An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission

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ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00038906/00041248

Parties:

	Complainant	Respondent(s)
Parties	Jane Crowe	Debenhams Retail (Ireland) Limited & Debenhams Retail (Ireland) Limited (in Liquidation).

Representatives	Breendan Kirwin SC, Claire Bruton BL Michael Meegan Mandate Trade Union	Kelley Smith SC, Des Ryan BL, Matheson Solicitors.

Complaint(s):

Act	Complaint Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under section 9 of the Protection of Employment Act 1977 as amended.	CA-00037923-001	19th June 2020
Complaint seeking adjudication by the Workplace Relations Commission under section 10 of the Protection of Employment Act 1977 as amended.	CA-00037923-002	19th June 2020
Complaint seeking adjudication by the Workplace Relations Commission under section 9 of the Protection of Employment Act 1977 as amended.	CA-00037837-001	18th June 2020
Complaint seeking adjudication by the Workplace Relations Commission under section 10 of the Protection of Employment Act 1977 as amended.	CA-00037837-002	18th June 2020

Date of Adjudication Hearing: 26th of October 2022 and 3rd of March 2023

Workplace Relations Commission Adjudication Officer: Brian Dalton

Procedure:

In accordance with Section 41 of the Workplace Relations Act, 2015 following the referral of the complaints to me by the Director General, I inquired into the complaint and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints.

The WRC commenced early engagement with the representatives of the complainants, respondent/liquidator. An initial Case Management meeting was held on 16th December 2021 with the representatives to discuss the best approach to deal with the large volume of complaints submitted. Both representatives and the liquidator proposed a "test case" which would be heard and have a decision issued by the WRC.

The Parties have collaborated to agree a full chronology of events which is set down in the factual background below. However, at the first day of hearing on the 26th of October 2022 a difference regarding the status of minutes of consultation meetings was raised. The Union stated that the minutes were not agreed between them and where the minute writer was not present at the hearing the minutes were hearsay and inadmissible. The liquidator Mr O'Leary stated in his view that they were an accurate record of the meeting. It is not in dispute that the consultation meetings occurred; however, the minutes are disputed as agreed between the Parties. Sworn evidence was given by Mr Andrew O'Leary liquidator, Mr Gerry Light General Secretary and Mr John Douglas now retired General Secretary. This evidence is summarised in the relevant part of the decision which follows.

A preliminary issue arose at the first day of hearing concerning the number of complaints presented for adjudication and a clarification that the matters for adjudication are provided for under the Protection of Employment Act 1977 (the Act) as amended pursuant to sections 9 and 10 of the Act and not under Regulation 6 of the European Communities (Protection of Employment) Regulations 2000 as had been stated initially. Both parties agreed that the complaints are made pursuant to section 9 and 10 of the Act.

The Parties agreed to make a supplementary submission concerning the number of complaints presented for adjudication and if the complaints could be made against Debenhams Retail (Ireland) Limited and Debenhams Retail (Ireland) Limited (In Liquidation).

On receipt of these supplementary submissions and providing for additional time to finalise the supplementary submissions, on or about 18th of January 2023 the Adjudicator detailed CJEU Jurisprudence that may or may not be relevant to the matters before him. In turn the Adjudicator invited the parties to make a written submission with reference to specific CJEU case law:

> *"I am writing to both parties concerning EU case law as referred to in my recent correspondence.*
>
> *I have reviewed both parties' legal arguments and wish to bring to your attention additional cases that you may wish to address me under my obligation to apply EU law:*

1. Judgement of the Court (Fifth Chamber) Miriam Bichat (C-16/17), Daniela Chlubna (C-62/17), (C-72/17) v Aviation Passage Service. 7th of August 2018

2. In the same case the Advocate General's Opinion delivered on 21st June 2018 [Opinion of Advocate General Sharpston].

I refer to the Advocate's Opinion, while not binding, sets out a clear overview of Directive 98/59 as it may apply in a Group Structure and to Collective Redundancies-Concept of an undertaking controlling an employer-Procedures for consultation of workers-Burden of Proof. In turn the Court had regard to that opinion in making its determination

This opinion also gives a view on what is meant by consultation and the information to be provided to the representative body:

43. The procedure laid down by the directive concerns consultation. It does not seek in any way to govern the manner in which a group of undertakings is organised nor does it restrict the freedom of such a group to organise its activities in the way which it thinks best suits its needs. (19) The aim of the consultation is, where possible, to avoid the need for the projected collective redundancies altogether. Where that cannot be achieved-and it has to be assumed that in many cases it will not be-their number should be reduced or the consequences should be mitigated, all to the degree possible in the circumstances. The obligation to participate is at all times on the employer; it is not on the undertaking having control, even though it is clear that the duty to hold consultations can arise in situations where the prospect of those redundancies is not directly the employer's choice. To that end, the employer must begin the consultations 'in good time with a view to reaching agreement' and the worker's representatives should be placed in a position to make 'constructive proposals.' (20)

44. The consultation process should, in every sense, be meaningful. It is not intended to be a purely symbolic exercise. Indeed, the essence of the notion of 'consultation' is that both sides may achieve a constructive result through discussion and negotiation that might otherwise not have been achieved. The employer mut therefore ensure that the consultations in question pursue a worthwhile purpose. It is the employer which must undertake them; it cannot rely on a failure by the decision-making undertaking to provide the necessary information and must bear the consequences of such a failure. (21) It is therefore essential that information be provided to the employer by the correct source.

To quote from the Advocate General's Opinion, at paragraph 2:

Conclusion:

"The employer is under a duty to start the consultation process under Directive 98/59 when it becomes aware of the adoption of a strategic decision or change in activities which compels it to contemplate or to plan for collective redundancies Where there is an 'undertaking controlling the employer' for the purposes of Article 2(4) of that directive, the imposition by that undertaking on the employer of what amount to requirements that make it economically necessary for the latter to effect collective redundancies will require the employer to start the consultation process if it has not already done so."

Allowing for the dependency on the UK parent the question arises when should the consultation process have commenced based on the economic decisions being made by the parent where redundancies would be contemplated?

I also reference section 10A of the Act:

Application of sections 9 and 10.

10A.—Sections 9 and 10 shall apply to an employer irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking which controls the employer, and it shall not be a defence on the part of the employer that the necessary information had not been provided to the employer by a controlling party, or parties, which took the decision leading to the collective redundancies.

The following case also addresses when consultation should commence:

3. Akavan Erityisalojen Keskuslittory and Others v Fujitsu Siemens Computers Oy Case C-44/08

I reference the Courts rulings 1-4 of that decision and that the obligation to start consultations on the collective redundancies contemplated does not depend on whether the employer is already able to supply to the workers' representatives all the information required under Article 2(3)(b) of Directive 98/59.

