ulster University throughout the process. These included:

- the failure to comply with Ulster University's own redundancy policy (which states that "consultation is required when redundancies are *under consideration*" i.e. not when a redundancy scheme is *produced*);

- the fact that senior management deliberately withheld information from UCU during the process, up to and including 31 August 2015;

- the fact that the existence of the Research Excellence Framework (REF) metric was withheld from UCU;

- *and* the failure of senior management to understand the relevance this metric had for the need to consult, (arising directly out of the legislation at Article 126 (6) (a) and (b)), as it formed part of the reason for the redundancies and the proposed method of selecting employees for redundancy.

1.4 The Tribunal Specifically Concluded*:*

1.4.1 *that there was little will on behalf of Ulster University to engage with UCU; that Ulster University and the process in this redundancy exercise has led to a palpable bitterness on the part of both the staff who went and those who stayed and… that there was a poor relationship between management side and the Trade Unions.*

1.5 Perceptions during the Course of the Tribunal Hearing and of the Outcome.

1.5.1 The case ran for eleven days in June and August 2017. Evidence was heard from eleven members of staff on behalf of Ulster University and eight witnesses on behalf of UCU, comprising staff members and UCU's Northern Ireland Official. I interviewed Ulster University employees and UCU members who had given evidence at the Tribunal, and the Trade Unions Official.

- Ulster University staff, all bar one, said that they had been surprised, and some shocked, at the Tribunal's decision. Two staff members stated that they still did not understand it and were worried that the same mistake might be made again.

- Most of these staff stated that their surprise arose from the fact that the legal team representing Ulster University had reassured them throughout that Ulster University had a good case and, more likely than not, would win. Only one staff member advised me that they had

misgivings and that was because they were not impressed by the quality of UCU's barrister and because of their own interpretation of the employment judge's attitude to some of Ulster University's witnesses.

- All staff I spoke to stated that they had found the redundancy process and subsequent Tribunal very difficult and they were continuing to deal with its ramifications (e.g. teaching-out closed courses). There was general condemnation for the way in which the staff reductions had been made, with the Deans being expected to identify numbers from within Faculties, and sometime specific staff and departments, as opposed to seeking volunteers for redundancy from across the university as a whole. One staff member felt that this had militated against Ulster University "owning" the need for redundancies amongst them all and had the effect of treating the faculties as silos. All those interviewed felt that the process had been divisive.

- For their part, UCU stated that they were confident from an early stage that their claim would be successful. Three months prior to the hearing, they made an offer of £200,000 to settle the case. I was advised that Ulster University considered this offer but, on the basis of legal advice and their belief that the redundancy process had been properly followed, rejected it and the case continued to hearing. The total compensation ordered by the Tribunal amounted to over £1.6m.

2.0 THE INDEPENDENT REVIEW AND ITS REMIT

After the Tribunal judgement was issued, the Chair of Council undertook to commission a review into how this situation had come about, and why, and to examine what mistakes had occurred during the redundancy process with the intention of identifying "lessons learnt", to ensure future best practice that both meets and exceeds any statutory obligations and of restoring good industrial relations within Ulster University.

2.1 The Objectives of the Review

2.1.1 The specific objectives of the Review were to:

a) *Review Ulster University's decision-making process at Council and Senior Leadership level for the Budget Review Group Process in the University and the strategy for consultation with Trade Unions and employees in 2015. This should include consideration of what committees were involved and what reports/information were presented to them.*

b) *Test where accountability lay for employee relations in the University and whether there were checks and balances to ensure the University's Senior Leadership and Council were accordingly and appropriately aware of how key matters like the consultation were being handled.*

c) *Confirm whether the risks of the BRG Process and Redundancies had been fully presented in the University Risk Register at the Audit Committee and Resources Committee.*

d) *During the timeline of the process, were there any opportunities which were ignored/missed which could have triggered the concern of Senior Leadership at Counsel and if so, why were these ignored/missed.*

e) *Determine what lessons can be learned for the future from the University's management of the issues which led to the Industrial Tribunal's decision.*

f) *To make recommendations on proposed actions the University should initiate to ensure avoidance of a similar occurrence in the future.*

2.1.2 As a lawyer with specific expertise in employment-related litigation and practice, I was commissioned to undertake an independent review into the objectives identified.

2.1.3 I considered the objectives in the Terms of Reference. A summary of the methodology used is attached at Appendix A.

2.2 Context to Redundancies/Reduction in Funding

2.2.1 In 2014-2015, Higher Education Institutes (HEI's) were faced with substantial cuts in funding as a result of the forfeit against the Northern

Ireland Assembly for not introducing Welfare Reform. In August 2014, the then-responsible department, the Department for Employment and Learning (DEL) wrote to the then-Vice-Chancellor of Ulster University to advise him that DEL were making significant in-year cuts that would have serious consequences for its spending programmes, including the Higher Education Institutions.

2.2.2 DEL's letter stated *"…the HEI's are therefore required to plan now for reductions in block grant allocations in October (2014), once again we will try to ensure that the October cuts to HEI's budget will be slightly less than the overall level of the Department's cuts. I recognise that a further adjustment to the grant allocations in October will be ever more challenging with only five months of the financial year left in which to achieve the reduction, hence the need to start planning now."*

2.2.3 The letter ended with the gloomy prediction that *"… the budgetary prospects for the next financial year 2015-16 appear equally bleak at this stage and that it will be important to start contingency planning for that year also."*

2.2.4 DEL wrote again in October 2014 advising of further cuts to HEI's funding and urged "*I would therefore request that you start to plan for these further cuts immediately as they will have to be implemented in a very short timeframe.* This letter ended by echoing the first letter's prediction *"… the budgetary prospects for the next financial year 2015-16 appear even bleaker at this stage and, although the Executive has yet to take any decisions on next year's allocations, it is important to start contingency planning now for that year also. I would ask that you immediately start to plan for cuts of up to 15% in 2015-2016 and to assess the impact of such cuts."*

2.2.5 In his evidence to the Tribunal, the Ulster University's Chief Financial Officer spelled out what this meant for Ulster University in real terms. He stated that since 2011, Ulster University had operated with year-on-year reductions to its budget allocations from the Executive. In 2011, the block grant funding was £89.7m and by 2015-2016 Ulster University had been advised that its funding allocation would be £70.3m, representing a reduction of £19m in cash terms.

2.2.6 Ulster University acted swiftly in response to these immediate and future cuts. It acted on a number of fronts, including lobbying the Government in conjunction with QUB and others, and from as early as August 2014, when the Council, Senate and the Senior Executive Team, (SET) committees met, Budgetary Update or reference to the financial position, became a fixed item on their agendas.

2.2.7 The Chief Financial Officer reported to all three committees on further cuts to the budget as and when Ulster University were advised of them. Vice-Chancellors' reports to Senate and Council reported on the budgetary position and the SET's on-going work on the implications this had for Ulster University.

3.0 REVIEW OF DECISION-MAKING BODIES AND PROCESSES

3.0.1 The first objective for this review is to:

'Review Ulster University's decision-making process at Council and Senior Leadership level for the Budget Review Group Process in the University and the strategy for consultation with Trade Unions and employees in 2015. This should include consideration of what committees were involved and what reports/information was presented to them.'

3.0.2 Decision-Making Committees

The decision-making committees around the redundancy process were Council, Senate, Senior Executive Team (SET) and the Budget Review Group (BRG).

3.1 Council

3.1.1 Council is the overall decision-making body, exercising primary oversight and governance in the university. It is collectively responsible for *"…overseeing the institution's activities, agreeing its future direction and for fostering an environment in which the potential of the institutional mission is maximised,"* (Council Code of Practice).

3.1.2 Under this Code, Council is obliged to adopt a Statement of Primary Responsibilities which, amongst other things, includes the provision to ensure *"…the establishment and monitoring of systems of control and accountability, including financial and operational controls and risk assessment, and clear procedures for handling internal grievances and for managing conflicts of interest."*

3.1.3 The Code of Practice also places responsibility on the Council for leadership on the governing body and ultimate responsibility for its effectiveness. The Code adds *"…the Chair shall wish to receive assurance that the institution is well connected with its stakeholders."*

3.1.4 The work of Council is enhanced and delivered through committees, namely the Audit Committee; the Resources Committee; the Governance, Nominations and Remuneration Committee; Senate; and the Senior Executive Team (SET). The Vice-Chancellor chairs SET and provides reports to Council and Senate. SET services both committees.

3.2 Senate

3.2.1 Senate is the principal academic committee with a key role in setting Ulster University's academic direction and academic governance. It works in collaboration with Council, SET and the academic community.

3.2.2 Senate's advisory role includes advising and making recommendations to the Vice-Chancellor and Council on academic matters, including the following: *the strategic development, implementation and monitoring of academic objectives of the University; the impact of developments in the internal and external environment on academic matters; academic*

priorities whilst remaining mindful of resource implications; significant changes in academic organisation; any matters which are referred to it by the Vice-Chancellor or Council.

3.3 SET

3.3.1 SET was the primary executive body of Ulster University that *sets direction and strategy and leads implementation across academic excellence and research, teaching and student experience, local civic leadership and international engagement, as well as the essential professional services required to support the delivery of Ulster University's academic mission.*

3.4 BRG

3.4.1 In April 2015, SET created a new sub-committee/working group of SET called the Budget Review Group, (BRG) *"for the purposes of planning and remodelling for the existing and any future funding cuts…using the data relating to the range of metrics which was presented to SET in November 2014".*

3.5 Council and Senate – Involvement in and Oversight of Redundancy Process and Consultation

3.5.1 During the relevant period from November 2014 until UCU lodged its claim in July 2016, Council and Senate each sat on five occasions. The Vice-Chancellors' reports were presented either verbally or in writing. The current Vice-Chancellor became Vice-Chancellor designate in April 2015 and formally took up office in July 2015.

3.5.2 The Vice-Chancellors reported directly to both Council and Senate on the budgetary cuts. The reports during the period November 2014 to August 2015 provided updates on this as it unfolded; they detailed the contingency planning that was being formulated by SET and then by BRG; they reported the course closures and the potential reductions in student numbers. The reports did not refer to potential job losses. The Vice-Chancellors' reports made no recorded references to union involvement, their attitudes or views or to any consultation with them.

3.5.3 The Vice-Chancellors' reports were recorded in the minutes of the Council and Senate meetings. Also recorded was their support for the work of the SET and later the BRG. The reports contained high level information, such as figures and percentage spend etc., around how the contingency planning was being designed with a view to best protecting/developing Ulster University for the future. Although the information provided was at a high level, there was enough from which to infer that job losses were inevitable.

3.5.4 There were, however, no specific references to job losses recorded. There were no questions or discussions recorded in any of the minutes of Council or Senate about whether either of the unions had been advised of,

or consulted, in the contingency planning being conducted by SET or BRG on SET's behalf and of any such potential job losses.

3.5.5 At a meeting of Senate on the 3 June 2015, the Acting Vice-Chancellor advised Senate of the work of the BRG and requested absolute confidentiality regarding the cuts to permit appropriate consultation and communication and to avoid misinformation. Senate agreed that there should be regular communication with staff but there was no specific reference to consultation with the Unions or UCU.

3.5.6 The Vice-Chancellors' reports made occasional references to informing staff of developments and, at a joint meeting of Council and Senate in June 2015, there was a reference in the Acting Vice-Chancellor's report to a successful "Communications Plan" that had been rolled out to all staff. However, there was no reference in these presentations to a Voluntary Severance Scheme, to the use of Research Excellence Framework in the metrics and, significantly, there was no reference to consultation with the unions.

3.5.7 The Vice-Chancellor Designate attended BRG meetings on 1 June, 4 June 15 June and 22 June 2915 by Skype. He assumed the role of Chair of BRG after his appointment was official in July 2015.

3.5.8 On 31 August 2015, the Vice-Chancellor chaired a number of meetings. The first of these was a closed meeting of Council called to seek Council's approval for the proposed Voluntary Severance Scheme (VSS). The minutes record the fact that the scheme had been robustly reviewed by two members of the committee from a financial perspective. It was also recorded that *"the scheme took cognisance of the university's statutory obligations, fairness, pay-back times and the need to consider reinvestment".*

3.5.9 It is unclear what other "statutory obligations" had been considered but the statutory obligation to consult with the Trade Unions was not one of them.

3.5.10 Council was asked to approve the eighteen-month VSS. They were advised that the effect of certain course closures would be presented to the joint Council/ Senate meeting immediately after this meeting. The Vice-Chancellor advised Council that the requisite "teaching out" on closed courses would not diminish the student experience.

3.5.11 An issue of quorum was raised. The meeting was not quorate. The minutes recorded the following; *"With no opposing voices, the will of the Council had been to endorse the Voluntary Severance proposals, agree the timetable for implementation and agree the adoption of the 18 Months scheme."*

3.5.12 A joint Council and Senate meeting followed on immediately. At it, the Vice-Chancellor gave a presentation on the financial context and the methodology adopted by the University for identifying course closures. He referred to the existence and work of BRG.