I note both parties have referenced Claes v Landsbanki Luxembourg SA, in liquidation joined cased C-235 /10 to C-239/10 and in particular 2 Under the Operative part of the judgement that:

"Until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator."

I propose to reconvene as soon as possible so that both parties can address me on the cases referenced in this correspondence, as they may be relevant to the facts as submitted and presented in oral evidence. I would suggest that any written submission should be made a week before the hearing and copied to the other side. Both parties at the hearing can address me on the other party's submission on the relevance or otherwise of the above cases as they may or not apply in this case.

To expedite matters I will summarise the parties' positions made to date and send to both of you as a draft for your review prior to finalising my decision after the reconvened hearing. Any clarifications or case management can be addressed to me at the reconvened hearing."

A hearing took place on the 3rd of March 2023 to hear final legal arguments relating to the 4 complaints.

On or about the 10th of May 2023 amendments suggested in the respective party's summary and the chronology of events was considered and incorporated into the final decision as appropriate.

Arising from this process the Chronology of Events and evidence given at the hearing, forms the basis of the factual matrix to be considered in reaching a finding and conclusion.

While the Complainant referred to a 5th consultation meeting in fact 4 consultation meetings took place as the 5th meeting took place after the formal 30 day consultation had ended.

Background:

Ms. Crowe commenced her employment with Debenhams Retail (Ireland) Limited on the 14th of October 1996 as a shop assistant. The Complainant worked 20 hours a week and her gross weekly pay was €285. This is Ms. Crowe's complaint, but forms part of a body of complaints brought by Mandate on behalf of Debenham employees.

On or about the 8th of April 2020 the parent company of Debenhams informed Debenhams Retail (Ireland) Limited that it could no longer provide funding to it. The parent would be imminently in administration and was insolvent and was not able to fund the Irish Company. The Board of Directors of the Irish Company met at an emergency meeting and recommended to their shareholder, Debenhams Retail Limited (in Administration) to take immediate steps to petition the Irish High Court to wind up the Company and to have a liquidator appointed. It is alleged by the Complainant that the requirements as set out at section 9 and 10 of the Protection of Employment Act 1977 (as amended) have not been complied with:

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

And:

Obligation on employer to supply certain information.

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

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

(a) the reasons for the proposed redundancies,

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

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

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

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

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

and

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

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

(f) the method for calculating any redundancy payments other than those methods set out in the Redundancy Payment Acts, 1967 to 1991, or any other relevant enactment for the time being in force or, subject thereto, in practice.

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

And:

10A.—Sections 9 and 10 shall apply to an employer irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking which controls the employer and it shall not be a defence on the part of the employer that the necessary information had not been provided to the employer by a controlling party, or parties, which took the decision leading to the collective redundancies

The Respondent/Liquidator deny the claims and state that the Company met all the required statutory obligations as prescribed under the Act. The financial crisis facing the Group of companies was exacerbated by the Covid lockdown and the effect health regulations had on trading.

Summary of Complainant's Case:

The Complainant alleged that the facts show that the Parent had made a strategic decision to place itself into administration on or about the 6th of April 2020. It is arguable that the decision was made before then. It is clearly at this point that the consultation process should have been commenced by

the Irish management team as it must be the case that collective redundancies were being contemplated at that point. The liability falls to the employer and not the controlling body who made that decision. The obligation on the employer in this case Debenham's Retail (Ireland Limited) was to commence the consultation process on or about the 9th of April 2020 at the latest. The Complainant argued that it was the 9th of April 2020 as that was the date the Irish Board met and that was the date Mr Bebbington wrote to all staff. However, the consultation process did not commence properly until the 17th of April 2020 when the provisional liquidator had been appointed.

Two Respondents are named in so far as 4 breaches have occurred, namely Debenhams Retail (Ireland) Limited and Debenham Retail (Ireland) Limited (in Liquidation). It is not that the complaints have been taken against two distinct legal entities. The Complaints are made against the same legal entity. However, the management of the subsidiary were obligated to commence the process prior to the liquidators being appointed. In fact, the appointment of the liquidators significantly narrowed the options open to the parties. A legal entity could be liable for several breaches under the statute and under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (referred to hereinafter as the 'Directive').

The facts are no consultation was undertaken by management at the Irish Company as prescribed by the Directive and Act. It is entirely appropriate therefore to distinguish the Respondents liable to commence the consultation when the strategic decision was made that must have contemplated redundancies and on the face of the agreed documentation when the Liquidators stated that in fact it occurred on the 17th of April 2020.

It was argued that the Directive and the 1977 Act call for that process to be a meaningful engagement. The Respondents argues that it was comprehensive, responsive, and fair. However, the Liquidators state that financial realities in this case were bleak. The Complainant's Representatives sought information about store profitability, landlord and lease details, stock ownership and the possibility of trading online. The reason for seeking this information was to explore how the number of collective redundancies could be reduced and if the effect of the job losses could be mitigated. The Union Representatives sought an extension of the process so that the process could have reached a logical conclusion when all relevant information was available. While information was provided, it was incomplete, and it was not possible absent of such relevant information to make meaningful proposals. On the facts the Liquidators did not engage meaningfully with the Union representatives as demonstrated by a tick box exercise that manifested no mitigation, cut short the process when relevant information was clearly not available and demonstrated through their actions a process that was superficial and predetermined from the outset.

In summary the Irish management team were obligated to commence the formal consultative process on or about the 9th of April 2020 at the latest. The Liquidators stated the process commenced on the 17th of April 2020. It must follow that on or about the 9th of April and until the Liquidators were appointed the Irish management were obligated to oversee the consultation process and they failed entirely to carry out their legal obligations under sections 9 and 10 of the Act. The Liquidator failed to engage in meaningful consultation and passively engaged in the process as demonstrated by a tick box exercise and the failure to provide very relevant information about the ownership of stock, the capacity to operate the online platform, profitability of stores and leasehold interests. The Liquidators actions could not be described as meaningful engagement.

Summary of Respondent's Case:

The Respondent/Liquidator stated that consultation began as early as possible after Debenhams Retail Limited the Parent company based in the United Kingdom could no longer fund the Irish Operation. The Irish subsidiary had been loss making for some time and had been restructured some years previously. The UK Parent was about to go into administration, a procedure that would allow it protection from its creditors. The Group was insolvent. The fortunes of the Group and the Irish subsidiary were adversely impacted by COVID lockdowns. The fragile nature of the Group's finances meant that such a profound crisis was a tipping point and the Group had limited options.