3.5.13 Although there were some queries raised about course closures and the appropriateness of the University not offering certain subject areas, the Minutes record that *"Senate noted the methodology adopted and AGREED, by a show of hands to approve the course closures. Five members, including the Students' Union President, indicated that they did not agree to the proposed list of closures."*

3.5.14 Those members of Senate I interviewed, some of whom were personally affected by the BRG process, described this meeting as being hurried, confusing and without regard to the feelings of anyone present who might be impacted by the news.

3.5.15 The stated purpose of these meetings was to have the proposals for dealing with the cuts as formulated by BRG "ratified" by Council and Senate. However, as SET had delegated authority to reach such decisions it is unclear why such ratification was sought. In any event there was no ratification by Council as that meeting was not quorate.

3.5.16 The Council and Senate meetings on 31 August 2015 were followed, on the same day, by a meeting of the Joint Trade Unions Consultative and Negotiating Committee (JUCNC). This was chaired by the Director of Human Relations. He confirmed that this meeting was the start of the consultation process. However, the VSS was opened the following day and UCU were provided with no information about the scheme until the middle of September 2015.

3.5.17 UCU had staged protests outside two Council meetings in late 2015. UCU claimed that, at one of these protests, Council's meeting venue was changed to avoid the confrontation. Members of Council to whom I spoke did not recollect this occasion although it may have been the case that Council members had not been aware of the decision to relocate. UCU claim that, while the Council Meeting of 2nd October 2015 was taking place, their protest outside was noisy and hard to miss; it was also quite specific and on point of the failure to consult. On placards were the words, "*No to a fait accompli—Consult the Unions now".*

3.5.18 Despite this protest and the clear messages on the Union placards, the Minutes of this Meeting make no reference to the protest and the demand to "… Consult the Unions now". The Minutes do, however, record the fact that the Vice-Chancellor's verbal Report to Council gave the following assurance: *"…the University had completed the consultation process and had followed the official processes and structures. The UNITE union had engaged with the University but UCU had yet to engage with the process. The legal advice acquired by the University confirmed that official processes had been adhered to and importantly staff had been respected throughout the process."*

3.5.19 The Vice-Chancellor stated that he based this verbal Report to Council on an assurance given to him by the Director of Human Resources that the legal advices received by the University were to the effect that the Redundancy Procedure, including the Consultation Process, was robust.

3.6 Conclusions on Council and Senate's Involvement in, and Oversight of, the Redundancy Process and Consultation.

3.6.1 My review of Council and Senate meetings confirms the fact that both these committees were fully aware that the work being done by SET and BRG was a specific response to the budgetary cuts and was not part of the usual academic planning process, a defence offered at the Tribunal. I concluded that this ought not to have been considered as sustainable and was rightly rejected in the Tribunal's judgement.

3.6.2 It is my finding that both Council and Senate were being regularly briefed with more than enough information to know that job losses would be inevitable, yet at these meetings, there was no recorded reference to Trade Unions and the need to consult and I can only conclude that these were either ignored or overlooked.

3.6.3 Although decisions taken at Council and Senate are usually strategic and high level, (and in Senate's case, largely academic), and are not normally concerned with staff management issues, it was surprising, given the substantial savings that had to be made and the strategic management and human resource experience that some members brought to those committees (particularly Council), that no one asked what the Unions thought about any of the plans/proposals or queried if/when the statutory consultation process commenced. I noted that Council did not seek details of how the negative impacts of the financial cuts (such as job losses, reputational standing) were being addressed by senior management during the redundancy process and that their failure to do so amounted to a failure of good governance.

3.6.4 The absence of a reference in the Minutes of the Council Meeting of 2nd October 2015 to any discussion of the apparent contradiction between the message on the Union's placards and the Report furnished to Council by the Vice-Chancellor led me to conclude that the members of Council failed to understand, or overlooked, the extent of their responsibilities to satisfy themselves that the statutory obligation to consult had been met, or that they placed implicit trust in their senior management team to such an extent that they made no enquiry as to the reason for the protest and UCU's demand for proper consultation.

3.6.5 The fact that the Vice-Chancellor's Report to Council was a verbal report and was unsupported by the written legal advices received by Ulster University on 29 September 2015, meant that Council members remained ignorant of the fact that the solicitors had stated that their legal advices were based on what they had been told, that the University had been "consulting with" the unions throughout 2015 *and* that there remained outstanding information still to be given to the Unions to avoid non-compliance with Article 216 of the Employment Rights (Northern Ireland) Order 1996. It is clear that, even if what the solicitors had been told about the extent of the consultation with UCU had been correct, (which it was not), the legal advices that further action by Ulster University was still required in order to comply with Article 216 undermined the assurance

given by the Vice-Chancellor to Council members about the redundancy process.

3.6.6 I concluded that the Vice-Chancellor's verbal assurance that the consultation process was robust fell short of the actual legal advice received. Council's failure to query this assurance represented a failure to exercise good governance. In the absence of a written report from the Vice-Chancellor, Council members should have sought sight of the legal advice to assure themselves that their statutory requirement to consult had been met.

3.6.7 I concluded that Council and, to a lesser extent, Senate and failed in their oversight and challenge management responsibilities of the redundancy process. Members of Council and Senate whom I interviewed stated that they perceived that the redundancy process was being driven by the Director of Human Resources, and that they did not appreciate that it was part of their role to seek regular assurance from him about his work in the BRG process, despite its being of such strategic importance. Council cannot delegate its *responsibility* for a matter of such crucial importance, and there was a failure to exercise an overseeing, challenge function to assure themselves that the University was not in jeopardy.

3.6.8 My findings and conclusions in relation to Council's expectation that the management of the redundancy process was the responsibility of the Director of Human Resources explain the Tribunal's findings on the same point, which stated
"It was clear from the evidence of the respondent's witnesses that issue to do with complying with consultation obligations were left entirely to Mr Magee as Head of HR. The level of unrest amongst staff was such that there was an obligation on the senior managers as a whole to address their minds to what was being raised by the Trade Union (UCU).

3.7 SET's Involvement in and Oversight of the Redundancy Process and Consultation

3.7.1 SET comprised of the Vice-Chancellor (in his Chief Executive Officer role), the Deans and other academic personnel, and the Directors of Human Resources and Finance. SET was the team that developed Ulster University's response to the budget cuts. This process began immediately on receipt of DEL's financial advices in November 2014 and SET, and later the sub-committee BRG, continued honing that response from then and throughout 2015. The SET held meetings on the budget cuts and staff reductions on 10 November 2014, 24 November 2014, 8 December 2014, and 13 April 2015.

3.7.2 In the Tribunal, Ulster University described the work of SET during this period as the "normal academic 'scenario planning'", carried out every year to plan for the incoming year. However, the minutes of the SET meetings make it very clear that, whether it was "academic planning" or not, from November 2014 and into early 2015, this planning was anything but "normal". Ulster University had been advised by DEL in August and October 2014, not only of actual substantial budgetary cuts but of more

cuts to follow and the evidence is that that year's planning was undertaken in the context of the very much reduced budget.

3.7.3 The minutes show that SET tasked the Deans to model the potential impact of reductions of 50, 100 and 150 in intake of students, with the directive:- *"Details of the courses affected (including closure or reduction in intake size)* ***along with the associated staffing reduction*** *and any opportunity for expansion at marginal costs in areas of strengths should be included." (*My emphasis). The Deans were also tasked to consider any such staff reductions with a view to the enhancement of the Research Excellence Framework results.

3.7.4 SET focussed on papers brought to the committee by the Deans around the reduced student scenarios. Consideration was given to course closures and moving provision within schools and faculties. Three courses closed in November 2014. This included Dance, but this had been mooted prior to the budget cuts. More course closures happened in December 2014 and throughout 2015, without any consultation with UCU.

3.7.5 At this early stage, November 2014, SET asked the Director of Human Resources to arrange a meeting with the Unions, to include the Vice-Chancellor, to inform them that Ulster University was responding to the news of the cuts and was dealing with it. A UCU/JNC took place the following day, although the Vice-Chancellor did not attend. There was a discussion between the Director of Human Resources and UCU and the union confirmed their willingness to assist Ulster University in the difficult financial situation wrought by the cuts. Director of Human Resources made no reference to the details of SET's specific, or any, directions to the Deans, or to REF.

3.8 Conclusions on SET's Involvement in and Oversight of the Redundancy Process

3.8.1 It seems strange to have denied that the work of SET was a response to the budget cuts; such early and immediate planning would have been a responsible reaction to the cuts. However, I concluded that the denial acted like a smoke screen to protect Ulster University's assertion, and legal defence, that no firm decisions had been taken until 31 August 2015 when the proposals document was launched to the unions and these were just that, *proposals that* only then triggered the need to consult.

The Tribunal rejected Ulster University's defence and evidence that the work of SET between November 2014 and April 2015 amounted *"normal academic 'scenario planning'"* and held that the proposals document, released to the unions on the 31 August 2015, amounted to "… a fait accompli, i.e. finalised decisions", and that *"…the proposals document, … sent to the Unions in September 2015, … was largely unchanged from its form in January 2015." (Paragraphs 66 and 66(4)).*

3.8.2 SET did not meet between April 2015 and September 2015. This meant that (the considerations and proposals generated at) BRG was not operating as a subcommittee of SET, that the proposals generated by

BRG were not referred to SET for ratification but rather became actual decisions and that the important challenge-function of SET for the work of the BRG was lost.

3.9 The Involvement of Budget Monitoring Review Group (BRG) in the Redundancy Process and Consultation.

3.9.1 In April 2015 SET established the BRG, chaired by the Vice-Chancellor, and comprised of members of SET, the Deans and the Directors of Human Resource and Finance.

3.9.2 In the minutes of its first meeting BRG articulated its role which was *"to identify further student number reductions/course reductions/closures, assess the implications for research and evaluate the implications for staffing."* The minutes also revealed that the purpose of the BRG was "*to plan and remodel Ulster University in response to the funding cuts and that BRG would use the data relating to the range of metrics that had been presented to SET in November 2014."*

3.9.3 The BRG met on a total of 10 times, twice in April and May 2015, four times in June 2015 and twice in July 2015. At each of the meetings, proposals from the Deans were brought forward, discussed and refined. There were papers tabled and cross-referenced and proposals developed for course closures that led to a considerable number of job losses.

3.9.4 My analysis of the BRG minutes indicated that there were common themes to the meetings, as follows: the development of proposals for significant cuts in course provision along agreed metrics; the development of a voluntary redundancy scheme in line with metrics which were designed best to protect the standing of Ulster University, the need for confidentiality and the development of a communications strategy for staff.

3.9.5 There was no reference to the need for consultation with the Unions in any of these meetings.

3.9.6 The Deans were asked to revisit their scenarios from November 2014, taking cognisance of recent course review datasets and current staffing costs within their faculties, in areas of research and associated staffing deemed by BRG "weak" in the context of the Research Excellence Framework (REF).

3.9.7 It was agreed that the generated proposals would be presented to SET, and updates given to Council. It was stressed that a critical factor was that the process should be strategically driven, "…*providing Ulster University sufficient room to re-invest in areas of strength in teaching and research with a view to, amongst other things, increasing the number of research-active staff returned in REF 2020."* This approach was described as "restructuring for strength."

3.9.8 The minutes of the first meeting went on to record, among things, the possibility of establishing the nature of Ulster University's redundancy scheme and the requirement to have an agreed package in place; the

expectations by the Unions that cuts were imminent and therefore there was a need to have an agreed consultation and communication plan in place. Although the latter was discussed, it did not become an action point until June 2015.

3.9.9 At the 9 June 2015 meeting of the BRG, the Director of Human Resources presented a paper outlining the practicalities and procedures of the final redundancy plan, known as the Voluntary Severance Scheme (VSS). It contained an offer of an enhanced financial package and the option of a part-time contract to teach out. Its close off date was the 30 October 2015. The minutes recorded the Director's instruction to the committee, which read *"No Deans to meet with Staff or Unions-that is to be done through HR".*

3.9.10 Also in June 2015 the BRG agreed an All-staff Communications Plan. It listed Ulster University's relevant stakeholders. Under "Unions" it read, *"Briefing and liaison-sharing of press statement"*. There was no discussion around *consultation* with the Unions. There was no reference to the earlier suggestion (November 2014) to develop a communications plan with the unions and no questions were asked about this or about if or how this had been working.

3.9.11 It was a significant fact that the BRG asked its members to commit to maintaining strict confidentiality regarding their discussions, with the proviso that the Deans could discuss plans with relevant colleagues. This had the effect that some colleagues, members of the BRG and some staff sitting on Senate, knew more about the planned staffing cuts than others who were directly impacted. One staff member learned their fate for the first time at the Senate meeting on 31 August 2015.

3.10 Conclusions on the Involvement of BRG in the Redundancy Process and Consultation.

3.10.1 It was accepted by the members of BRG in their evidence to the Tribunal and in their statements to me, that Ulster University had seized the opportunity, in the Tribunal's words, *"to strengthen the respondent's REF research profile by concentrating on certain areas of research to target perceived weaker staff and areas of research and to recruit staff who could contribute to the research profile and thus affect the University's ranking in a positive* way".

3.10.2 The Tribunal reached two significant conclusions based on this finding. The first was that *"From our assessment of the evidence as a whole we find that the inclusion of REF considerations in this process was deliberately kept from (the) Trade Unions side" and later… "In the event, the Trade Unions side was, in our judgement, deliberately kept in the dark by senior management and this was clear to us from the documentation which emerged in the course of these proceedings."* The second was that the inclusion of the REF factor "*fatally undermined*" the claim that the redundancy scheme was a *voluntary* scheme.

3.10.3 In reaching the first conclusion, the Tribunal took into account the fact that Ulster University did not disclose to the unions the fact that REF had formed part of the decision-making until after the commencement of UCU's Tribunal case in July 2016.

3.10.4 My conclusion on this point was that this finding was further supported by BRG's insistence on confidentiality. I was told that its purpose was to contain staff speculation and anxiety. It did not achieve this. As the restriction did not prevent the Deans speaking to Heads of Faculties and Schools in drawing up their proposals, a level of staff awareness was thus inevitable. Nor did it prevent information leaking into the media arena, thereby heightening staff stress and anxiety. It was reasonable to conclude, therefore, that its probable purpose was to limit information to the unions but in any event I concluded that it did not justify keeping the Unions in ignorance of REF during the redundancy process.

3.10.5 I also concluded that this point was further supported by the discrepancy between the Communications Plan and the actual communications presentations. The chair of BRG gave a number of presentations to staff at various venues, outlining the impact of the budget cuts on courses and jobs losses (1200 reduction in student places and 210 staff posts), and stated that the University needed to make *"hard and critical decisions of how to sustain the future".* He claimed that these decisions would be based on objective criteria relating to *"the popularity of the courses, student feedback, career prospects and employability and the future direction and sustainability of the University. In making these decisions one of the key criteria will be the regional impact of the University on the local economy…".*So, while the Communications Plan had referred to REF as one of the metrics to be employed in the selection for redundancy, the communications presentations omitted this detail.

3.10.6 In relation to the Tribunal's second conclusion that the voluntary nature of the VSS was undermined, the Tribunal found that the voluntary nature of the scheme was undermined by (i) the inclusion of REF and (ii) the fact that staff were coerced into accepting VSS by being told they would lose their jobs anyway and receive a lower redundancy package if they did not accept the terms of the VSS.

3.10.7 There were no reports brought to BRG in respect of the attitude of UCU and their on-going demands to be kept informed and consulted. There were no recorded/minuted queries from any of the members of BRG about the response of UCU or of the need to keep them informed and to consult with them.

3.10.8 The confidentiality restriction appeared to make no exception for the purpose of consulting with the unions during this period. At a meeting on the 4 June 2015, the Director of Human Resources advised the BRG that he had a JNC meeting planned for the following week and raised his concerns about what should be discussed. At first he was advised to keep the communications at high level and when he said there would be questions asked, he was advised to "...get them (the unions) to commit to confidentiality".

3.10.9 UCU's demands were insistent and consistent during this period. They were raised at UCU/JNC and raised directly with the Vice-Chancellors. UCU stated that when they heard of developments through the media, and from affected staff, their requests for information were ignored or they were given misleading information.

3.10.10 I concluded that there was a deliberate decision by the BRG not to give the unions any more information than it was prepared to give to the media and only a short time before being released to the Press, to prevent leaks. I concluded that the BRG either was ignorant of, or misled itself, about the difference between *informing* the unions about the decisions reached by the BRG and the need to *consult* with them about those decisions. UCU, however, stated that the insistence on confidentiality was a deliberate measure designed for the purpose of keeping them in the dark and demonstrated Ulster University's reluctance to work with them.

3.10.11 A further failure of BRG's oversight role was that some members relied on the Human Resource department to "*keep them right*". The Tribunal also found this to be the case and stated *"…it was clear from the evidence of the respondent's witnesses…"* (most of whom had been members of the BRG, (my addition) *"…that issues to do with complying with consultation obligations were left entirely to Mr Magee as Head of HR".* However the Tribunal also concluded that, in the working context in Ulster University at the time, this was not sufficient to discharge their statutory duty to consult and added *"The level of unrest amongst staff was such at the relevant period and the protests of the Trade Unions were so strong that there was an obligation on the senior managers as a whole to address their minds to what was being raised by the Trade Unions".*

Some of the members of BRG acknowledged the fact that they had been unaware of the legislative provisions about redundancy consultation. I concluded that this remained the case for some of those individuals as, at the time of my interviews, they were still puzzled as to why Ulster University had lost the Tribunal case.

4.0 Accountability for Human Resources/Employee Relations - Checks and Balances

4.1.1 The second objective of this review is to:

Test where accountability lay for employee relations in the university and whether there were checks and balances to ensure the University's Senior Leadership and Council were accordingly and appropriately aware of how key matters like the consultation were being handled.

4.1.2 Accountability for employee relations/human resources lay with Council, SET and the Human Resources department. The relationship between the unions and senior management was conducted by members of the Human Resources team, through the UCU Joint Negotiating Committee and the Joint Trade Unions Consultative and Negotiating Committee both of which were chaired by the Director.

4.1.3 As stated, I did not have an opportunity to speak to the Director of Human Resources as he left Ulster University in 2016. I have, however, reviewed the minutes of committees in which he was actively involved, spoken to UCU and other Ulster University staff and read the Tribunal's findings in relation to his conduct of the redundancy process.

4.1.4 I also reviewed the minutes of JUCNC and UCU/JNC meetings, and correspondence between the Director and the Vice-Chancellors during the redundancy process up until 27 October 2015, when UCU advised Ulster University that it would not "consult" on the redundancy process until Ulster University had complied with its redundancy policy. The minutes of the meetings and the correspondence revealed the fact that industrial relations between UCU and Ulster University were in a parlous state.

4.1.5 Indeed UCU advised me that their relationship with the Director was very poor and had been for some time. UCU local representatives described his attitude towards them, as, at best, difficult. They felt that they had to watch him carefully, checking minutes to ensure they correctly reflected what had been agreed, as they believed he was less than honest with them at UCU/JNC and throughout the redundancy process.

4.1.6 My review of these minutes noted that the Director did not, at any stage, raise at UCU/JNC the need for "an agreed consultation and communication plan in place for the unions" which had been discussed at the BRG's first meeting, 13 April 2015. I noted that it was UCU who took the initiative, asking the Director for updates on the budgetary position and presenting formal papers to UCU/JNC requesting information on Ulster University's response to the cuts. As time passed and UCU became aware of course closures from the media, their requests for information were accompanied by their formally-stated concerns that they were being denied information and that there was no proper consultation with them.

4.1.7 The Director's initial responses at UCU/JNC to the requests for information were limited and guarded but as the process went on, his responses became deliberately misleading and evasive and, on occasion, UCU's requests for information were ignored completely.

UCU was also critical of Ulster University's reliance on the Director to have guided them through the redundancy process, given his history of unsuccessfully conducting redundancy processes for Ulster University. In two previous Tribunal cases, the Director had come in for personal criticism from the Tribunal judges regarding his poor handling of redundancy processes and his credibility.

UCU's view of the Director was supported by the Tribunal, who formed an adverse view of his credibility. The Tribunal found him to have been "*…generally evasive and lacking in credibility in answering questions.*" They rejected his evidence that staff had not been told at VSS meetings that, if they did not take VSS, they would be made redundant anyway. Their rejection was on the basis that his evidence was at odds with the Ulster University's own defence and the evidence of other witnesses, and the fact that the Director had not attended any of the VSS meetings. The Tribunal concluded that his evidence *"… tainted Mr Magee's reliability and credibility."* They found that the Director also *"… misled the unions when they were asking about information when he stated that the Deans had not considered certain points when they had in fact made concrete proposals to close some courses entirely, to close some courses at certain campuses and to make staff redundant following a closure of schools and faculties."*

I was further informed by UCU that, during the redundancy process, the Director was being investigated by an outside organisation following complaints made by ex-employees arising out of his evidence presented to previous Tribunals. The fact of this external investigation was confirmed by members of the Senior Management Team. The Vice-Chancellor advised me that he was initially unaware of this situation and that he was only told about it at a later stage. UCU were critical of the fact, that during this investigation, Ulster University allowed the Director to continue his work unchallenged and they suggested that a period of precautionary suspension would have been appropriate.

4.1.8 It was a major tenet of UCU's dissatisfaction of Ulster University's handling of the redundancy process in that Ulster University vested the Director with so much power and authority around the BRG process. They described Ulster University's decision to do so as culpable, even negligent.

4.2 Conclusions on Accountability for Human Resources, Employee Relations – Checks and Balances

4.2.1 From my review of UCU/JNC minutes there is no doubt that the Director failed to apprise UCU of requisite information, withheld pertinent information and misinformed them. He also failed in his responsibilities

properly to advise the members of SET and BRG of UCU's concerns about the lack of information and consultation.

4.2.2 This was also the conclusion of the Tribunal, who had the advantage of assessing the Director's evidence at Hearing. However, from my review of the UCU/JNC minutes and from the tone of his correspondence I discerned that his attitude towards UCU was, at best, patronising and dismissive.

4.2.3 My conclusions reflect poorly on the members of SET and BRG in their senior management role, which specifically vested them with oversight and challenge responsibilities, including checks and balances of the Director's work. They ought to have known that their responsibilities encompassed employee relations and specifically the need to comply with their statutory redundancy responsibilities.

4.2.4 I concluded that Senior Management Committees, including Council, ought to have expected to receive from the Director, perhaps as a fixed agenda item, regular reports on the development and implementation of the redundancy process. Their failure to demand these and the Director's failure to provide them left the appropriate governance bodies in ignorance of the fact that there was no proper consultation with UCU.

I also concluded that the failure by Ulster University to inform the Vice-Chancellor of the Director's history in relation to previous redundancy cases and of the external investigation during 2016 amounted to a severe lack of judgement on the part of those who took the decision not to tell him. The consequence of this was that the Director was allowed to continue his work unhindered. Allowing him to do so and the lack of any restrictions placed on him during this time was remarkable. In these circumstances, there was an even greater onus on SET, BRG and the Vice-Chancellors to monitor and challenge the Director and they failed so to do.

Allowing the Director to conduct the redundancy process also had an unfortunate impact on industrial relations in Ulster University. UCU reached the conclusion that senior management thus treated them with disrespect. Ulster University's support of the Director in the Tribunal process endorsed that feeling and further damaged the already precarious industrial relations.

4.2.5 My conclusions are supported by the Tribunal judgement. The Tribunal rejected Ulster University's argument that the fact that JNC and JUCNC meetings that had taken place from 2014 onwards, was any evidence of active engagement with UCU. The Tribunal found, as a fact, that key information had been kept from the UCU and that there had been a deliberate unwillingness to consult with them.

4.2.6 The Tribunal found that the level of unrest amongst staff and the protestations of UCU were so strong at the relevant time, that there had been an obligation on the senior managers as a whole to address their mind to what was being raised by the Trade Unions. The Tribunal went on

to conclude "*in the event the Trade Unions side (UCU) was, in our judgement, deliberately kept in the dark by senior management and that this was clear to us from the documentation which emerged in the course of these proceedings.*"

5.0 Consideration of Risk

5.1.1 The third objective of the review is to*:*

***'Confirm whether the risks of the BRG Process and Redundancies had been fully presented in the University Risk Register at the Audit Committee and Resources Committee**.'*

5.1.2 My enquiries and review of the Risk Register revealed that although the cuts in funding were listed as the University's top risks during 14/15 and 15/16, the actual process of BRG was not listed as a risk. The Risk Register showed as follows: -

- Risk 14/15: In light of the on-going Political instability, failure effectively to protect the level of public funding for 3rd level education – High risk

- Risk 15/16: Failure to respond/adapt to the consequences of the recent funding cuts which could impact on the student experience and the delivery of the University's core business. (reviewed and escalated from Medium/High to High)

5.1.3 As part of the risk management process, senior managers are asked to provide an assurance of their stewardship at the end of each academic year and are given the opportunity to complete exception statements which allow them to provide details of where incidents/issues have prevented them from delivering their objectives in the previous year. The Dean of Arts used this forum to highlight 'the impact on student recruitment, research activity and staff morale, as a result of funding cuts and the outcome of BRG.

5.1.4 My review of the Register and further enquiry concluded that there was no evidence or knowledge of the subsequent litigation being listed as a risk in 2016.

5.1.5 The failure to articulate the risk of inappropriate implementation of staffing reductions, and identification of possible compensation costs may point to/lead to a lack of provision for potential liabilities. A commitment to having identified and calculated the likelihood and quantum of potential failings in the process would at least have suggested a full awareness of and commitment to ensuring compliance with the requisite legal standards of redundancy. In their absence the Risk Register is missing a feature with significant potential – and in the event actual - impact on the organisation.

6.0 Missed Opportunities and Lessons Learned

6.1 The forth & fifth objectives of the review is to consider whether:

'During the timeline of the process, were there any opportunities which were ignored/missed which could have triggered the concern of Senior Leadership and Council and if so, why were these ignored/missed' and thereby identify the lessons learned for the future.