The Irish Board as soon as it was decided by the UK Parent that no funding could be provided to the Irish subsidiary wrote to the Parent and recommended that the Irish subsidiary be placed into liquidation. Provisional joint liquidators were appointed by the High Court and they in turn were appointed as liquidators soon after. The liquidators and management prior to liquidation acted promptly and fulfilled their legal obligations to consult meaningfully with the employee's Union representatives and reach agreement if possible. All relevant information was provided to the Union representatives. The Respondent's intent was to limit the scale of collective redundancies and the impact that redundancies might have on the employee if possible.

The Respondent fully complied with the statutory timeframe to do so despite significant logistical hurdles created by the Pandemic and the imposed lockdowns that meant the process became more complex. Allowing for the relevant time periods prescribed in law, jurisprudence dictates that the consultation should take place in good time after an actual strategic decision has been made that contemplates collective redundancies. Mere speculation and hypothetical scenarios could not kick start a formal consultation as prescribed by statute. The consultation did take place in good time.

All relevant information was provided to the Union representatives. It was unfortunate if not unexpected to find the Irish Subsidiary was very fragile, insolvent and without the financial support of the Parent could not survive. The subsidiary in fact had accrued very large losses of the order of €20 million. In addition, the subsidiary had limited control to act alone when the Parent in fact had entered into the formal lease agreements and controlled and owned the online platform. While there were conflicting claims on the ownership of the stock that would not have changed the outcome. Extending the consultation process with a false expectation that something could be salvaged when the financial facts where overwhelmingly bleak would have been irresponsible. The sad reality was that the business would have to cease trading. Pursuant to the Companies Act 2014 and common law principles obligations on directors consider the position of all creditors in the event of insolvency.

The Respondent submitted there can only be two complaints before the Adjudicator. There is only one legal entity. The fact that entity is in Liquidation does not change the legal personality of the Company. In the alternative, they argued that a party cannot be given two awards based on facts that in essence are the same and from a causal chain that are entirely linked. To do so would amount to double recovery in their view.

Agreed Chronology of Events

Chronology:

On or about the end of March 2020 the UK parent of the Irish subsidiary filed a notice of intention to appoint administrators in England.

On the 6th of April 2020, Mr. Stefaan Vansteenkiste CEO of Debenhams UK sent a message addressed to staff in England to inform them that Debenhams intended to appoint administrators. This was necessary so that the Company could continue to trade without the threat of creditors applying to the courts to wind up the Company.

In his message the CEO stated that this step would create some breathing space for the that business, would confirm access to continuing funding and allow the Company to trade online.

On the 8th of April 2020 the head of the Irish subsidiary wrote to the parent and asked if the parent or the administrator would continue to be able to provide financial support to the Irish operation.

By return on the 8th of April the parent stated that:

> *"neither Debenhams Retail Limited (in Administration) (or any administrator appointed to it) nor any other entity will be in a position to provide financial support to Debenhams Retail (Ireland) Limited going forward."*

On the 9th of April 2020, a meeting of the Board of Directors of Debenhams Retail (Ireland) Limited was held to consider what actions the Company should take considering the parent's position that it would not be able to provide financial support. The directors concluded that:

- the Company could not continue trading as a going concern
- the Company would cease trading from all its stores with immediate effect
- the Board would issue a letter to the UK parent recommending that Debenhams Retail Limited in its capacity as the Company's sole shareholder, take immediate steps to petition the Irish High Court to wind up the Company and to have a liquidator appointed.

On the 9th of April 2020 the Chief Executive of the Irish subsidiary Debenhams Retail (Ireland) Ltd wrote to staff and informed them that:

> *"…today the Shareholder of Debenhams Retail Ltd (DRL) is going into administration and that it will make an application for Debenhams Retail (Ireland) Ltd (DRIL) to be placed into liquidation under the Companies Act 2014. It is anticipated the application will be made and a Provisional Liquidator will be appointed next week."*
>
> *…In the UK, Debenhams has entered into administration in order to protect its business. Regrettably, due to the challenges facing Debenhams Retail (Ireland) Ltd, it is anticipated that an application will be made to appoint a liquidator to the Irish operations.*
>
> *As you know Debenhams has already suspended trading in the Republic of Ireland stores and* ***we can confirm that these stores are not expected to reopen****.*

*This letter is primarily to inform of the decision and **further communications about this process will follow from the Liquidator in due course**.*

We are sorry this decision has been made and we would like to take this opportunity to thank you for your invaluable service to our customers, your unquestionable loyalty to the company your outstanding teamwork you have shown throughout your years in Debenhams Ireland and wish you every success for the future."

On the 14th of April 2020, a written resolution was passed by Debenhams Retail (Ireland)Limited that the Company be wound up. It instructed the directors to make a petition to wind up the Company and appoint joint provisional liquidators.

Also, on the 14th of April 2020 Mr Gerry Light Assistant General Secretary of Mandate wrote to Mr Stefaan Vansteenkiste CEO of the parent at their head office stating that the manner of senior management communication about placing the Irish operation into liquidation was shocking. He stated that the Union would resist unilateral action and continue to seek a solution that was honourable and that the Union's efforts would mount a sustained campaign to mitigate the impact on their members. A similar letter was sent to Mr John Bebbington Managing Director of Debenhams Retail (Ireland) Limited.

Also, on the 14th of April 2020 Ms Sinead O'Connor HR Manager for Debenhams Retail (Ireland) Limited wrote to Mr Gerry Light Assistant General Secretary of Mandate Trade Union pursuant to the Protection of Employment Acts 1977-2014 stating that in accordance with section 10 of the Act the reasons for the proposed redundancies related to trading difficulties and the application to appoint a liquidator to the Company on the 15th of April 2020. It stated that all employee roles within the Company are proposed for redundancy. The key details in the correspondence were:

- The total number of employees proposed to be made redundant was 957
- Redundancies were expected to take effect once a liquidator has been appointed.
- All employee roles within the Company in Ireland were proposed for redundancy.
- Statutory Redundancy would apply.

On the 15th of April 2020, Mr Light of Mandate by email wrote to Ms O'Connor and stated:

"*Given the employer has now taken the decision to action the collective notice as required under the relevant legislation I wish to remind you of the additional obligation placed on the employer resulting from this action. The law clearly states that the employer from this point forward is obligated to engage in meaningful consultations with employee representatives."*

On the 16th of April 2020, by order of the High Court (Coffey J.), Mr Kieran Wallace and Mr Andrew O'Leary were appointed as joint provisional liquidators of the Company. The petition to wind up the Company was listed for hearing on 30th April 2020.