6.2 Governance

6.2.1 The most obvious missed/ignored opportunity that would have triggered the concern of Senior Leadership at Council, was the failure to adhere to the normal practices of good governance.

6.2.2 These included the disturbing lack of governance, oversight and challenge to the work of the major decision-making committees, SET and BRG, and of the Director. The absence of effective checks and balances resulted in the failure to ensure proper management of the BRG process/ redundancies and in particular, to deliver a strategy for consultation with UCU.

6.2.3 As my review has established, Council were fully aware of the potential for job losses and of UCU's demands for consultation. Their failure to check/challenge that the usual redundancy processes were in hand or to respond to the protests outside their own meetings created in UCU a belief that Council were complicit with a management strategy to exclude them from the process until decisions had been taken.

6.2.4 I concluded that this amounted to the "unwillingness to engage" with the unions, as found by the Tribunal.

The failure by Ulster University to inform the Vice-Chancellor of the Director's history in relation to previous redundancy cases and of the external investigation during 2016 amounted to a severe lack of judgement and good governance on the part of those who took the decision.

6.3 Communication

UCU advised me that, from September 2015, they repeatedly demanded that the VSS scheme be suspended pending the provision of information and consultation about the redundancy process in general and the operation of VSS in particular. The scheme was not suspended and full information about the scheme was not provided. UCU stated that they had to accompany their members to VSS interviews without any basis for proper support. UCU spoke of the distress of its members who were effectively having "a gun to their head" and of their own distress at not being able to be of help to their members.

6.3.1 UCU found itself in the position of having to flag up their concerns to Vice-Chancellors during the redundancy process. These were very experienced union representatives who were fully aware of the proper requirement for consultation and negotiation. However, as this had failed at local level, they felt driven to use all means available to them and seek help from the Union Official. The Official wrote several times to the Vice-Chancellor and, in particular, sent him a "cautionary" email on 8th January 2016, four months before the 2016 dismissals took place, expressing UCU's

concerns about the lack of communication and information from the Director of Human Resources. The email also decried Ulster University's on-going trust in the Director, given his experience at previous redundancy Tribunal cases. In one such case, the Employment Judge had found that the Director's reasons for failing to follow proper redundancy procedures to be "simply breath-taking in their arrogance and inadequacy". The email contained a link to the Tribunal Judgement in question.

6.3.3 As the Vice-Chancellor claimed that he had continued the practice within his office of redirecting correspondence in relation to Human Resources to the Director, he missed the opportunity to realise that UCU were writing directly to him to complain about the Director. This was regrettable because his failure to respond to their correspondence was perceived by UCU both as a slight and a source of great frustration and stress. UCU members were looking to their representatives for information, advice and assistance at a time when careers were on the line and UCU were not given sufficient information whereby they could provide informed support. It created a sense of helplessness in the representatives, in that they were prevented from properly representing their members' interests, consistent with the collegiate culture of the organisation and good employee relations. It created a long-term breach in the union-management partnership required for good industrial relations.

6.4 Rejection of Offer to Settle

6.4.3 Ulster University refused to accept an offer of £200,000 from UCU to settle the case for its members.

6.4.4 Ulster University's position was that they had relied on the advice of their lawyers. Whilst that is understandable, as far as it goes, there appeared to have been little reflection on the risks of losing, including the potential financial costs of losing (as in the potential pay-out if the Union's case were to be successful), the adverse effect of losing on staff morale or the potential reputational damage for Ulster University in an adverse outcome. An approach between the parties at this stage might also have provided an opportunity to seek to retrieve the industrial relations relationship.

7.0 Recommendations

7.1 The final objective of the review was

To make recommendations on proposed actions the University should initiate to ensure avoidance of a similar occurrence in the future.

7.2 I recommend that Ulster University accepts this Report and acknowledges its conclusions that highlight errors made, and implements the following recommendations, promoting a Lessons Learned culture and as a means of preventing any recurrence of the matter.

7.3 As the result of this review I recommend the following specific remedial action points: -

7.3.1 Identify an opportunity for Council and the Senior Leadership Team formally to acknowledge the report, its conclusions and recommendations.

7.3.2 A letter of apology should be issued to each person the University unlawfully dismissed. This should be signed by the Vice-Chancellor and the Chair of Council.

7.3.3 An apology should be issued to UCU from the Vice-Chancellor and Chair of Council for the refusal to engage with the Union about its concerns during the redundancy process. The apology should be issued in Insight and must acknowledge the restorative work now required to address the resulting low morale of staff.

7.3.4 Update and implement governance training for Council and Senate, concentrating on their "challenge" role. Further, specific awareness-raising is required on corporate commitments under employment legislation, especially in relation to engagement and consultation as part of the decision-making process.

7.3.5 Deans and SET (now Senior Leadership Team (SLT)) should undergo basic industrial relations training so as to understand the relationship between collective bargaining and agreeing terms and conditions of employment.

7.3.6 A procedure should be established whereby Deans and SLT are required to produce a detailed rationale when proposing changes to terms and conditions or working practices. The proposal must be subject to negotiation at the JNC and JUCNC prior to implementation.

7.3.7 A fixed agenda item of "HR Considerations" should be tabled at all SLT and Council meetings. This will comprise a summary report of issues raised by the trade unions at JNC and JUCNC.

7.3.8 Consideration should be given to conducting a regular employee relations audit to monitor staff welfare and morale as an employee relations indicator.

7.3.9 The importance of risk identification and mitigation need to be fully recognised and should be explicitly incorporated into decision-making processes. Risk management training should be delivered to all decision-making committees.

7.3.10 An agreed joint management-unions training/team development initiative on a culture change, facilitated by an external expert, should be commissioned. This is likely to involve, at least in the short-term, facilitated meetings/processes to rebuild the necessary levels of trust and mutual confidence.

APPENDIX A

METHODOLOGY

APPENDIX A

METHODOLOGY

Documents

This review required an examination and understanding of the decision-making processes around redundancies in Ulster University in 2015 – 2016 and the failure to consult with UCU. This was conducted using a combination of document analysis and interviews.

The documents were contained in six full lever arch files and five smaller files which contained the minutes referred of meetings of relevant committees, and all correspondence between UCU and management pertaining to the redundancy process in 2015/2016

I was also furnished with the full set of papers prepared for and presented at the Tribunal. These included files containing witness statements from UCU and Ulster University. The decision of the Tribunal was also examined in detail.

Interviews

I conducted interviews with union members and the staff with the same objective. I explored with them their perceptions of the Tribunal and of its Judgment. I asked each what they felt had contributed to the failure to consult. I interviewed some of the Deans who had been integral to the work of the BRG, two of the Vice-Chancellors active at the relevant period of time and the Chair of Council.

It was not possible to interview the former Director of Human Resources, as he left the University in 2016.

I interviewed the UCU Official in Northern Ireland and local UCU representatives in Ulster University, some of whom had given evidence at the Tribunal but who had also been actively pursuing information and demanding rightful consultation throughout 2015. I am grateful to the retired staff member who spoke to me about their experience, of “having been targeted” by the redundancy process and had only become aware of their situation at a public meeting.

In all of this I kept to the fore of my mind the purpose of the review, which was to learn lessons arising from the Tribunal Judgment and to ensure that, if similar circumstances ever arose in the future, the outcome achieved then would be reflective of best practice.

APPENDIX B

JUDGEMENT OF THE TRIBUNAL

THE INDUSTRIAL TRIBUNALS

CASE REF: 1717/16

CLAIMANT: **University and College Union**

RESPONDENT: **Ulster University**

DECISION

The decision of the tribunal is that there was a failure to consult with the Trade Union and the tribunal hereby grants a declaration to that effect. The tribunal hereby makes a protective award of 90 days.

Constitution of Tribunal:

Employment Judge: **Employment Judge Murray**

Members: **Ms E McFarline** **Mrs M O'Kane**

Appearances:

The claimant was represented by Mr T Brown, Barrister-at-Law instructed by Ms Gavin of Francis Hanna and Co Solicitors.

The respondent was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Ms Flannery of Arthur Cox Solicitors.

THE CLAIM

1. The claim is by a recognised Trade Union that there was a failure to consult under the collective consultation provisions set out in the Employment Rights (NI) Order 1996 (as amended) ("ERO"). The respondent's case is that the duty to consult did not arise but that if it did, there was consultation and its extent was frustrated by the non-engagement of the Trade Union.

THE ISSUES

2. The issues at hearing narrowed to the following key issues:

(1) Was the duty to consult under Article 216 of ERO triggered?

(2) On what date was the duty to consult triggered?

(3) Was any consultation that took place compliant with the legislation? In particular did it take place in good time and was it sufficient in that any relevant information was given? Was any consultation genuine with a view to reaching agreement?

(4) If the tribunal makes a declaration of failure to consult, should a protective award be made and if so, for what period?

(5) It was agreed by the parties that the claimant was a recognised Trade Union. Does the bargaining unit include professorial grades?

(6) What are the relevant dates in relation to any consultation period and for any remedy?

THE LAW

3. Both sides provided written submissions which were supplemented by oral submissions at the submissions hearing. Counsels' written submissions are attached to this decision.

4. Booklets of authorities were provided by both sides and all relevant authorities were considered by the tribunal in reaching this decision.

5. The collective consultation obligations are set out in the Employment Rights (Northern Ireland) Order 1996 as amended (ERO) at Articles 216 onwards. The key provisions relevant to these proceedings are as follows:

> ***"Duty of employer to consult representatives of employees***
>
> ***216.****—(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;

(2) The consultation shall begin in good time and in any event—

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

(b) otherwise, at least 30 days, before the first of the dismissals takes effect.

(4) The consultation shall include consultation about ways of—

(a) avoiding the dismissals,

(b) reducing the numbers of employees to be dismissed, and

(c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

(6) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—

(a) the reasons for his proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant,

(c) the total number of employees of any such description employed by the employer at the establishment in question,

(d) the proposed method of selecting the employees who may be dismissed,

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect,

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any statutory provision) to employees who may be dismissed.

(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer's undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out."

6. The remedy available is set out at Article 217 which provides in essence that the remedy available is a declaration together with payment for a protected period of up to 90-days. The guiding principle for a tribunal in assessing the protected period is set out at Article 217(4)(b) which states as follows:

"Complaint and protective award

217*(4) The protected period—*

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of Article 216; but shall not exceed 90 days . . . ."

7. The special circumstances defence was not raised by the respondent. (ERO Article 216(9)).

8. The claimant did not make the case that there was a technical breach of the provisions in relation to the way any information that was provided was delivered to the Trade Union. (ERO Article 216(7)).

9. Whilst in the issues document during the Case Management process, the claimant relied on three alternative dates for the date on which the duty to consult was triggered, at the submissions stage the primary date relied upon was 1 June 2015 in that the claimant argued that the duty was triggered on that date at the latest.

10. The legal framework set out in Mr Brown's written submissions which are attached, was agreed by Mr Mulqueen to be an accurate account of the legal framework. In view of this we do not set out in this decision a comprehensive account of all the legal principles but highlight below the principles and extracts from the authorities which are particularly relevant.

11. The issue of whether or not the termination of contracts that occurred amounted to dismissals or resignation or mutual termination, is not relevant to the question of whether or not, at the time the duty was triggered, the requisite number of redundancies was proposed. The question of whether the terminations amounted to dismissal is only relevant to whether or not individuals could include themselves in the group to benefit from any protective award which might be paid following any declaration that one is payable. This was the agreed legal position by both sides.

12. In the written submissions for the claimant there is discussion of the scope of the domestic legislation and the scope of the Directive. Mr Brown confirmed that the claimant does not allege that there was a failure to implement the Directive adequately. Mr Brown's point was that the domestic legislation could be read to

incorporate the apparently wider scope of the Directive. In oral submissions Mr Brown confirmed that this was not a key point in the case given the way the evidence unfolded at hearing. We note that the domestic legislation was amended to implement the wider scope of the Directive and some of the authorities referred to by the parties predate that widening of scope. In view of our factual findings this is not an issue in this case.

13. In the case of **Sovereign Distribution Services Ltd v Transport and General Workers' Union [1990] ICR 31(EAT)** the following dictum outlines the rationale for the collective consultation provisions. The legislative provisions referred to are replicated in ERO.