On the 17th of April 2020, a conference call/Zoom meeting was held with employee representatives including Mandate Trade Union. The joint provisional liquidators and Company personnel were also in attendance.

The meeting covered several matters, including:

- A detailed explanation of the requirement to appoint a liquidator and the timeline of events
- An overview of the financial status of the Company
- An explanation of the decision of the Court
- The role of the liquidators and the nature of the liquidation process
- **The consultation process in relation to proposed collective redundancies.**

Mr O'Leary liquidator stated that as a liquidator he and his colleague had an obligation to comply with employment law. While all employees were being put on notice that their roles were at risk of being made redundant, that did not mean that at this time all employees were being made redundant. It was up to the representatives and indeed any employee to put forward a proposal to them during the 30-day consultation. If at the end of that 30-day consultation process nothing materialised, then at that point employees would be made redundant.

At the meeting Mr Light for Mandate referenced the letter from Ms O'Connor HR Manager of the 14th of April 2020 that detailed proposed collective redundancies, he had concerns that the Company were correctly undertaking their legal responsibilities.

On the 20th of April 2020 Mr Light wrote to the joint liquidators acknowledging their appointment and that his Union be kept informed and copied in all communication to staff. He also stated that it was the Union's understanding that the Liquidators' remained available to meet during the consultation process that was underway.

By letter dated the 23rd of April 2020 the Liquidators wrote to staff about the consultation process and that they should engage in the process through their representatives. Any concerns that they might have would be addressed through the formal consultation process underway. That letter stated:

> ***Consultation Process***
>
> *…This means that the Company will enter into a 30 -day consultation period with representatives on behalf of the employees. This process commenced with an initial meeting that took place on Friday 17th April between representatives of both Mandate and SIPTU and I.*

By letter dated 23rd of April 2020, the liquidators wrote to Mandate pursuant to section 10 of the Protection of Employment Act 1977 as amended.

The Liquidators' stated that:

> *"The Joint Provisional Liquidators will endeavour to explore all options in relation to the business. In the event that redundancies transpire, it is envisaged that any such redundancies will be notified at the cessation of the 30-day consultation period in or around 18 May 2020."*
>
> *"All employee roles within the Company in Ireland are at risk of redundancy and so it is not currently envisaged that selection criteria will be applied."*

On the 28th of April 2020 a second consultation meeting was held, and the following was discussed:

- Appointment of Liquidators and that the Company would be entering full liquidation

- Consultation would continue as already detailed
- Redundancies would only take after the 30-day consultation period expired
- A briefing on current cash reserves; the level of stock held in the stores; online trading and the status of store leases.
- An update about the UK parent.
- The possibility of reopening some stores to sell existing stock
- Whether there would be discussions about a redundancy deal.

On the 30th of April 2020, by order of the High Court (Sanfey J.), Mr Kieran Wallace and Mr. Andrew O'Leary were appointed as joint liquidators of the Company. The winding up of the Company was ordered by the Court.

By letter dated 5th of May 2020 Mandate wrote to the liquidators and some of the key points made were:

- The information provided to date was incomplete allowing for the fact that the consultation process had reached the midpoint.
- That this in turn could open claims for improper or inadequate consultation process
- It was noted that the affidavit opened to the High Court on the 30th of April 2020 highlighted that many of the exercises necessary to finalise an assessment of the DRIL business remained incomplete and had been restricted due to COVID regulations.
- That in turn this delay should be factored into the extension of the consultation process and when individual redundancies would take place.
- That the Union's objective continued to be the total or partial retention of the Debenhams Retail (Ireland) Limited (DRIL) business and failing that the application of the terms contained in the collectively negotiated redundancy agreement
- That significant funding was available from the Irish Government so that they can survive the current Covid-19 emergency. That such financial support along with other financial support from the EU and domestically in the areas of rents and rates provided an opportunity for a realistic survival of the Irish Business.
- That the Liquidators engage with the current owners and the administrators of Dublin Retail Limited(DRL) in the UK and to seek support from them for such measures.

On the 7th of May 2020 a third consultation meeting was held with employee representatives. At this meeting Mr Light complained that the extent and quality of the information sought had not been met. Mr O'Leary updated the meeting on the matters raised at the last meeting. He informed the group that the company was insolvent. He stated that the liquidators did discuss the requests made by the union representative with the UK parent company and there was no appetite to support the Irish Business having regard to their own financial constraints. He also briefed the group on discussions with the UK parent about the website, stock, and leases. Considering the position of the parent concerning financial support and their control of the stock and website, the Liquidators had concluded there was no purpose in prolonging the consultation and that the liquidators were highly likely to commence the redundancy process the following week.

On the 11th of May 2020 Mr O'Leary wrote to Mr Light referring to Mr Light's letter of the 5th of May 2020 and the 3rd consultation meeting held on the 7th of May 2020. In that letter Mr O'Leary

informed the Union that extensive engagement had taken place with Debenhams UK. He explained that his role as liquidator was different to that of an examiner. As a liquidator their role was to realise the maximum value for the assets over which they had been appointed for the benefit of the creditors and winding up the Company in an orderly fashion. That could lead to a sale of all or parts of the business; however, that did not often occur. Mr. O'Leary confirmed that:

- The website was owned by the UK business
- The UK business asserted that they retained ownership of all stock held in the stores by way of a historic agreement
- Landlords had given some indication about a rent reduction; however, such reductions would only be temporary. The leases are held by a UK entity, Debenhams Plc (In Administration) and the Company are a sub tenant of same. This meant there was no value in the leases as Debenhams Retail (Ireland) Limited was not legally able to assign them.
- Finally, as requested an attached copy of the Financial Statements to the year ended 1st September 2018

By letter dated the 11th of May 2020, Mr Light wrote to the Mr O'Leary that it was the view of the union representatives that the degree of information was less than complete, and that consultation as envisaged in law was unlikely to be achieved. He requested:

- A copy of the legal advice that the leases were under the control and ownership of the UK business
- A copy of the legal advice that the UK business was largely the beneficial owner of the remaining stock
- A copy of the legal advice that the online business was fully owned by the UK business
- While the liquidators had stated that the most recent business projections did not identify any profitable stores, the representatives were seeking a list of the profit/loss making stores on the last date that this information was applicable.

Mr Light went on to inform the liquidator that as the party who assumed legal responsibility for the Company that his Union and members were in dispute with their employer and that a ballot for industrial action would be taking place. This was necessary to ensure that his members were legally allowed to engage in appropriate actions at all places connected to the Debenhams (DRIL) business. Mr Light sought a further meeting with the Liquidators week commencing the 11th of May 2020.

On the 13th of May 2020 Mr O'Leary replied to Mr Light's letter of the 11th of May 2020. Mr O'Leary referenced the 3 consultation meetings that had taken place. At these meetings a detailed overview of the issues of importance was discussed. The Liquidator had opened the meetings for questions and answered these in as much detail as possible. Mr O'Leary stated that as previously communicated there were significant issues in relation to the ownership of the stock, website, trading name and overall funding. He responded to the queries previously raised:

- The leases connected to the Irish Stores were not open to Debenhams Retail Ireland Limited to assign or to re-negotiate any of the leases on its own.
- The current stockholding of Debenhams Retail Ireland Limited was complex with continuing discussions being had with the UK parent.
- The online business was owned by Debenhams Retail Limited.

- The accounts for the year ended 1st of September 2018 showed that the Company incurred a loss of €21.625 million.
- As of February 2020, the Company had liabilities to other group companies in the sum of €25 million.
- Debenhams Retail Limited were no longer able to fund Debenhams Retail Ireland Limited as it was in administration and insolvent.
- Rent of €2.7 million was outstanding.
- It was not possible to project how any store could trade profitably and given the extent of the Covid-19 crisis and the current position in relation to trading it could not possibly be contemplated to trade as an insolvent business during this period of uncertainty.

On the 15th of May 2020 a 4th consultation meeting took place. At this meeting Mr O'Leary stated that he saw no reason to extend the consultation process and to do so would be irresponsible. Mr Light asked how could the process conclude when there was uncertainty about the ownership of the stock? Mr O'Leary stated that even if the stock was owned by the Irish Company that did not mean that the stores could trade. Mr Light repeated that the consultation process was deficient regarding providing information as requested. That assertion was in turn questioned by the Liquidator as in his view relevant information had been provided in a timely manner.

By letter dated 20th of May 2020 the joint liquidators wrote to employees with notice of termination of employment on the grounds of redundancy.

On the 25th of June 2020 another meeting took place between the parties; however, that does not form part of the formal consultation process to occur over the 30-day period as that had ended.

Findings and Conclusions:

An issue arose on the first day of hearing concerning the number of complaints before the Adjudicator. Counsel for Mandate stated that there had been two separate consultation processes. It was argued that there were two sets of claims, one set of claims made against the employer Debenhams Retail (Ireland)Limited and the second set made against the Liquidators. It was not that a different legal entity existed; however, there were two distinct actions arising from the obligation on the management of Debenham's Retail Ireland Limited to comply with the Act which they failed to do and then after the Liquidators were appointed a separate onus on them to comply with the Act, which they failed to do.

There were two formal processes commenced with Mandate. One was started by the HR Director Ms Sinead O'Connor and a second process was started by the Liquidator. In fact, Ms O'Connor continued to communicate with Mandate once the Liquidator had been appointed.

The Respondent stated that there was one process, and that Ms O'Connor after the Liquidators were appointed acted under their direction. The Liquidator in effect took on the onus or obligation to continue that process and did so in a comprehensive and complete way. On the same facts there cannot be 2 distinct set of proceedings amounting to 4 complaints. Case law is clear that the liquidator continues with the consultation:

Claes v Landsbanki Luxembourg SA, in liquidation joined cased C-235 /10 to C-239/10 and in particular 2 Under the Operative part of the judgement that:

"Until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator."

It cannot be that the Liquidators' obligations are viewed separately and distinctly to the employer in this case. The employer's obligations must continue to be carried out by the liquidator, they are not separate and a distinct exercise.

At the first day of hearing, Complainant Ms Crowe's representative alleged that the decision to make Debenham's staff redundant more than 2 years ago was preordained and predetermined, and that decision was made before the Company was put into liquidation.

It was also alleged that both the management of Debenham's Retail (Ireland) Limited and subsequently the joint liquidators Mr Andrew O'Leary and Mr Kieran Wallace failed to provide relevant information to her Union representatives so that meaningful discussions could take place to reduce the number of redundancies and /or to minimise the negative effects arising from such a large-scale redundancy,

It was alleged that attempts by her Union representative to engage in a meaningful process were met at best with a superficial engagement and in realty was a tick box exercise that was required to be completed. However, it did not afford the employees the protection as set out in the Act or Directive. The information provided was totally inadequate and made it impossible to craft any meaningful proposals to limit the scale of the job losses and/or limit the catastrophic impact on staff.

In evidence Mr Light (General Secretary of Mandate) stated that in his opinion that the decision to make the workers redundant has been preordained and predetermined on a date prior to the 8th of April 2020. The Union had sought information including the financial position of the Company, the profitability/loss of each store, revenues and profit from online trading. This information should have been provided so that meaningful proposals could be formulated to reduce the number of proposed redundancies which was the entire workforce or to limit and mitigate the impact on members. There had been a previous agreement where staff received statutory redundancy and 2 weeks per year of service. The Irish Board on or about the 8th of April 2020 in effect made the decision to wind up the company.

The claims made against the Employer and Liquidator were strongly denied by the Respondent's Counsel. There had been full compliance with the requirements of the Act both regarding providing relevant information and engaging in meaningful consultation. The Liquidator held 4 consultation meetings. All meetings were open to questions being asked and where the Liquidator didn't know the answers he followed up and provided written answers. Staff were proactively communicated with during the process so that they were aware that a formal consultation process had begun and how to link into the process by contacting their representatives.

Mr O'Leary, Liquidator gave evidence that regardless of whatever decisions had been made

previously once a liquidator has been appointed it does not matter what decisions have been made prior to the appointment. The formal consultation process was meaningful and comprehensive. There were certain financial realities that were stark. It was also the case that Debenhams Retail Ireland Limited had incurred very significant financial losses. A full disclosure of those liabilities were set out in an affidavit made to the court and those details were fully shared with the Union representatives. The Irish operation was totally dependent on the Parent company for funding and could not survive independently. Debenhams Retail Ireland Limited in effect had no control on store leases or the online platform and the Company was heavily indebted to the Parent. After extensive and detailed engagement with the Parent company, it was abundantly clear that Debenhams Retail Ireland Limited could not survive as a trading entity and was insolvent and loss making. Open and frank discussions did take place with the Union representatives. However, the financial realities meant it was not possible to limit the scale of job losses or to mitigate their impact. However, all relevant information was provided and meaningful consultation did take place.

On the second day of hearing counsel for Mandate, stated that the CJEU had determined that there was an onus on the employer to consult in good time if they were contemplating redundancies and that obligation arose once the intention of the employer was manifest. In this case that obligation arose as early as the 8th of April 2020 when the Irish board of directors made a decision to appoint liquidators and to inform staff that the stores would be closing. However, the obligation to consult definitively arose on the following day when Mr Bebbington a company director of Debenhams Retail (Ireland) Limited wrote to staff informing them of developments and the pending consequences for them.