> *"It is important in looking at this part of the Act to bear in mind that it is headed*
>
> *"Part IV Procedure for handling redundancies." As everyone knows redundancies can bring trauma to the individuals concerned. Although in many cases the decision is forced upon management, nevertheless the duty cast upon employers by these sections provides the only opportunity for employees through their recognised trade unions to be able to seek to influence the decision and to put forward other ideas and other considerations, not only as to the overall decision, but as to those individuals who should be made redundant and various aspects which may be material. It is therefore, in order to give them that opportunity, that section 99 was brought into being." (page 33 at F and G) (Emphasis added).*

14. In the case of **Dewhirst Group V GMB Trade Union EAT [2003]** the following dicta outline the features of fair consultation in the context of large scale redundancies:

> *"25. The authorities makes clear that the duty to consult is a duty to hold meaningful consultations. We refer to the frequently repeated dictum of Hodgson J in R – v – Gwent CC ex parte Bryant [unreported] cited in, among other places, Middlesborough Borough Council – v – TGWU:*
>
> *"Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation."*
>
> *H H Judge Clark put the matter in this way (see paragraph 28):*

"Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

We also bear in mind the approval by Glidewell L J of a passage in Harvey in R – v – British Coal Corporation Ex parte – v – Vardy [1993] IRLR 104:

"I agree with the passage in the current edition of Harvey on Industrial Relations. In paragraph 1365 the learned editor says:

'In substance, the Act places on employers an obligation to plan any redundancy programme well in advance, and to do so in conjunction with the unions where appropriate. Although it is mainly directed at largerscale redundancies, it should be emphasised that its provisions also apply where the employer proposes to make even one single employee redundant … However, according to the interpretation so far placed upon the Act by the English courts, the obligation is not so much to consult with the unions on whether there should be redundancies, but rather to consult on how to carry out any redundancy programme which management deems necessary." (paragraph 25).

15. In the case of **Scotch Premier Meat Ltd v Burns [2000] IRLR 642(EAT)** the following dictum sets out the rationale for regarding voluntary redundancy as dismissal:

"Given we consider that it is the duty of a good employer facing a redundancy situation in the interest of the whole workforce to consider as at least one option, voluntary redundancies, and call for such, given again that those who accepted such a procedure are benefiting the remaining workforce to some extent, unless as happened here, all are eventually dismissed. It would discourage, in our opinion, that voluntary redundancy being effected or taking place if by so doing the employees lost rights they would otherwise have if they were compulsorily dismissed. We consider it is the proper approach of this tribunal and the employment tribunal to assess the matter in the way most favourable to the retention of rights that the employees have and there can be no greater right than a right to claim unfair dismissal if the redundancy procedure is inadequately handled by the employer." (paragraph 23).

16. In the case of **Optare Group Ltd v TGWU [2007] IRLR 931 EAT** the Court emphasised that the issue of whether a dismissal occurred is a question of causation as set out in the following extracts:

"The question of causation can properly be expressed as being "who really terminated the employment" or "who was responsible for instigating the process resulting in the termination of employment". Where people volunteered because invited to do so in circumstances where the employer sought volunteers to mitigate the impact of redundancies, and such facts were established, it would be wrong to go further and investigate each volunteer's individual psychological process and/or motives for volunteering. If it is clear that the employer in an existing redundancy situation has issued an invitation to employees to volunteer for redundancy, that certain of them did so and that, as a result, their employment terminated then that is enough, having regard to the guidance in Burton, Allton and Johnson Ltd v Peck, approved in Birch v University of Liverpool, to enable the tribunal properly to conclude that the cause of their termination was their volunteering to be dismissed. That is not to identify and apply a rule of law, but is a common sense application of the principle of causation to factual situations which arise repeatedly in industry." (headnote).

"within the operation of a redundancy procedure, those who volunteer for redundancy will normally be regarded as having volunteered to being dismissed and so will have been dismissed. It points out that this analysis was commented favourably upon by the EAT in Birch and was, in turn, approved and adopted by Lord Justice Ackner in the Court of Appeal." (paragraph 25).

17. The following extracts from **Harvey** are particularly relevant to this case:

On the meaning of redundancy **Harvey** states as follows:

"'Redundancy' for this purpose is very widely defined. A redundancy is a dismissal for any reason not related to the individual employee concerned, or for a number of reasons none of which is related to the individual concerned (TULR(C)A 1992 s 195(1) as substituted). There can thus be a duty to consult about dismissals arising from all sorts of management initiatives to improve organisational efficiency, whether or not the programme involves redundancy in the narrower sense of the redundancy payments scheme. The label is unimportant. The initiative may be dubbed re-organisation, restructuring, regrading, redistribution, streamlining, automation, computerisation, slimming, demanning or a dozen different things. The central question is whether the individual has simply been sacrificed to the needs of the organisation". (paragraph 2524 Division E).

18. In the case of **Susie Radin Ltd v GMB and Others [2004] EWCA Civ 180** (Court of Appeal) the following summary in the headnote outlines the factors for a tribunal in assessing compensation for failure to consult:

"Employment tribunals should have the following matters in mind when deciding in the exercise of their discretion whether to make a protective award and for what period:

(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s.188: it is not to compensate the employees for loss which they have suffered in consequence of that breach.

(2) Tribunals have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default.

(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.

(4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s.188.

(5) How the length of the protected period is assessed is a matter for the tribunal, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the tribunal considers appropriate".

19. In the case of **UK Coal Mining Ltd v National Union of Mineworkers [2008] ICR** the EAT emphasised the punitive nature of the remedy and stated that it was no answer to such a claim to say that consultation would have been utterly futile:

*"**46** The Court of Appeal has held that this is a penal provision and that "The required focus is not on compensating the employees but on the default of the employer and its seriousness. It is that seriousness which governs what is just and equitable in all the circumstances": per Peter Gibson LJ in Susie Radin Ltd v GMB [2004] ICR 893, para 26. Furthermore, as his Lordship made clear in the same case, at para 43, it is no answer to a failure to consult collectively (as it might be in an unfair dismissal case) that any such consultations would have been utterly futile.*

*Furthermore, the mutual trust which needs to exist between the employer and the Unions, if there are to be successful consultations, is put at risk if the Unions have cause to believe that they have been given false information". (*paragraph 46).

20. **Harvey** states in relation to remedy:

> *"A protective award is essentially a punitive award. Its purpose is to impose a sanction, and an effective sanction, for an employer's failure to observe his statutory duty to consult. Its effect is to entitle the employees concerned to minimum pay for a specified period called the 'protected period' (s 189(3)). Putting it crudely, either the employer consults before dismissing any employees (so that they get their normal wages during the consultation period) or else, if he dismisses prematurely, he risks being condemned to pay them a broadly equivalent amount under a protective award. He pays his money and he takes his choice, but pay his money he must. A protective award is thus a collective award. It is issued to the complainant for the benefit of all or any relevant employees in respect of whom the employer has failed to consult (Smith v Cherry Lewis Ltd [2005] IRLR 86, EAT). Its focus, however, is emphatically not on compensation for them: the focus of a protective award is on the default of the employer and its seriousness*
> *(**GMB v Susie Radin** at para 26)."* (paragraph 2739 Division E).

SOURCES OF EVIDENCE

21. The tribunal had written statements and oral evidence from the following witnesses:

For the claimant:

(1) Ms Katharine Clarke
(2) Ms Linda Moore
(3) Ms Goretti Horgan
(4) Professor John McCloskey
(5) Dr Suleyman Nalbant
(6) Dr Nuala Rooney
(7) Dr Ian Taylor

For the respondent:

(1) Professor Alistair Adair
(2) Mr Peter Hope
(3) Mr Ronnie Magee
(4) Mr Andrew Caldwell
(5) Professor Liam Maguire
(6) Professor Jan Jedrzejewski
(7) Dr David Barr
(8) Professor Paul Carmichael
(9) Professor Ian Montgomery
(10) Professor Carol Curran
(11) Ms Ann Newland (written statement only by agreement).

22. The tribunal was referred in detail to documentation amounting to approximately 900 pages.

FINDINGS OF FACT AND CONCLUSIONS

23. Set out below are the tribunal's primary findings of fact drawn from the extensive evidence which was presented. It is important to note that this decision does not record all the competing evidence on all points, but concentrates on the principal findings of fact and conclusions drawn from the extensive detailed evidence which was provided.

Amendment issues

24. There was an application to amend the response form at the outset of the hearing by Mr Mulqueen. The application to amend related to an argument by the respondent that the meaning of "establishment" meant that the four campuses in issue in the University should be treated separately rather than as one establishment and that the consequence of this was that there was no duty to consult at all in view of the numbers involved. As Mr Mulqueen decided after submissions to withdraw the application for an amendment at the outset of the hearing, the case proceeded on the agreed basis that the tribunal could look at the University as one establishment albeit that there were four campuses involved.

25. Mr Mulqueen made the point that the claimant was restricted in the case it could present to the case outlined in the interlocutory process prior to the hearing in relation to the date relied upon for the triggering of the duty to consult. In looking at this point we note that the interlocutory process in tribunal proceedings is not akin to a pleadings process in the High Court. The point of the process is to ensure that neither side is taken by surprise by a key point being raised by the opposition.

26. The evidence presented in tribunal and the cross-examination was in relation to the whole process leading up to the termination of employment of a large group of employees and there was no question of the respondent being taken by surprise or of different evidence being required due to the refinement of the claimant's case as the case unfolded. We accept Mr Brown's point that documents emerged and there were answers to cross-examination questions which refined the claimant's case further and meant that in oral submissions one date was the primary date relied upon rather than the three which were proposed during the interlocutory stage.

27. We note that the claim form did state as follows:

> *"The Respondent dismissed 140 members of staff on the 30th April 2016. This came about as a result of the Respondent having to make cutbacks following the announcement of cuts in government funding in October 2014.*

On foot of this the Respondent embarked on a course of action starting in or around January 2015 to plan a reduced budget and for corresponding reductions in staff. This clearly defined business decision that fewer staff were needed gave rise to the existence of an impending redundancy situation and therefore the obligation to consult with the recognised Trade Unions under Article 216 of the Employment Rights NI Order 1996, was triggered at that time.

The Respondent had a statutory obligation to consult the recognised Trade Unions at an early stage of this process and it clearly did not do so in the period between January 2015 and August 2015".

28. In our judgement this encompasses the case which was presented.

29. We therefore find in this case that the respondent had sufficient information on the claimant's case in advance of the hearing to enable it to gather and present the relevant evidence in rebuttal. We also find that this is not a case where the claimant needs to amend the claim in order to rely on a specific date following the evidence.

30. If we are wrong in this we grant the application made by Mr Brown at oral submissions stage for an amendment to the pleadings to enable that date to be relied upon. We note that the authorities state that an amendment can be made at any stage in proceedings including at the conclusion of the case. We invited Mr Mulqueen to make specific submissions on the application to amend and in particular on the balance of hardship test which must be applied to any amendment application which is made at any stage of proceedings. Mr Mulqueen declined to make any specific submissions on this point.

Background

31. This case concerns the circumstances which led to a reduction in teaching and other staff in the Ulster University whereby 143 staff left in April 2016.

32. The claimant is a recognised Trade Union which at the relevant time represented 600 or more members in the respondent University.

33. A principal source of funding for the respondent was the budget given by DEL each year which was communicated in funding letters.

34. The respondent's primary submission was that the duty to consult did not arise at all essentially because no dismissals were proposed because a voluntary scheme was envisaged. In this regard the respondent relied on its contention that no dismissals actually took place. If the tribunal found against the respondent on that point, it was common case between the parties that there was a proposal at some point during the relevant period to make redundant 20 or more staff within a period of 90 days and, as a consequence, the duty to consult was triggered at some point. In contention between the parties was the date the

duty to consult was triggered, whether any consultation that took place was timely and sufficient, and whether any dismissals actually took place.

35. A key to main abbreviations and acronyms is as follows:

BRG - Budget Review Group. This was a Management Sub-Group set up by the Senior Management Team in April 2015 to carry out planning for the budget cuts which were recognised to be imminent following three letters from DEL in 2015 which related to funding cuts.

JNC - Joint Negotiating Committee

JUCNC - Joint Trade Union Consultative and Negotiating Committee

REF - Research Excellence Framework. This was a biannual peer review scheme which graded research and was a key indicator of a University's ranking and was therefore very influential in relation to funding and numbers of students.

VSS - Voluntary Severance Scheme. This was the title given to the scheme which was devised by Management and which Trade Union side contended was a redundancy scheme.

36. Senate and Council are the two governing bodies in the University.

37. Professor Adair, who was Acting Pro-Vice-Chancellor at the relevant time, gave evidence of the planning process which takes place annually in the University and stated that the respondent planned annually when they knew the level of funding and when, amongst other things, courses which were underperforming were identified.

38. We find that the planning in 2015 (being the year in issue in this case) was, however, different in that the funding cut was of a bigger magnitude than previously and came on the back of several years of funding cuts some of which had been absorbed without staff cuts. This did not therefore involve a case of re-organisation to deal with falling student numbers as had happened in previous years. The numbers and funding issues were such that substantial numbers of staff would have to go and this was well recognised from early on. The "scenario planning" carried out by senior managers in November 2014 outlined the likely effect of a loss of 50, 100 or 150 students.

39. In April 2015 (after the third letter that year from DEL relating to funding pressures) Professor Adair and the senior management team established a sub-committee named the Budget Review Group (BRG) to develop proposals to deal with the loss of student and staff numbers which would result from the anticipated further reduction in budget from DEL.

40. The terms of reference of BRG were outlined in a report to Senate and it was clear from that that one key driver in the development of proposals was the REF

process and the need: *"to be able to invest in areas of strength in delivery of our teaching and research objectives while divesting from areas of weakness".* The final funding letter from DEL was therefore not crucial to that exercise which clearly envisaged a loss of staff.

41. The complexity of the decision making is shown by the "metrics" which had to be considered. The "metrics" are the measures by which the "success" of the University was measured and had an important effect on funding. These metrics included: the REF scores; the National Student Survey; employability rates; UCAS tariff rates; and student retention rates. Other important considerations were, firstly, the need to take account of 4 campuses and to maintain balance in relation to courses and numbers across them, and, secondly, the issue of funding conditions connected to external funding received from organisations other than DEL.

42. A paper was produced by a senior manager following the BRG meeting on 21 April 2015 and this outlines the key strategic objective from an early stage in relation to boosting the University's REF scores:

> *"… we need to return AT LEAST 100 extra academic staff in REF2020 functioning at the 3* and 4* level. One way to do this is to support those staff who almost made it into REF2014 but either lacked the quality or volume of outputs. Another way is to invest in new REFable staff through new posts or through replacing leavers with REF returnable staff. I would recommend a mixture of both approaches".*

43. Later in the same paper the author states as follows:

> *"To do so, we would need to double the amount of research activity and maintain the quality levels as within our top 10 performing Research Institutes. We do not wish to lose those staff who are producing world leading and internationally excellent research. Furthermore, we do not wish to lose those staff who are capturing substantial research grants from prestigious funding bodies that pay overheads or those staff who are having a research impact as defined by HEFCE.*
>
> *However, we have staff in Research institutes that are underperforming either in terms of grant capture or REF profile. Unless, these staff can prove that they can do so or have the potential to do so, they must be removed from the research institute and replaced by higher performing staff. In addition, there are some staff in Schools who have a poor record of teaching quality and research quality. They must be targeted for redundancy and replaced with REFable staff who will also be high quality teachers".*

44. It was therefore clear from the evidence that, when it was evident that there would definitely be job losses, senior managers took the decision that this could be used as an opportunity to strengthen the respondent's REF research profile by concentrating on certain areas of research to target perceived weaker staff and areas of research and to recruit staff who could contribute to the research profile and thus affect the University's ranking in a positive way. This was the

REF process whereby research was submitted to that process periodically and led to a REF score for the University. The claimant did not know that REF considerations were part of the decision-making until after these proceedings were launched by the claimant. From our assessment of the evidence as a whole we find that the inclusion of REF considerations in this process was deliberately kept from Trade Union side.

45. On 1 June 2015 BRG decided on what they termed the "big bang". This meant that the job losses which had to take place because of the funding cuts would take place in one go. We find that it was therefore clear on 1 June 2015 that large scale redundancies would take place at one time.

46. On 31 August 2015 a joint meeting of Senate and Council (the governing bodies of the University) took place and they gave approval for the detailed BRG proposals which had been developed over the previous months relating to the closure of courses and schools.

47. Clearly very difficult and complex decisions were taken by the Deans in relation to closure of some faculties entirely (such as Modern Languages), the closure of some courses, and the reduction in the number of undergraduate students. The cuts of undergraduate numbers were such that it was inevitable that there would be a consequent loss of numerous academic jobs.

48. We do not accept any suggestion by the respondent's witnesses that the scenario planning by BRG was part of the normal planning which was done annually. The DEL funding letters were dated 7 February, 30 March, 15 April and 30 July 2015. The funding cut was of such a magnitude that everyone knew that this would lead to large scale job cuts. At the latest, by 1 June 2015 the issues for discussion were in relation to <u>which</u> members of staff would go rather than whether a large number of staff would go.

49. It was clear from the documents that the position from DEL funding was that there would be large scale redundancies and everyone knew that the situation could only get worse. We do not therefore accept the respondent's case that it was a requirement for the final funding letter to be received from DEL in July 2015 before matters could be put to the Trade Union. That funding letter contains a caveat whereby it could change even in-year so that further cuts might result. That is what happened in 2015 in that in-year cuts were imposed. There was no suggestion at all in the evidence to us that there was any possibility of the situation improving.

50. We therefore reject the respondent's case that any discussions about redundancies which led to the "voluntary" VSS scheme meant that there were no proposals to make redundancies. In essence the respondent argued that because there were no dismissals in prospect that there was not a proposal triggering the duty to consult. We reject that argument and find that redundancies were proposed which triggered the duty to consult. As set out below we also find that the terminations that ultimately resulted were indeed dismissals and that that issue is relevant solely to remedy.

Date duty to consult was triggered

51. The authorities do not stipulate a specific time when a proposal crystallises and triggers the duty to consult. A 'proposal' for these purposes needs to be more than a possibility and less than a probability, or a decision. In this case, the issue is whether, and when, there were concrete enough proposals to make the requisite number of redundancies which should have been put to the Trade Union for any ensuing consultation process to have any meaning. We have no hesitation in deciding that there was at some point a proposal to make 20 or more staff redundant within the requisite period and that the duty to consult was thus triggered. The next issue is for us to identify the date upon which it was triggered.

52. It was agreed by both counsel that our initial focus had to be in on the date of any proposal and whether at that date 20 or more redundancies were in prospect and that those redundancies would be made within a 90-day period.

53. The numbers in issue and the period of 90 days were not in contention between the parties as the respondent agreed that (if its primary submission that the duty did not arise at all was rejected) a proposal existed at some point in relation to the requisite number of redundancies, albeit that the respondent's case was that the proposal crystallised at a later date than 1 June 2015.

54. At the outset of the case the dates relied upon by the claimant's side as to when the duty to consult was triggered were January 2015, early April 2015 or 1 June 2015. The claimant ultimately relied in submissions on 1 June 2015 as the latest date that the duty to consult was triggered. The respondent relied on 14 December 2015 being the date when the HR1 form was sent to DETI to put them on notice that multiple redundancies were in prospect. In a meeting with Trade Union side on 31 August 2015 Mr Magee stated that his discussion in the meeting of 31 August 2015 was the beginning of consultation and that was the date inserted by the respondent in the HR1 form. The HR1 form is a form which the respondent was obliged to send to DETI to alert them to proposed large-scale redundancies.

55. The HR1 form was sent to DETI by Mr Caldwell on behalf of the respondent in December 2015 and when questioned on this he could not indicate why it was sent at that point. It was entirely unclear to us therefore as to how that form related to whether or not a proposal had crystallised unless it related to a proposal date on 31 August 2015 which was the date relied upon by Mr Magee at the time and was the date inserted in that form. That date was when the BRG proposals were voted upon by Senate and Council. We note that the document outlining the proposals was not actually given to the Trade Unions until 11 September and no reason was given to us for this delay.

56. Scenario planning had continued under BRG and had culminated in proposals by the Deans in a paper produced after BRG meeting in April 2015

57. he respondent's answer to any delay in the scenario planning amounting to a "proposal" was three-fold:

(1) That they had to wait for the DEL letter. As set out below, we reject that point because the decision-making process did not depend on the final funding letter from DEL particularly as REF considerations were a key driver in the decisions being made about who to target for redundancy.

(2) That they were refining the closures and reorganisation. As set out below we find that that is precisely what the Trade Unions should have been involved in at a formative stage.

(3) That Senate and Council had to approve the plans and this occurred on 31 August 2015. As outlined below we reject that point.

58. We prefer the claimant's submissions and find that the duty to consult was triggered at the latest on 1 June 2015 for the principal reasons set out below.

59. The point made by the respondent's witnesses was that the respondent had to wait for the final funding letter from DEL before they could be sure that their plans would become a set of proposals. We reject that point. It was clear from the documentation and evidence that funding letters gave details of the funding for the forthcoming year. They were however subject to the caveat that funding could change and this did in fact happen when funding was cut during the funding year in 2015. The fact that funding might change therefore was not definitive in relation to whether or not the scenario planning became a proposal.

60. Virtually nothing of substance changed in the paper which was put to Senate from the date it was produced many months before by the Deans aside from the DHSSPS-funded Speech and Language Therapy course.

61. The authorities set out in **Harvey** are clear that the decision-making process which was alluded to in the evidence in this case, is not a bar to the duty to consult being triggered. It is not the case that the final decision-making body must ratify proposals before the duty to consult is triggered. The legal position is that HR managers (in this case the Deans and senior managers) have delegated authority to formulate proposals and those proposals can crystallise triggering the duty to consult before they are signed off by the decision-making body. We find that there was therefore no requirement in this case to wait for the Senate and Council decision on 31 August 2015 to enable the proposals to amount to proposals in law in relation to the duty to consult.

62. It is our finding that the duty to consult crystallised, at the latest, on 1 June 2015 given the history of funding cuts and cuts to student numbers. By that date it was clear, not only that substantial job cuts would be necessary and that this would involve a large number of redundancies at one time, but the faculties, schools and courses to be targeted had also been finalised.

63. Mr Brown put forward a point that the closure of schools amounted to the closure of a workplace and that the duty was triggered once that decision was made in line with the **NUM** case. We find that it is not central to our decision-making to decide on this point given our findings and conclusions on the relevant dates. If it is necessary for us to determine this point we find that the closure of a school was analogous to work of a particular kind no longer being required. This is an element of the definition of redundancy which is referred to elsewhere in ERO. It is our view that this is a better conceptual fit rather than the concept of closure of a workplace as, in this case, all of the campuses remained open albeit in a slimmed-down form.

Engagement with TU side

64. The decision to make redundancies is a management decision. The method by which the redundancies would be achieved is the focus of any consultation process. The rationale behind a consultation process is that when there are proposals to make redundancies then the Unions must be involved in meaningful consultation with a view to reaching agreement. If agreement is unlikely or is ultimately not reached, that is not to the point.

65. There were some references in the evidence to a reluctance of the Trade Union to be involved in redundancy exercises in the past. There was also reference to the Trade Union's refusal to go to a meeting in September shortly after they received the written proposals on 11 September 2015. This appears to be an argument that it would have made no difference if they had consulted. This is irrelevant to our deliberations on liability. There is a statutory obligation to consult and any prior non-participation by the Trade Union is not an answer to any failure to comply with that statutory obligation.

66. The respondent's case in essence was that if the duty was triggered the respondent then tried to engage with the Trade Union. The respondent's case was that it was the Trade Union which frustrated the process by not attending a meeting arranged for 16 September 2015 and it was at that meeting that detailed consultation would have occurred. We reject that argument. By the time the Trade Union refused to engage with the respondent they were justified in our judgement to do so given the following:

(1) They were presented with a fait accompli ie finalised detailed decisions, which in reality could not be changed, rather than proposals which could be consulted upon. The proposals document which had been formulated following input from the Deans and senior management team and BRG was sent to the Unions on 11 September 2015 but was in final form at the end of August 2015 and was largely unchanged from its form in January 2015.

(2) VSS had already been formulated and was opened to staff from 1 September 2015. This was a redundancy programme into which the Unions had no input. The only change of substance was that the Speech and Language Therapy course was not closed due to a veto by DHSSPS

which, as the funding body for that course, had to be consulted in or around July 2015.

(3) There was no prospect of changing the decisions that had already been made and ratified by the Senate and Council following a lengthy period of refinement by the Faculties, Deans and senior management.

(4) The protests of the claimant Trade Union and its requests for information and consultation had been rebuffed to the extent that they had been actively misled about the extent of the planning and the decisions that had been made without reference to them.

67. On 2 September 2015 the claimant Trade Union requested that VSS be postponed pending receipt of information:

> *"… we would request the following: a full business case for the proposals overall, with full information regarding the effects the proposals would have on numbers of staff and students and the balance of curriculum on the four campuses of the university; a copy of the Equality Screening; your plans to consult with the trade unions on the voluntary severance package, or your confirmation that this is being imposed rather than collectively agreed.*
>
> *We would further request that the proposed timeframe be amended in order to fulfil management's responsibility to engage in meaningful consultation. It is impossible to carry out consultation about the proposals as a whole in good faith parallel with meetings with individuals to discuss their potential exit. We would therefore request that the proposed one to one meetings do not commence until after the 90 day consultation period has elapsed. It is in the best interests of our members and of future industrial relations at Ulster*
> *for us all to work through this situation according to law and best practice, and we very much hope to be able to report to our members and to the media that we are working closely and meaningfully with the management on avoidance, reduction and mitigation of the redundancies".*

68. On 4 September 2015 Mr Magee's email in response to the Trade Union states as follows making reference to his meeting with them on 31 August 2015:

> *"In terms of the point re Consultation, I wish to clarify the question asked at Monday's meeting by Linda, if memory serves me right, was … "is this the beginning of formal consultation with the trade unions?" And I responded yes it was. Consultation with trade unions is not time bound. What is important in respect of consultation with trade unions and staff in redundancy situations is that when an employer selects individuals for redundancy and specifically the date by which the redundancy will take effect then it is important to comply with the statutory provisions and notice period and consultation. It is important to remember even at this*

early juncture that the University has not selected any person for redundancy at this point and no at risk letters have been issued or served to anyone".

69. We do not in these circumstances criticise the Trade Union for refusing to engage further with the employer. Their position was that they refused to lend legitimacy to a sham process. Using the terminology in the legislation and authorities we find that it cannot be said that the Trade Union was presented with plans which were at a formative stage.