Counsel for the Complainant, citing from *Fujitsu Siemens Computers Oy Case C-44/08* stated that the tribunal should carefully consider what the court stated about consultation:

> *Article 2(1) of Directive 98/59 on the approximation of the laws of the Member States relating to collective redundancies must be interpreted to mean that the adoption, within a group of undertakings, of strategic decisions or of changes in activities which compel the employer to contemplate or to plan for collective redundancies… A consultation which began when a decision making such collective redundancies necessary had already been taken could not usefully involve any examination of conceivable alternatives with the aim of avoiding them*.

In reply counsel for the Respondent stated that the *Fujitsu* decision referred to a consultation commencing in good time and that no firm timelines had been prescribed nor could they as that depended on the facts of each case. The Company faced an existential crisis arising from the Parent going into administration and Covid 19 closures of non-essential retail. In this situation the possibility of raising short term funding was extremely limited if not impossible. The directors were taken by surprise when they received the response that the Parent was no longer in a position to support the Irish operation. These developments took place over the Easter period and on the first opportunity the Liquidators were appointed.

When should the Consultation have begun?

In *Tangey v Dell Products* [2013] IEHC 622 Birmingham J stated that:

> *24. I have paid particular attention to the opinion of Advocate General Mengozzi in United States of America v. Nolan given that he was also the Advocate General in the Fujitsu*

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

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

On the facts a strategic/economic decision was made on the 8th of April 2020 by Debenhams Retail Limited (the UK parent and sole shareholder-referred to below as 'DRL') that it no longer was in a position to fund Debenhams Retail (Ireland) Limited (DRIL). The Complainant stated that the obligation to commence consultations arose no later than the 9th of April 2020.

The Respondent in their submission stated that based on the economic decision being made by the Parent, where redundancies would be contemplated, the relevant "decision" triggering the consultation process was the 14th of April 2020 when DRL adopted a resolution to wind up the Respondent.

The Respondent argued that while DRL could be considered an *"an undertaking controlling the Employer",* where the Employer is the Respondent and that DRL appointed administrators on or about the 7th of April 2020 it could not be safely concluded that this decision contemplated collective redundancies. The Respondent could have obtained funding from elsewhere. In a non-Covid environment the potential for another source of funding could have been explored.

Birmingham J in *Tangey* and based on the opinion of *Advocate General Mengozzi in United States of America v. Nolan given that he was also the Advocate General in the Fujitsu Siemens case (*stated) *his opinion is particularly influential* :

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

Based on the facts of this case the relevant date was unquestionably the 8th of April 2020 when by

return on the 8th of April the parent stated that:

> *"neither Debenhams Retail Limited (in Administration) (or any administrator appointed to it) nor any other entity will be in a position to provide financial support to Debenhams Retail (Ireland) Limited going forward."*

That decision exerted compelling force on the employer for the purposes of giving effect to the consultation obligation where collective redundancies would have to be contemplated.

It is also important to note that the start date for the consultation is not predicated on all relevant information being available. In other words, not having relevant information to hand is not a reason to delay the commencement of the consultation. While the HR Director did share information with the worker representatives on the 14th of April 2020 that did not start the consultation process. The Liquidators stated that the process commenced on the 17th of April 2020, but this is not the relevant date.

In Good Time?

> *Article 2(1) of Council Directive 98/59/EC*
>
> ***(1)*** *Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in* ***good time with a view to reaching an agreement.***

In *Tangey* Birmingham J stated:

> *39. Under Article 2(1) of Directive 98/59, the employer has the obligation to start consultations with the workers' representatives in good time if he is "contemplating collective redundancies". As stated by the Advocate General in points 48 and 49 of his Opinion, it is clear from comparison of various language versions of that provision that the Community legislature envisaged that the obligation at issue to hold consultations would arise in connection with the existence of an intention on the part of the employer to make collective redundancies*.

The Respondent argued that even if the strategic decision was made on the 9th of April 2020; when the consultation could actually start was conditional on the facts and what Good Time means in the circumstances of this case. If the consultation was required to be pursued from the 9th of April, the practical steps required to take place having regard to Covid lockdown, including time constraints as the decision was made at Easter and during a Public Holiday period meant that the first consultation meeting held on the 17th of April 2020 was commenced in good time.

In this case it could be argued that time was of the essence. Unlike the Parent company which was in administration and who had protection from creditor demands, no such protection would be sought for the Respondent company, such as examinership under Irish law. Therefore "in Good Time"- arguably means as soon as possible , particularly where options to mitigate the impact of collective redundancies reduce and narrow when a company is placed into liquidation. In such circumstances it would not have been unreasonable for the consultation to have commenced no later than the 9th of April 2020. However, as the Respondent argued what is required is for the process to start in' good time' and what does that mean in this case? The Liquidators accepted that as a liquidator their role was to realise the maximum value for the assets over which they had been appointed for the benefit of the creditors and winding up the Company in an orderly fashion. That could lead to a sale of all or

parts of the business; however, that did not often occur.

On the evidence and facts before me, I find that the consultation process commenced on the 17th of April 2020. The formal consultation period was 30 days. The delay to commence the consultation process must be viewed having regard to this 30-day window of consultation and it took place after the Liquidators were appointed. The Complainant has argued that the appointment of Liquidators narrowed the options available. It is noted that liquidators are empowered to sell the business or part of the business. And under the Acquired Rights Directive 2001/23/EC and the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 as amended relating to the transfer of employees or the sale of a business or part of it are relaxed where the transferor is the subject of insolvency proceedings. While those provisions exist the requirement to commence in good time must have regard to the fragility of this entity when it was both confronting an economic decision that meant that no further financial support would be available from the Parent company and in addition the Covid-19 threat where non-essential businesses were being forced to close. In these circumstances in good time meant that there was an imperative to start the process on or about the 9th of April 2020 and the delay until the 17th of April 2020 was material in narrowing potential options to reduce and mitigate the consequences of the intended collective redundancies.

The Respondent argued that Article 2of the Directive does not identify a specific period of time for the consultation to commence. It does not use language such as immediately, as soon as possible, as soon as reasonably practicable or otherwise direct that urgency is to be applied. Instead, the use of the phrase in good time implicitly recognises the factual situation in each case that must be taken into consideration.