Length of consultation period

70. The 90-day period for consultation is a minimum period set out in the legislation. The authorities are clear that this can be increased depending on the circumstances and the complexity of the redundancy exercise.

71. In this case we would have expected a substantial period of consultation in excess of 90 days prior to the proposed date of terminations because of the complexity of this redundancy process which related primarily to the following matters:

(1) The fact that 4 campuses were involved, the fact that some courses were spread across several campuses, and the requirement to have equitable campus distribution;

(2) The "metrics" in issue (ie the various and diverse indicators used to rank Universities) in relation to the University's ranking;

(3) REF considerations in particular;

(4) Funding considerations (aside from the DEL funding), for example the DHSSPS funding and the Peace Funding from the USA;

(5) The limited scope for redeployment as there was a recognition by everyone as at 31 August 2015 that redeployment opportunities were very limited indeed.

72. It is our finding that the Trade Union should have been involved in this process at an early stage shortly after 1 June 2015 for consultation to have any meaning.

Timeliness and sufficiency of information

73. The issue of timing and whether consultation was genuine with a view to reaching agreement are to a large extent intertwined in this case. The Trade Union was presented with a fait accompli with insufficient time and insufficient information for them to formulate counter proposals. The fact that REF was a key consideration in deciding who to target was also in our judgement deliberately withheld from Trade Union side.

74. Proper consultation involves consulting on ways of avoiding dismissal, on reducing the numbers to be dismissed and on mitigating the consequences of dismissal with a view to reaching agreement. The Trade Union has to be provided with enough information in order for that to be meaningful.

75. In this case the Union's request for information on 30 April 2015 stated:

> *"Over the past week we have been in contact with members in several different schools who tell us that they have been informed by managers at various levels that courses in their schools are ear-marked for closure, whole schools may close and job losses in certain areas are 'imminent'. These members are obviously extremely anxious about their futures, professionally and personally.*
>
> *UCU is concerned that there appears to be a failure to consult with the recognised trade unions representing the affected staff. You will be aware that under Part XIII of the Employment Rights Order 1996 you are required for the purposes of redundancy consultation to advise of the reasons for proposals to effect job losses, the numbers and descriptions of employees whom you propose to dismiss, and to enter into meaningful consultation about avoiding dismissals, reducing the number and mitigating the consequence of dismissal.*
>
> *In circumstances where our members are being told courses are to close UCU cannot see how this is not a redundancy situation.*
>
> *Please update us urgently on the latest situation. At best we would consider it a breach of trust should we once again learn of developments through the media, which as you are aware has happened on two occasions in the past year. At worst, we are concerned there might be a breach of statutory consultation obligations. You will understand that we need to be in a position to reassure our members. Given the urgency of the matter, we would appreciate your response in writing at the earliest opportunity".*

76. This was met the next day with a response from Mr Magee stating that:

> *"I can confirm to you that the Senior Management Team have not yet received any proposals from Faculties re course closures or redundancies, potential or otherwise. What is happening is that faculties are beginning to examine the potential and that is why conversations are beginning to happen.*
> *However obviously as per our existing protocols with the recognised trade unions, when proposals emerge then I will sit down with you to discuss those proposals.*
>
> *I trust this is useful to you".*

77. By that stage the Deans and senior managers had been analysing the figures and statistics in order to formulate detailed proposals driven by REF considerations. We therefore find that the Trade Union, far from being consulted was actively misled, when they sought information after hearing rumours that there were to be job cuts. Mr Magee's email to them stated that there were no plans when in fact firm decisions had already been made to close courses and schools and these decisions for the most part were ultimately implemented.

78. In the respondent's own policy on redundancy entitled *University of Ulster Redundancy Policy and Procedures* it states as follows in relation to collective consultation:

> *"When considering restructuring and/or reductions in staffing levels in a work area, which could lead to redundancies, the University will consult and enter into discussion with representatives of the Recognised Trade Union(s). The issues which make change necessary and the timescale for consultation will be clearly outlined at that stage to the relevant Trade Union. The timescale will allow Recognised Trade Union(s) time to consider proposals, seek views and make representations. This timescale will depend on the particular constraints of each case and these constraints will be clearly highlighted in the consultation". (emphasis added).*

79. The University's own redundancy policy therefore states that consultation is required when redundancies are under consideration. This underlines the level of obligation placed by the respondent on its senior managers in relation to assessing when it was proper for them to start consultation. This point is also relevant to remedy.

80. We therefore find that the Trade Union could have been given information at a much earlier stage and certainly not much later than 1 June 2015 when the duty to consult was triggered. The fact that the respondent did not do so meant that they failed to consult in good time.

81. The thrust of the evidence presented by the respondent was that the trade Union side was kept informed generally and that consultation and engagement was ongoing particularly after 31 August 2015 following ratification by the Senate and Council of the proposal document produced by the Deans.

82. However the following email sent from Mr Magee on 16 September 2015 gave inadequate information and did not reveal that REF considerations were the key driver in relation to who was chosen to be targeted for VSS:

> *"You highlight two aspects of the proposals in which you are seeking additional detail i.e. REF results and student/staff ratios. The REF results are in the public domain and requests for staff student ratios can be provided of course, however a review of the rationale provided at both University and*

Faculty levels reveals the impact of the reduction in MaSN together with financial cuts and the future strategic direction of the faculties are the dominant factors in these decisions. Today's requested meeting of the JUCNC is to facilitate you as union representatives to explore this further with each Dean as part of the consultation process".

83. In the same letter Mr Magee rejects the request that VSS be postponed.

> *"Your demand that the 'VSS is postponed with immediate effect until the employer formally notifies the recognised trade unions is commencing its statutory obligations to consult for 90 days and exhausts that process' again shows a clear misunderstanding of the legislation to which you refer. Let me be clear that the University is in a voluntary process at the moment. There is no question of postponing this process and as you are well aware, the consultation process has already commenced. The 90 days referred to in the legislation relates to the period of consultation prior to notice to terminate employment is issued. The University has not issued any such notice to date, however, although we are currently in the consultation process with the trade unions, this does not prevent the University from fulfilling its obligations to also consult with individual staff in areas affected by the proposals which includes making them aware of the options available to them, including voluntary redundancy".*

84. We find the respondent's failures to amount to egregious failures especially in circumstances where one key consideration in the decision-making process (before the Trade Union were involved in any way) was that staff should be targeted according to REF considerations. The purpose of this was to get rid of perceived weaker staff and to boost the REF profile in readiness for the REF 2020 score. The Trade Union did not know about this key point until after these proceedings were issued in the tribunal. In submissions the respondent's position was that this information was not required information and they therefore did not have to share it with the respondent. We reject that argument.

85. We find that the REF element of the decision-making was relevant information under Article 216(6)(a) and (d) as this related to the interlinked reasons for the proposals to make redundancies and the proposed method of selecting the employees who might be dismissed. This information also related to Article 216(6)(b) as it concerned the numbers and descriptions of employees whom it was proposed to make redundant.

86. We therefore find that failure to provide that information was, of itself, a serious failure to comply with the obligations to consult as set out in ERO once the duty was triggered as this was information which was central to the decision-making and to the formulation and implementation of the VSS Scheme.

Dismissal

87. A key issue is whether or not those who availed of VSS were dismissed or whether they left by way of consensual termination. The authorities are clear

that the presumption is that, in a voluntary redundancy situation, those who take voluntary redundancy are dismissed. It was agreed that the dismissal issue is relevant solely to the issue of identifying the group of individuals who can expect a remedy ie only those who were actually dismissed on a specific date.

88. We have no hesitation in finding that the VSS scheme was a redundancy scheme and that those who took it were dismissed. We so find for the following principal reasons:

(1) The VSS scheme emerged in the context of proposed redundancies. Everyone in management recognised that substantial numbers of staff would have to go because of the funding gap and the purpose of VSS was to achieve that quickly by targeting staff in order to further the respondent's strategy as regards strengthening their REF profile.

(2) If the VSS did not achieve enough numbers then compulsory redundancies would inevitably result.

(3) The respondent's case, that this was a voluntary severance scheme, was fatally undermined by the fact that, rather than opening VSS to all staff, particular staff were targeted and invited to make applications for VSS.

(4) This targeting was underlined by the fact that in one-to-one consultations those staff were told that if they did not take VSS they would lose their jobs anyway or schools would close and they would then receive a statutory redundancy payment which was much lower than the payment applicable under the VSS. We find that this clearly introduced pressurisation or coercion to the process and we therefore find that the process could not be compared to the early retirement scenario of consensual termination referred to in **Birch**.

(5) Staff had to consider whether to go for VSS in a vacuum as no information had been forthcoming to their Trade Union representatives prior to the opening of the VSS scheme on 1 September 2015.

(6) The respondent's senior managers themselves regarded it as a redundancy scheme as the terminology in a number of documents reflects that belief and understanding on their part.

(7) Once they became aware of VSS (on the day it was offered to the staff concerned) the relevant Trade Unions, UCU and Unite, made pleas to open the VSS to all staff and these were immediately rejected.

89. The claimant in correspondence to the respondent termed the targeting as "putting a gun to the head" of the targeted staff. We agree with that assessment. In no way was it consensual for individuals to be targeted in this way and then to be told in one-to-one meetings that if they did not take the offer that they would go anyway but with a much reduced payment.

90. The fact that it transpired that statutory redundancy was not paid to the three staff who were made redundant compulsorily is not relevant to our deliberations on dismissal. Similarly the fact that the terms of VSS were generous is irrelevant to the issue of whether the staff who took VSS were in fact dismissed.

91. The **Birch** case was relied upon by the respondent on this point of whether the terminations were dismissals. We note that the **Birch** case concerned a retirement scheme and we find that a key point of distinction is that there were several references in that case to there being no question of pressurisation or duress when staff were assessing whether to go for the retirement scheme. In the current case there was clearly duress placed on the staff who were targeted. This is a case where volunteers for redundancy were not only "volunteering for the firing squad" (as termed in **Harvey)** they were being told "volunteer or else". This was coercive.

92. There was no need for such a short timescale between VSS opening and the irrevocable acceptance of it by individuals. The intention was to actually effect the redundancies as at 30 April 2016 and we conclude that the aim of imposing a deadline of 31 January 2016 was probably to put individuals under pressure to accept VSS.

93. As a result we find that the 143 staff who took VSS and left in April 2016 were dismissed.

Bargaining Unit

94. We find that that the 143 staff who took VSS and left in April 2016 constitute the bargaining unit and include the Professors. Our principal reason for so finding is that in the respondent's own replies they outline the Professors as constituting members of the relevant bargaining unit. It was Mr Magee who suggested that Professors were not included. This was at odds with the replies, was raised for the first time in his evidence and we reject it given our adverse view of his credibility generally.

Credibility and motive

95. The respondent made the point that there were issues with the credibility and motivations of several of the claimant's witnesses. The respondent further made the point that the fact that more people were not called to give evidence to us on the circumstances and reasons for them taking the VSS was something from which we should draw an adverse inference of some sort.

96. We reject the respondent's arguments on these points. We find that the credibility points made by respondent were not central to our assessment of the claimant's witnesses given the nature of this case. In other words, the duty to consult, the date it was triggered, and the timeliness and sufficiency of consultation did not depend on the credibility or otherwise of those witnesses. The issues of whether dismissal occurred was determined by us on the

documentary evidence and that of the respondent's own witnesses and, in the event, the credibility of the claimant's witnesses was not key to that assessment.

97. Credibility however was relevant in relation to the evidence of Mr Magee who averred that in the one-to-one consultation meetings staff were not told that if they rejected VSS they would lose their jobs anyway and would only receive statutory redundancy. We reject Mr Magee's account as it was at odds with the documents and with the evidence of the respondent's other witnesses who actually conducted the one-to-one meetings. Mr Magee was not in attendance at any of them. This tainted Mr Magee's reliability and credibility. We also found Mr Magee to be generally evasive and lacking in credibility in answering questions. His credibility is relevant to any points in mitigation as regards remedy.

98. We find that Mr Magee also misled the Unions when they were asking about information when he stated that the Deans had not considered certain points when they had in fact made concrete proposals to close some courses entirely, to close some courses at certain campuses and to make staff redundant following a closure of schools and faculties

99. We accept the evidence of Professor McCloskey and find that the points which Professor McCloskey changed or clarified in his evidence to us were not central to his evidence on the issues before us. We find that Professor McCloskey's oral evidence, in particular, showed the depth of feeling involved where staff were told that decisions had been taken to close areas of research, to close schools, or that jobs would go when no consultation about these decisions had taken place. Professor McCloskey gave undisputed evidence as to why his area of research was of high calibre, productive and profitable. He gave clear and convincing evidence, which we accept, that he was reluctant to take VSS but felt that he had no choice.

100. The way Professor McCloskey and his colleague Dr Nalbant were treated illustrates the deeply unsatisfactory consequence of the lack of consultation in this case. Professor Curran, Dean of the School of Environmental Sciences, gave a presentation to her school and said that the School of Geography would be closed because of adverse REF scores which meant, essentially that the School's REF score for research was deficient. Closure of the whole school meant that, as a consequence, the Geophysics Research Group (which comprised only Professor McCloskey and Dr Nalbant) was closed.