The phrase 'in good time' must be read in conjunction with 2(2) of the Directive:

> (*2) These consultations, shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.*
>
> *Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.*

In other words, consultation should commence in good time having regard to the facts in this case, particularly relating to the financial impact on the entity caused by Covid-19 public health orders and store closures that were deemed to be non-essential and the withdrawal of financial support by the Parent. The phrase in Good Time must be viewed in the context of the fragility of the business and that delay would narrow the options open to both parties during the consultation period. Therefore, that financial vulnerability called for consultation to commence in good time and at an early stage which was no later than the 9th of April 2020.

Relevant Information:

Article 2(3) requires that the employer **shall** in good time supply the representatives with **all relevant information.**

Thus, the Directive places an obligation to share in good time all relevant information. The Respondent stated that they provided all relevant information. However, 2(3) of the Directive must be interpreted having regard to the preceding requirement under 2(2) that the consultation is about *ways and means of avoiding collective redundancies or reducing the number of workers affected, and*

of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

The Union representatives had requested information so that they could formulate constructive proposals.

On the 11th of May 2020 Mr O'Leary wrote to Mr Light referring to Mr Light's letter of the 5th of May 2020 and the 3rd consultation meeting held on the 7th of May 2020. In that letter Mr O'Leary informed the Union that extensive engagement had taken place with Debenhams UK. He explained that his role as liquidator was different to that of an examiner. As a liquidator their role was to realise the maximum value for the assets over which they had been appointed for the benefit of the creditors and winding up the Company in an orderly fashion. That could lead to a sale of all or parts of the business; however, that did not often occur. Mr. O'Leary confirmed that:

- The website was owned by the UK business.
- The UK business asserted that they retained ownership of all stock held in the stores by way of a historic agreement.
- Landlords had given some indication about a rent reduction; however, such reductions would only be temporary. The leases are held by a UK entity, Debenhams Plc (In Administration) and the Company are a sub tenant of same. This meant there was no value in the leases as Debenhams Retail (Ireland) Limited was not legally able to assign them.
- Finally, as requested an attached copy of the Financial Statements to the year ended 1st September 2018

And in reply Mr Light wrote to Mr O'Leary that it was the view of the union representatives that the degree of information was less than complete, and that consultation as envisaged in law was unlikely to be achieved. He requested:

- A copy of the legal advice that the leases were under the control and ownership of the UK business

A copy of the legal advice that the UK business was largely the beneficial owner of the remaining stock.

- A copy of the legal advice that the online business was fully owned by the UK business

- While the liquidators had stated that the most recent business projections did not identify any profitable stores, the representatives were seeking a list of the profit/loss making stores on the last date that this information was applicable.

Article 2(3) requires the following of employers:

> *(3)* ***To enable workers' representations to make constructive proposals, the employers shall in good time during the course of the consultations****.*
>
> *(a) supply them with all relevant information and*

I find that in the context of a retail store to seek the profitability of each store; the value of stock;

who owned the stock; the capacity to trade online during the Pandemic; landlord lease arrangements are all relevant factors to formulating constructive proposals. The Liquidators did engage with the controlling undertaking and replied with the information available to them. However, it was not the information asked for and that information was relevant so that the worker representatives were enabled to make constructive proposals. That capacity was frustrated by the responses and information not provided which was not the relevant information sought. I have concluded that the information sought was necessary.

On the 11th of May 2020 Mr O'Leary wrote to Mr Light referring to Mr Light's letter of the 5th of May 2020 and the 3rd consultation meeting held on the 7th of May 2020. In that letter Mr O'Leary informed the Union that extensive engagement had taken place with Debenhams UK. However, that engagement did not yield the relevant information sought by the worker representatives. It is also important to note the onus placed on the employer when considering breaches under Article 2(4):

> *(4) The obligations laid down in paragraphs, 1, 2 and 3 shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employers*
>
> *In considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.*

During cross examination by Counsel for the Respondent Mr Light stated that no constructive proposals were formulated. The Respondent stated that they did all in their power to provide all relevant information and that the requirement was relevant information and not all information was provided. The distinction between all relevant information and all information is important. However, I have concluded that the information sought by the Union representatives was relevant and not having that specific information frustrated their capacity to make constructive proposals.

Meaningful Consultation:

I note the opinion of Advocate General's Opinion delivered on 21st June 2018 [Opinion of Advocate General Sharpston] in *Miriam Bichat (C-16/17), Daniela Chlubna (C-62/17), (C-72/17) v Aviation Passage Service:*

> *44. The consultation process should, in every sense, be meaningful. It is not intended to be a purely symbolic exercise. Indeed, the essence of the notion of 'consultation' is that both sides may achieve a constructive result through discussion and negotiation that might otherwise not have been achieved. The employer mut therefore ensure that the consultations in question pursue a worthwhile purpose. It is the employer which must undertake them; it cannot rely on a failure by the decision-making undertaking to provide the necessary information and must bear the consequences of such a failure. (21) It is therefore essential that information be provided to the employer by the correct source.*

In assessing whether or not the process was meaningful the actions and behaviour of both the employer and the union representatives must be analysed from the time that the consultation process was required to begin. I have determined that the process was required to commence no later than the 9th of April 2020. Having regard to the fragility of this Company and the perspective of a 30-day consultation period; commencing the consultation on the 17th of April 2020 was not in good

time.

The consultation process can start without all relevant information being available to share. In *Akavan Erityisalojen Keskuslittory and Others v Fujitsu Siemens Computers Oy Case C-44/08,* the Court determined that the obligation to start consultations on the collective redundancies contemplated does not depend on whether the employer is already able to supply to the workers' representatives all the information required under Article 2(3)(b) of Directive 98/59.

As detailed the relevant information sought by the workers' representatives was necessary so that they could make constructive proposals and was not supplied to them as requested.

I note both parties have referenced *Claes v Landsbanki Luxembourg SA, in liquidation joined cased C-235 /10 to C-239/10* :

> *"Until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59 must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator."*

Therefore, the breaches under Article 2 are maintained until the legal personality of the entity ceases and the obligations under Article 2 must be carried out by the management of the establishment or by its liquidator, where that establishment has been taken over in its entirety by the liquidator.

I note that in *Tangey* Birmingham J concluded that:

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

There was a stark difference in the financial fortunes of Dell and Debenhams Retail (Ireland) Limited. However, the comments made by the Judge captures the reality of a meaningful engagement and consultation where what was originally tabled was changed in a meaningful way. It was argued by the Respondent Counsel that this was not possible in this case; however, that can never have been truly tested as relevant information was not shared with the workers representatives. However, on the evidence there was no material change in any element of the collective redundancy proposal as

detailed at the outset and no mitigation to limit the effects on the workforce was made. While that does not mean with certainty that no meaningful consultation did occur, it is more likely that is so.

How many Respondent(s) and claims?