101. This was announced at an open meeting and was the first indication that Professor McCloskey and Dr Nalbant had that they would likely lose their jobs because their school was being closed. As it was announced in the context of closure of schools and courses because of concerns about research, they regarded it as an unjustified slight on their area of research when in fact their area was regarded as very high calibre, it attracted funding, and was of international renown with a REF rating of "outstanding". In these circumstances we can understand why Professor McCloskey reacted so strongly to the way this was communicated to him. Professor McCloskey secured substantial finding for his research which he now conducts for the University of Edinburgh.

102. In the statement from Ms Horgan (a UCU Union representative at the relevant time) she outlines, in a nutshell, the effect of lack of consultation on the process:

> *"By ostracising the Union they excluded staff from providing their expertise on how redundancies could have been avoided as we are experts in our own fields. By excluding the Union they were short sighted as the knowledge of the lecturing staff could have provided solutions and alternatives, however it was never up for consultation".*

103. We note that the proposal to close the Speech and Language Therapy course was one of the few proposals to be changed in the proposals put forward by managers and it occurred due to what was effectively a veto from the relevant Department. In that instance the Department had to be consulted because of a specific funding issue. This occurred well before the proposals were put to Senate in August 2015 and this showed us that there was scope for re-organisation or listening to a consultee when the decision-making process was revealed to it. From this we conclude that consultation with the claimant Trade Union could have taken place if the will to consult had been there.

104. We find from an assessment of all the evidence over the lengthy period to which we were referred that there was very little will on the respondent's part to engage with the Trade Unions and, indeed the Trade Union was misled on key points. We were repeatedly given evidence by the respondent that the Trade Union had previously failed to engage meaningfully in previous redundancy exercises. Essentially the picture painted by the respondent' managers was that there would have been no point in engaging because the Trade Union had made it clear previously that they would not be engaged in choosing which of their members to be made redundant. We reject this point by the respondent as the consultation which was lacking in this case would not necessarily have involved the Trade Union in targeting individuals.

105. We completely reject as irrelevant any argument by the respondent that consultation would have made no difference because of a previous alleged attitude of non-engagement by the claimant. This point is irrelevant to whether or not the duty was triggered, whether or not there was consultation in good time, and whether or not relevant and sufficient information was provided when proposals were at a formative stage with a view to agreement. This may however be relevant to remedy (see below).

106. We hereby make a declaration that the respondent failed in its statutory obligations, there was a failure to consult in good time or at all given the withholding of key information, and this was in breach of the relevant provisions of ERO.

107. We find that the relevant bargaining unit was all 143 staff who were dismissed in April 2016.

Length of consultation

108. The point at which the proposal crystallised and the duty to consult was triggered in this case was 1 June 2015 at the latest and at that point the relevant date for calculation purposes is the date when the terminations are proposed to take effect. The date proposed at that point for the redundancies to take effect was 31 December 2015. The relevance of that date is that one works backwards for the 90 day period to establish when the consultation should have started at the latest. Working 90 days back from 31 December 2015 brings us to 30 September 2015. This is latest date by which the consultation should have started.

109. The respondent therefore could, and should, have started to engage meaningfully with the Trade Union from that point and that consultation should have started no later than 30 September 2015. This was a particularly complex situation (as set out at paragraph 71 above) so in our judgement consultation could and should have started earlier i.e. soon after 1 June 2015.

110. VSS opened on 1 September 2015, specific individuals were 'invited' to apply, and applications had to be in by 30 October 2015. Individuals whose applications were approved had to confirm acceptance by 31 January 2016 with termination of their contracts envisaged for 30 April 2016. The claimant relied upon 31 January 2016 as equivalent to notice being given of the date of termination as this was when there was an irrevocable decision to accept VSS. In line with the reasoning of the ECJ in **Junk**, the point was that this was effectively the start of each individual's notice period. The significance of that date in this case is that that is the date relied upon by the claimant by which the consultation had to be completed and this point relates to whether consultation was adequate.

111. We accept the point made by Mr Brown that the 31 January 2016 date is tantamount to the date notice began. As VSS was irrevocable by that stage, consultation beyond that point would have been meaningless. We find that consultation therefore had to be completed by that date.

112. The authorities are clear that the consultation has to be completed by the date that notice is given. The date of the actual termination in this case was 30 April 2016 and that date is therefore not relevant for the purposes of the determining the date for completion of consultation. The rationale behind this is that, in reality, consultation with a view to reaching agreement on saving jobs or amending terms for redundancy can have little meaning if the notices of termination have been sent out and staff are already working their notice.

113. The EDT (effective date of termination) referred to in the settlement agreements which were signed by those who took VSS is not relevant to our deliberations on any dates for the purposes of calculating the consultation period.

Remedy

114. On remedy both sides agreed that it is the respondent which bears the burden of proving mitigation. It was therefore for the respondent to provide evidence or argument to support a reduction from the 90 days set out in the legislation.

115. The claimant's side urged us to award the full 90 days protective award because no points were put in mitigation by the respondent. The respondent's position on this was that there should be no award at all as the attempts to consult were frustrated by the claimant's side and that respondent should also be given credit for engagement with Trade Union from 2014.

116. Given our findings that consultation did not start in good time and when it did purportedly start that a fait accompli was presented to the Union, we find that this is a case of failure to consult at all. Two key points for us in assessing this are, firstly, that the Trade Union had been actively misled by Mr Magee in relation to the advanced nature of the decision-making process and, secondly, that the Trade Union was never told that REF considerations were central to the decision-making and targeting as this was not referred to until after these proceedings commenced.

117. We note that the authorities make clear that the assessment of remedy is not related to any loss suffered by any individual nor is it related to the motivations that individuals might have for taking redundancy. The thrust of the authorities and the legislation is that this is a sanction to penalise a respondent for failure to consult adequately, in time, or at all. We were told the amount of money received by several of the claimants' witnesses under the VSS Scheme. In common with any redundancy scheme, the amount of money provided varied according to the level of each person's salary. We find it completely irrelevant to our deliberations to take account of how large or small any payment for redundancy was.

118. The authorities are clear on remedy that a benign motivation or genuine ignorance of obligations is not necessarily a point in mitigation justifying a reduction of the maximum period for compensation given the punitive nature of this remedy.

119. In mitigation the respondent appeared to rely on the Trade Union's failure to engage. As we have rejected that and we accept the Trade Union's reasons for that, this is a not a point in mitigation to reduce the 90-day period. We also find that the Trade Union did not frustrate the process. The onus is these situations is on management side which has all the information. VSS had been opened and the respondent refused to put it on hold following the Trade Union's reasonable request to do so. This showed to us how far along the process was in relation to decisionmaking, in that decisions had been made and were essentially irrevocable at that stage.

120. The respondent referred us to voluminous documentation relating to meetings of the JNC and the JUCNC from 2014 onwards. Effectively these were committees

which included management and Trade Unions, the purpose of which was to apprise the Trade Unions of matters relevant to the running of the University. The respondent's point appear to be that these minutes of meeting showed that there was active engagement with the Trade Unions and that there was not a lack of willingness to engage with them.

121. We find it noteworthy however that despite the existence of these committees and their regular meetings, key information was kept from the Trade Unions and we infer from that that there was a deliberate unwillingness to consult with the Trade Union side about the ongoing decision-making.

122. Some of the evidence in cross-examination appeared to explore the motivation of managers. It was clear from the evidence of the respondent's witnesses that issues to do with complying with consultation obligations were left entirely to Mr Magee as head of HR. The level of unrest amongst staff was such at the relevant period and the protests of the Trade Union were so strong that there was an obligation on the senior managers as a whole to address their minds to what was being raised by the Trade Union. In the event the Trade Union side was, in our judgement, deliberately kept in the dark by senior management and this was clear to us from the documentation which emerged in the course of these proceedings.

123. The issue of whether or not the respondent wilfully or innocently failed to consult earlier is not relevant to our deliberations on whether or not the duty arose, the point at which it arose and whether it was complied with. It could however be relevant to remedy in assessing whether this was an inadvertent failure or whether it had a deliberateness about it.

124. We also take into account the fact that this is a large organisation with a HR Department with access to information and, presumably, to legal advice on the respondent's obligations. It was clear that Mr Magee knew (as shown in his letter of 9 October 2015 to UCU) what had to be consulted upon in order to comply with the respondent's statutory obligations. Numerous documents and meetings were generated by the decision-making process leading up to the termination of these posts and at one point there was detailed discussion by managers of a communications strategy. We find it very telling that there was no reference at all in that communications strategy to any engagement with the Trade Unions.

125. We also find it significant that the date that the proposals were revealed to the Trade Union verbally on 31 August 2015 was the same date that they were revealed to the Press. In fact the Press had more details at earlier stages about course closures than the Trade Union had.

126. It is clear to us that there was a poor relationship between management side and the Trade Union and the process in this redundancy exercise has led to palpable bitterness on the part of both the staff who went and those who stayed.

127. In this case it is relevant for us to reach a conclusion on the motivation of managers for failure to consult: whether it was their incompetence, whether it was due to their ignorance of legal obligations or whether it was due to their belief that because of previous non-engagement or opposition by the Trade Union that they did not have to try to engage. We find on an assessment of all the evidence that this was a deliberate failure to consult in that management wanted to keep the Trade Union side in the dark probably because of the poor relationship with them and because of the concentration on REF considerations which would have been controversial if revealed.

128. In all of this the Trade Union was in an invidious position for months where its own members were asking what was happening because they were being told locally that their schools or courses were closing, there were press reports to that effect, and the Trade Union was unable to give any assurance that members' concerns or views were being put forward in the formulation of redundancy plans as they had received no information despite their repeated requests.

129. Taking account of the above matters we find this to be a very serious failure to consult at all warranting the full protective award. We therefore find that a 90 day protective award is the appropriate remedy for those in the bargaining unit.

Employment Judge

Date and place of hearing: **9, 12, 13, 14, 15, 16, 19, 20, 21, 23 June 2017 and 15 August 2017 at Belfast**

Date decision recorded in register and issued to parties:

APPENDIX C

TERMS OF REFERENCE FOR THE REVIEW

TRIBUNAL DECISION ON UNIVERSITY AND COLLEGE UNION VERSUS ULSTER UNIVERSITY- INDEPENDENT REVIEW

Background

The University has received a critical tribunal decision on the process it undertook for consultation on redundancies associated with the Budget Review Group (BRG) process in 2015116. The BRG process was the University's means of dealing with an unprecedented funding reduction, of approximately £9m, to its budget as directed by the Department of Employment and Learning (now subsumed into the Department of the Economy) in 2015.The BRG was tasked with developing proposals to deal with the loss of student and staff numbers that were deemed a consequence of the funding cuts.

The Tribunal, in its judgement report published in December 2017, concluded that:

1. *There was little will on behalf of the University to engage with the Trade Unions and that the Trade Unions were misled on key points (Paragraph 104 of the report)*

2. *That the University failed in its statutory obligations to consult in good time or at all given the withholding of key information, and that this was a breach of the relevant provisions of the Employment Rights (NI) Order 1996 (Paragraph 106 & 127 of the report)*

3. *The university used REF performance as a means of targeting redundancies even though this had not been shared with the unions in the consultation process.*

The Chair, on behalf of the University Council, wishes to ensure best practice, which both meets and exceeds any statutory obligations, is adopted moving forward and therefore seeks to understand how and why the mistakes, as set out in the Tribunal judgement, occurred and that lessons are learned in this respect.

Objectives of the Review

The review is seeking to learn lessons that have arisen from the Tribunal judgement and to future proof the University's approach to ensure that if similar circumstances ever present that the outcome achieved reflects best practice. The more specific objectives *I* terms of reference for the review are to:

- Determine what lessons can be learned for the future from the University's management of the issues which led to the Industrial Tribunal decision

- Review the University's decision making process at Council and senior leadership level for the BRG process in the university and the strategy for consultation with Trade Unions and Employees in 2015. This should include consideration of what committees were involved and what reports *I* information were presented to them

- Test where accountability for employee relations lay in the University, and whether there were checks and balances to ensure the University's Senior Leadership; and

- Council were accordingly and appropriately aware of how key matters like the consultation were being handled.

- Confirm whether the risks of the BRG process and redundancies had been fully presented in the University risk register at the Audit Committee and Resources Committee

- During the timeline of the process were there any opportunities which were ignored /missed which could have triggered the concern of Senior Leadership or Council, and if so why were these ignored /missed?

- To make recommendations on proposed actions the University should initiate to ensure avoidance of a similar occurrence in the future.

Approach

The University Chair has approached the Labour Relations Agency to determine if they can undertake this review. While it is anticipated much of the review may be conducted by undertaking scrutiny of all of the relevant paperwork, the Reviewer may identify a need for direct engagement with relevant stakeholders, which may include a range of current employees and UCU Trade Union officials, as identified in the Tribunal decision.

Timing of the Review

The review will be initiated in April 2018 with a concluding report received by the end of June 2018 for presentation to Council by the University Chair.