The Complainant argued that there are 4 breaches under the Act and the requirements as set out under sections 9 and 10 of the Act concerning the obligation to consult and to supply relevant information. The management of Debenhams breached their obligations commencing on or about the 9th of April 2020 and then the Liquidators also breached their obligations commencing on or about the 17th of April 2020.

The Complainant stated that Article 2(4) recognises two separate entities taken by the employer or by an undertaking controlling the employer. However, that distinction related to the obligation to commence consultation and provide relevant information. The liability to do so ultimately and is clearly stated rests with the employer for commencing the consultation and providing relevant information. *Claes v Landesbanki determined* that obligations as defined under Article 2 of the directive pass onto to the liquidator. The employing entity is still intact. It does not provide for multiple claims as different actors leave and others take their place when the employer remains in being. The process conducted by the Liquidators was the consultation process. All facts are viewed against the requirements as set down by Article 2 from the date that a commercial decision is made that contemplates redundancy.

The consultation process must be pursued when a strategic/economic decision means that it is intended or contemplated that collective redundancies will take place. That decision even when made by an undertaking controlling the employer, falls on the employer to start the process. The employer in this case is Debenhams Retail (Ireland) Limited. The legal personality of the employer does not change when the liquidators are appointed. The consultation process required to commence on the 9th of April related to the employer who is Debenhams Retail (Ireland) Limited.

While it is argued that the HR Director in the first instance detailed the particulars of the collective redundancy and she also assisted the liquidator, it is not the case that there are two separate processes on the same facts. The fact is that Debenhams Retail (Ireland) Limited and Debenhams Retail (Ireland) Limited (in Liquidation) are the same entity for the purpose of this challenge. The consultation process related to that entity and whether the management at a point where in charge of the entity and then the liquidators is immaterial to the fact that it is the same consultation process arising from a strategic decision that contemplated or intended that collective redundancies would occur.

I find that there are only 2 complaints before me and not 4. The breaches that may occur during the consultation process maybe numerous; however, what is required based on the totality of the facts and having regard to sections 9 and 10; is to consider the following two questions: 1. was there meaningful consultation and 2. was there relevant information supplied? The fact that different actors were in charge of the process at different times does not mean that there were two separate and distinct consultation processes arising from the economic decision by the undertaking controlling the entity not to fund the employer.

Decision:

Section 41 of the Workplace Relations Act 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under Schedule 6 of that Act.

CA-00037923-001 and CA-00037837-001 pursuant to section 9 of the Protection of Employment Act 1977 as amended:

I have determined that these 2 complaints (against Debenhams Retail (Ireland) Limited and Debenhams Retail (Ireland) Limited (in Liquidation) lodged as separate respondents should be treated as one against the employer Debenhams Retail (Ireland) Limited. The consultation process must be pursued when a strategic/economic decision means that it is intended or contemplated that collective redundancies will take place. That decision even when made by an undertaking controlling the employer, falls on the employer to start the process. The employer in this case is Debenhams Retail (Ireland) Limited. The legal personality of the employer does not change when the liquidators are appointed. The consultation process required to commence on the 9th of April related to the employer who is Debenhams Retail (Ireland) Limited

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

I find the complaint to be well founded.

The process was required to commence earlier than it did. The consequence of commencing the process when the liquidators were appointed did narrow the options available to reduce the number of redundancies and to mitigate the consequences for those employees who would lose their jobs. The process when it started was not conducted in a meaningful way by the Employer as relevant information necessary so that the worker representatives could make constructive proposals was not to supplied to them. There is no evidence of any material change in what was proposed at the outset of the consultation and what was implemented. Having regard to these conclusions I determine that the Employer failed to meet the requirement to consult pursuant to section 9 of the 1977 Act and the Directive 98/59.

Section 11 A provides that:

11A. A decision of an adjudication officer under section 41 of the Workplace Relations Act 2015 in relation to a complaint of a contravention of section 9 or 10 shall do one or more of the following, namely—

(a) declare that the complaint is or, as the case may be, is not well founded,

(b) require the employer to comply with the provision of the Act of 1977 concerned and, for that purpose, to take a specified course of action,

(c) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all of the circumstances, but not exceeding 4 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.]

Having regard to the fact that the matter before me is a breach made under a Social Directive concerning the protection of employment the award must be effective and proportionate. Having regard to circumstances of this case I award 4 weeks compensation. The Complainant's weekly gross pay is €285 x 4 which amounts to €1140 compensation.

CA-00037923-002 and CA-00037837-002 pursuant to section 10 of the Protection of Employment Act 1977 as amended:

I have determined that these 2 complaints should be treated as one against the Employer.

The consultation process must be pursued when a strategic/economic decision means that it is intended or contemplated that collective redundancies will take place. That decision even when made by an undertaking controlling the employer, falls on the employer to start the process. The employer in this case is Debenhams Retail (Ireland) Limited. The legal personality of the employer does not change when the liquidators are appointed. The consultation process required to commence on the 9th of April related to the employer who is Debenhams Retail (Ireland) Limited

Obligation on employer to supply certain information.

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

I find the complaint to be well founded.

During cross examination by Counsel for the Respondent Mr Light stated that no constructive proposals were formulated. The Respondent stated that they did all in their power to provide all relevant information and that the requirement was relevant information and not all information was provided. The distinction between all relevant information and all information is important. However, I have concluded that the information sought by the Union representatives was relevant and not having that specific information frustrated their capacity to make constructive proposals.

Having regard to the fact that the matter before me is a breach made under a Social Directive

concerning the protection of employment the award must be effective and proportionate. Having regard to the circumstances of this case I award 4 weeks compensation. The Complainant's weekly gross pay is €285; therefore, I award €285 x 4 = €1140 compensation.

In summary, I find that the total amount to be awarded to the Complainant from the two complaints against the Employer is €2280.

I find that there are only 2 complaints before me and not 4. The breaches that may occur during the consultation process maybe numerous; however, what is required based on the totality of the facts and having regard to sections 9 and 10; is to consider the following two questions: 1. was there meaningful consultation and 2. was there relevant information supplied? The fact that different actors were in charge of the process at different times does not mean that there were two separate and distinct consultation processes arising from the economic decision by the undertaking controlling the entity not to fund the employer.

Please note that the complaints submitted under Adj38906 and Adj41248 have been determined by me to be duplicate complaints lodged against different named respondents who in fact are the same employer as defined under the Directive. I am of the view that there is a single respondent employer and as such one decision has issued in relation to both adjudication files referenced.

Dated: 15th May 2023

Workplace Relations Commission Adjudication Officer: Brian Dalton

Key Words:

Consultation, Relevant Information, Collective Redundancies, Debenhams, Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies