



The impact of bankruptcy on restructuring in the UK tourism sector: XL Leisure *EMCC case studies*

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Introduction

The collapse of package-holiday giant XL Leisure Group made front-page news in September 2008, with tens of thousands of British holidaymakers stranded in airports across Europe and hundreds of employees made redundant. As the company's assets were frozen, flights grounded and holidays cancelled, the scale and nature of the meltdown quickly became apparent. Indeed, the operator's demise was one of the earliest examples of the credit crunch affecting businesses. The size of debt amassed by XL Leisure, its previous failed restructuring, uncontrolled growth and mounting overheads meant that the company had been on the brink of insolvency for some time. The precarious financial situation into which the Group had sunk prior to collapse was only exacerbated by the economic downturn. The resulting hardships for employees and customers have raised questions over the way in which tour operators in the UK are run and how restructuring and insolvency in this industry are managed under less favourable market conditions.

XL Leisure Group plc was a large travel and leisure company with offices in the UK, Ireland, France and Germany.¹ As of October 2007, the Group was the third-largest tour operator in the UK with a total turnover of GBP 549.4 million per the audited accounts (BVDEP 2009, FAME database). The company's XL Airways unit offered chartered passenger transportation to around 50 destinations in Europe, the Mediterranean, North Africa and North America. Its fleet of about 32 jets were based at airports throughout the UK and in France and Germany. Other XL units, including Aspire Holidays Limited, Freedom Flights and Kosmar Villa Holidays, sold tour packages.

The main headquarters of XL Leisure Group plc were located at Explorer House, Fleming Way, Crawley (UK), but trading operations were also conducted from various premises in London, Swansea, Cardiff and Blackpool. In addition, the companies within the Group also had a number of crew rooms at UK airports, including Gatwick, Manchester, Bristol, Glasgow, Newcastle, East Midlands and Cardiff. As of October 2007, the company had 1,698 UK-based permanent employees, excluding a number of employees working overseas and the temporary workers. According to company records, staff included approximately 850 cabin crew members and trainers, 30 employees dealing with control and maintenance issues in various airports, 350 employees in the Crawley headquarters, 34 in Southgate and approximately 95 employees in Blackpool.²

¹ The company changed its name from Excel Airways Group plc to XL Leisure Group plc on 23 November 2003.

² The Joint Administrators of XL Leisure Group provided the staff figures, drawing upon company records. However, they emphasised that the company records may not be wholly accurate.

Timeline of the company's collapse

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In September 2008, XL Leisure Group shut down its UK operations. Eleven companies within the XL Leisure Group of companies were placed into administration by the Court at 01.00 on 12 September 2008: XL Leisure Group plc, Travel City Flights Limited, XL Airways UK Limited, Excel Aviation Limited, Explorer House Limited, The Really Great Holiday Company plc, Medlife Hotels Limited, Aspire Holidays Limited, Freedom Flights Limited, Freedom Flights (Aviation) Limited and Kosmar Villa Holidays plc. The other entities in the Group are dormant or non-trading, according to the Joint Administrators' Report and Statement of Proposals (Zolfo Cooper, December 2008).³ However, the French and German subsidiaries have remained in operation. The structure of the Group under administration is presented in Figure 1. The shaded boxes represent the 11 companies.

The business had been under financial strain and had underperformed in terms of operating profit for various reasons since 2007 (Chief Executive Officer's statement for the year ended 31 October 2007). One of the causes for this goes back to December 2006, when a management buyout group led by Philip Wyatt (XL's former CEO) bought the XL Leisure Group from the Icelandic investment group Avion, now known as Eimskip;⁴ Landsbanki, an Icelandic bank, provided €212 million of the acquisition finance.⁵ Consequently, the XL Leisure Group became 'highly leveraged with a significant amount of debt on its balance sheet' (Joint Administrators' Report and Statement of Proposals, 2008). Also in 2006, KPMG resigned as XL Leisure auditors, citing material errors in the company's accounts (ACCA, 2008). Various sources suggest that KPMG's resignation was due to the identification of 'potential accounting irregularities' that were ignored by the XL board (Huber, 2008). According to one of the sources, this related to XL Leisure's arranging to delay the payment of invoices to Alpha Airports, an airline catering company, which flattered the company's final figures (O'Connell, 2008).

Albeit under financial strain, the business continued to expand at a rapid pace during 2007 with the acquisition of the German and French subsidiaries. The French business was acquired for a total price of €87.2 million and the German company for a total of €21.7 million. The rapid business expansion did not bring quick returns and the liquidity problem became severe with the continual rise of fuel prices throughout 2007. In an interview in 2008 following the collapse of the company, Phil Wyatt, its former chief executive, emphasised the devastating impact of fuel prices on the businesses' profitability:

'Unfortunately, the huge fuel price hike and the inability of the business to hedge all its fuel has increased our costs year on year by over \$80 million. So where many people have been making hay with high oil prices, this is the repercussions of that hay - 1,700 people potentially out of work today in the UK' (BBC News Channel, 2008).

³ Formerly known as Kroll Corporate Advisory & Restructuring and formed in November 2008 following a management buyout from Kroll Inc., Zolfo Cooper is a leading international provider of advisory and restructuring services.

⁴ It is worth noting that Eimskip retained a 49% stake in the aircraft trading business, which was part of the Group.

⁵ The acquisition price mentioned in the report is USD\$280. The sum was converted using the USD/EUR exchange rate as of 1 December 2006, available online at: http://ec.europa.eu/budget/inforeuro/index.cfm?fuseaction=dsp_html_monthly_rates&Language=en.

Figure 1: Group structure

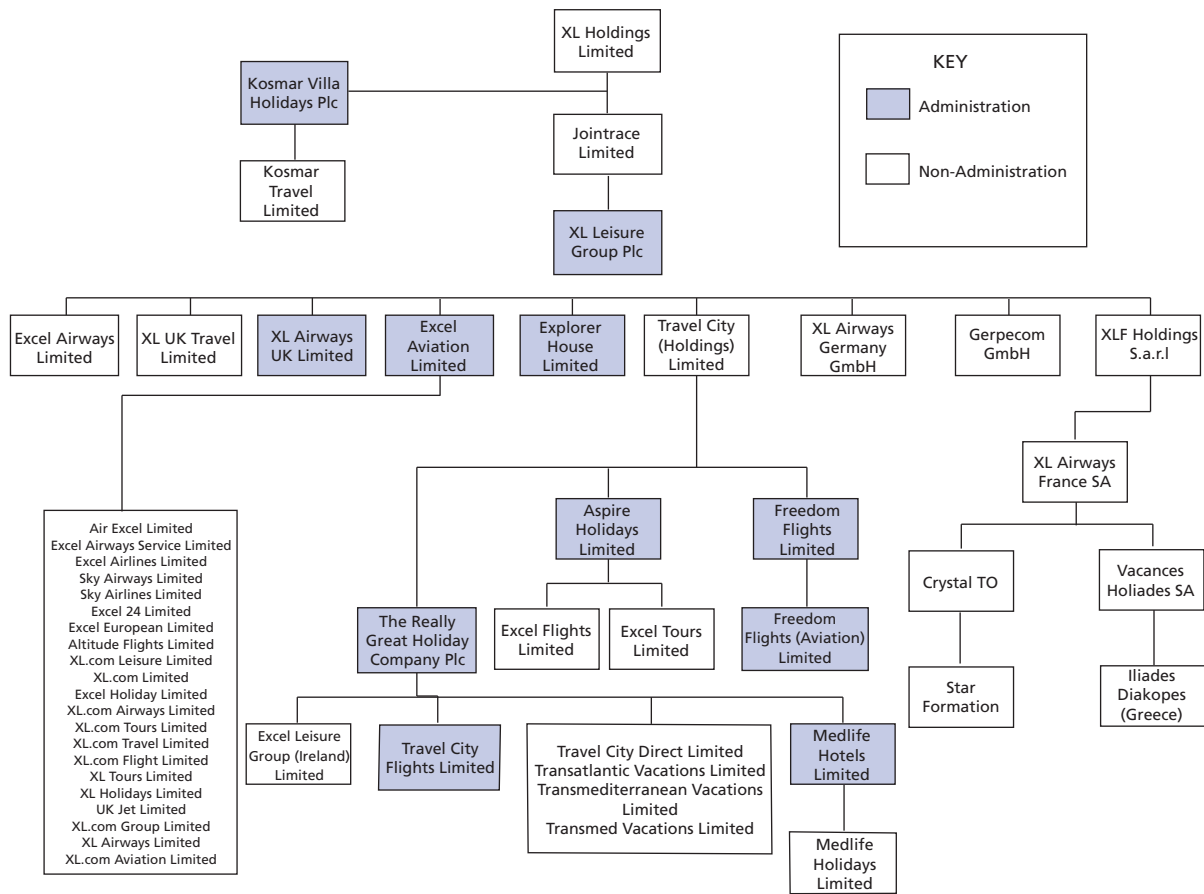


Table 1 reveals the worsening performance of the company over the years and the increasing accumulation of debt.

Table 1: Financial summary of the Group

	2007 (GBP, million) as of 31/10/2007	2006 (GBP, million) as of 31/10/2006	2005 (GBP, million) as of 31/10/2005	2004 (GBP, million) as of 31/10/2004	2003 (GBP, million) as of 31/10/2003	2002 (GBP, million) as of 31/10/2002
No. of employees	2,091	1,583	1,092	831	592	455
Turnover (GBP, million)	549.4	504.9	431.4	319.2	247.3	182.3
Profit/(loss) before taxation (GBP, million)	-7.1*	-9.8	18.4	20.9	13.3	3.3
Return on shareholder funds (%)	-16.28	-50.40	59.57	94.35	88.59	232.83
Return on capital employed (%)	-11.07	-19.30	45.00	82.60	78.20	188.19
Remuneration (GBP million)	54.4	40.2	27.19	21.4	16.6	13.7
Social security costs (GBP million)	4.6	3.2	2.5	1.8	1.4	1.1
Directors' remuneration	1.02	1.5	1.3	990,000	844,000	1.4

Note: *The operating loss was GBP 23.6 million.

Source: FAME database, BVDEP 2009

In the summer of 2007, the management did try to improve the company's cash flow and launched a two-year restructuring programme called Fit for the Future with a view to improving the company's profitability. According to the restructuring plan, the company made over 500 UK-based employees redundant as a direct result of a rationalisation of its flight schedule (Report and Financial Statement, 2007).

Highly leveraged companies such as XL Leisure may be able to survive in prosperous economic conditions, but in the context of the credit crunch that started to bite in 2008, the funding for this type of business quickly dried up. The Group's financial difficulties worsened in 2008, primarily because of increased fuel costs, a decline in consumer demand, excess capacity in the travel industry, fuel suppliers' demanding immediate cash payment for services and banks' shaken confidence in recouping the money lent (joint administrators' reports, 2008; Done et al, 2008). In May 2008, the company reported a GBP 23.6 million loss for the financial year to October.

BALPA,⁶ one of the two trade unions representing the flight crew of XL Leisure Group, had led discussions with the company since the summer of 2008, when the signs of the internal financial turmoil became more obvious to the staff and trade unions. At that time, the company could not meet its wage increase commitments and BALPA consulted with accountants in order to scrutinise the company's financial situation. Other early signs of

⁶ BALPA is the Pilots and Flight Engineers trade union and professional association representing members of UK airlines.

the company's financial hardship were reported by members of crew who became aware of the unpaid fuel bills piling up. The analysis confirmed the company's grim financial situation, which at that time was heavily indebted to the Icelandic bank, Landsbanki. One of the hypotheses for the fact that the company was still trading despite its severe debt was that its collapse would have triggered a ripple effect in other markets in Iceland.

In August 2008, XL's main creditors (banks) were the Icelandic bank Straumur-Burdaras⁷ and Barclays. In that month, Barclays froze credit to XL Leisure Group after several missed payments and decided to convert its credit facility into a loan. Under these conditions, the Icelandic bank, Straumur, which was nationalised a few months later, continued to provide minimal credit to keep the business running, but it was soon acknowledged that there was insufficient funding to keep the Group trading through the winter season. At the end of the summer season, the credit was crucial for XL Leisure because the company was in debt and was operating in an industry characterised by seasonality, winter deficits, high risks and low profit margins. Cost efficiency is one of the key survival factors for low-cost charter airline companies such as XL Airways UK. According to administrators' 2008 report, at the time of the collapse in September 2008, 'the Group had outstanding debt and guarantees in the order of £400 million across a number of lenders and financial institutions with differing security interests'. The debt and other guarantees also included outstanding liabilities related to bonding and hedging. Hedging is a business strategy practised by various financial and non-financial firms that take on a new risk to minimise the exposure to an existing risk, such as exposure to an adverse change in commodity price or exchange rate. Airline companies, for example, hedge their exposure to rising oil prices.

Due to the nature of the business and the interlinked company structure of the Group, all the companies had to enter administration to preserve the value of any realisable assets.

On the same note, the administrators emphasised that due to the nature of the business, XL Leisure's downfall is an example at the very end of the restructuring spectrum where companies do not have time to restructure the business and are faced with no choice but to close it down. According to the UNITE representative, this type of abrupt company closure is becoming more common amongst travel companies mainly operating short-haul holidays, such as XL Leisure. Airline companies flying long-haul routes seem to be in a better cash position and are less vulnerable to rapid financial meltdown. This may relate to the fact that in Europe, the majority of the flights to short-range destinations take place between May and October, while in the remaining months, only a small part of a short-haul fleet can be used (Delfmann et al, 2005). Companies that operate long-haul planes are less affected by seasonality and cyclical cash flow, as was the case of XL France, which together with XL Germany remained in operation after the collapse of XL Leisure in the UK. The two subsidiaries had a different business model, mainly operating scheduled flights to long-haul destinations and charter flights to medium-haul destinations.⁸

⁷ In August 2005, the directors of Burdaras, along with Straumur Investment Bank Ltd and Landsbanki Islands hf., agreed to merge. The merger was accepted by the Financial Supervisory Authority. See <http://www.straumur.net/en/About-Us/History/>.

⁸ XL Leisure Group's 2007 Report and Financial Statement.

Legal context for company bankruptcy and collective redundancies

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Insolvency proceedings in administration

Administration is managed by an authorised insolvency practitioner, who holds a license to act as administrator, appointed to manage all the business and property of the insolvent company. Insolvency describes the situation when ‘an employer has no money to pay the people they owe in full and they have to make special arrangements to try to meet these debts’ (Directgov, ‘Your rights’).

According to the UK Insolvency Service, the administration has three objectives:

- ‘Company rescue (as a going concern) being primary.
- If that is not possible (or if the second objective would clearly be better for the creditors as a whole), the administrator can achieve a better result for the creditors than would be obtained through an immediate winding-up of the company, possibly by trading on for a while and selling the business/businesses as a going concern.
- Only if neither of these objectives is possible, can he realise property (sell assets to somebody) to make a distribution to secured and/or preferential creditors’ (Insolvency Service, 2008a).

Under the Enterprise Act 2002, the administration procedure has been revised with a view to prioritising the rescue of the company whenever possible. In light of this revision, the administrator’s first duty is to consider rescuing the company in order to preserve viable businesses and safeguard jobs. According to the 2002 Act, the period of administration is limited to one year, but this can vary from one case to another depending on creditors and court decisions.

Redundancy consultation and notice in insolvency cases

Part XII of the Employment Rights Act 1996 covers employees’ rights in insolvency cases. It is mentioned from the beginning that courts and employment tribunals do not consider insolvency on its own to be a ‘special circumstance’ that would deter employers from fulfilling their duties of redundancy notification and consultation. In practice, however, previous cases of insolvency suggest that it may not always be reasonably practical for the employer to *fully* meet the advance consultation requirements.⁹ Even in these cases, the employer is expected to take all reasonably practicable steps toward meeting the consultation and notification requirements. Otherwise, the employer is obliged to provide the full reasons for failing to meet the legal requirements. ‘Special circumstances’ acknowledged by law are interpreted contextually by employment tribunals, and this aspect is the subject of an ongoing debate in the case of XL Leisure. A collective redundancy situation arises where 20 or more employees are to be made redundant at one establishment within a period of 90 days or less for reasons unrelated to the actions of employees.¹⁰ The employer who plans to make collective redundancies is legally required to consult in advance with representatives of the affected employees. In the case of employees represented by a recognised independent trade union, the employer must inform and consult with the authorised national and/or regional official(s) of that union. In the case of non-unionised employees, employers must inform and consult the appropriate representatives of the affected employees. The consultation should cover measures to avoid dismissals or jobs reduction as well as limit their negative consequences.

⁹ See the *Clarks of Hove v Baker Union* case described in ‘Insolvency and “special circumstances”’ (Accountancy magazine, 1977). See also Shaw (1978).

¹⁰ Collective redundancy provisions mainly apply to compulsory redundancies, but in some circumstances may also apply to ‘voluntary’ redundancies. For example, the employer is still obliged to consult with employees and notify BERR in situations where 20 or more redundancies are planned and there is uncertainty around whether there will be sufficient volunteers.

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 stipulates that the consultation with employee representatives must begin:

- ‘(a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect;
- (b) where the employer is proposing to dismiss as redundant at least 10 but less than 100 employees at one establishment within a period of 30 days or less, at least 30 days before the first of those dismissals takes effect’.

Furthermore, the employer needs to notify the proposed redundancies to the Department for Business, Enterprise and Regulatory Reform (BERR) in the UK. As of 1 October 2006, notifications to the BERR must be made in due course before any redundancy notices are sent to affected employees. This would allow the relevant local government offices and agencies to be alerted and prepared to take any appropriate measures to assist or retrain the employees in question.

Most importantly, the responsibility for consultation rests with the employer before the appointment of administrators. However, as it is acknowledged that not all employers follow the consultation requirements, the duty falls to the appointed insolvency practitioner when the employer becomes insolvent (Insolvency Service, 2008b). In such situations, insolvency practitioners are encouraged to consult the employee representatives, although it is recognised that little can be done if the employer failed to carry out his duties. It is recommended that where an insolvency practitioner consults the employer in advance, he or she should advise the employer to start the redundancy notification and consultation process as soon as possible, before filing for bankruptcy. They are also encouraged to point the employer to the Jobcentre and other local service providers for information on local assistance at this early stage in the insolvency proceedings.

An employer’s failure to consult with employee representatives may lead to employees bringing complaints to an employment tribunal, which must normally be brought within three months of the dismissals. In such situations, if the tribunal finds a complaint justified, it may take steps to safeguard the employees’ remuneration by making a protective award, whether or not the employees are still employed. The period of the award is determined by the tribunal and may be up to a maximum of 90 days. These provisions apply regardless of how long employees have worked for their employer or for how many hours a week they are employed.

According to the Trade Union and Labour Relations (Consolidation) Act 1992:

- ‘a protective award is an award in respect of one or more descriptions of employees
- (a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and
 - (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188, ordering the employer to pay remuneration for the protected period.’

Since 2008, an employer who fails to comply with these provisions may also be liable on summary conviction to a fine of up to Level 5 on the standard scale – currently GBP 5,000. As mentioned by the Insolvency Service, as the employer is in liquidation, no prosecution case may be brought without the permission of the liquidator or the court. However, it is understood that in the case of insolvent companies, it is not in the public interest for the

Minister to seek to prosecute the employer for failure to notify collective redundancies in advance, as this would impose an extra financial burden on the insolvent employer and reduce any possible repayment that may be made to creditors from the sale of the assets.

It is also acknowledged that it may not be possible for the employer or administrator to fully meet the requirements for minimum notification periods. In such situations, the employer or administrator may not incur a liability if they can demonstrate the existence of any special circumstances that held them back from meeting the requirements. Even in these situations, the employer has the obligation to take 'all reasonably practicable steps toward meeting the requirements and explain why they cannot be met in full' (Insolvency Service, 2008b). As indicated above, insolvency per se is not a special circumstance because it seems reasonable to assume that an employer would know about the likelihood of insolvency through their daily business dealings and bookkeeping.

Redundancy pay in the case of insolvent businesses

Redundancy and insolvency

Insolvency practitioners have a dual responsibility: a responsibility towards creditors, including employees, under the insolvency legislation; and a statutory responsibility to inform the Secretary of State of the amount of any unpaid debt owed by the insolvent employer to any employee who is making payment claims to the secretary of state through the Redundancy Payments Offices (Insolvency Service, 2008b). The latter statutory responsibility is stipulated in Section 187 of the 1996 Employment Act.

Claims to pay in insolvency cases

If the employer is declared insolvent and there are no assets left from which to pay the entitlements due to employees, the redundant employees can apply for a direct payment from the National Insurance Fund (NIF) (Directgov website). Under the insolvency provisions of the 1996 Employment Act, the Secretary of State for the BERR is responsible for making payments from the NIF. As laid down in part 12 of the 1996 Act, the Redundancy Payments Offices (RPO) of the Insolvency Service pay certain entitlements owed to former employees of insolvent businesses, such as claims related to redundancy pay, wages, holiday pay, notice pay, basic award for unfair dismissal, etc. It is worth mentioning that wages can include protective awards.

Her Majesty's Revenue and Customs (HMRC) is responsible for entitlements continuing on after the insolvency date, such as statutory sick pay, maternity pay, paternity and adoption pay. The necessary claim forms can be obtained from any Jobcentre.

Under such circumstances, staff will only be entitled to the minimum statutory redundancy payments, but not to any enhanced payments to which they may have been contractually entitled. More specifically, as of 1 February 2009, the statutory limit on what counts as a week's pay has been set at GBP 350 by BERR. However, the employees' contracts of employment can contain more generous provisions about redundancy payments e.g. payments linked to wage and years of service, but if the employer goes out of business and the government steps in to cover redundancy payments, then the employee will lose his or her right to more generous discretionary redundancy payments. In the case of XL Leisure employees, it is known that the cabin crew and ground staff were only entitled to the statutory payments, while pilots with more than two years of employment were entitled to

enhanced redundancy payments (inclusive of statutory entitlement) of one month's gross pay.¹¹ Consequently, the sums recoverable by pilots from RPO will be capped and will not reflect all their contractual losses.

With regard to how common it is for UK employers to pay more than the minimum redundancy pay, the *Labour market outlook: Redundancy* special survey by KPMG and the Chartered Institute of Personnel and Development (CIPD) found that 50% of employers offer redundancy deals above the statutory minimum (KPMG and CIPD, 2008).

If the employer is legally insolvent, the employees can claim the following separate payments (Insolvency Service, 2008b):

- redundancy payment depending on the number of years served in a particular age band (up to a maximum of 20 years) and the weekly wage (limited to GBP 350). The maximum number of weeks payable is 30, which applies only to those aged over 61 with 20 or more years of service;
- arrears of pay for one or more weeks (but not more than eight weeks);¹² this includes a protective award which is treated as wage;
- holiday pay accrued 12 months prior to the insolvency date (up to a maximum of six weeks);
- compensatory notice pay (any income the employee would have received or should have received during the statutory notice period);
- basic award for compensation for unfair dismissal (made by a tribunal);¹³
- unpaid pension contributions.

Most importantly, under the Insolvency Act 1986, certain employees' claims are given priority i.e. they must be paid before other debts are paid: holiday pay, arrears of pay, protective award and certain occupational pension contributions. Notice payments, redundancy payments, damages for unfair dismissal and other expenses are considered to be unsecured debts and are lower in the order of propriety.

If the employee is owed more money, then the remaining payments can only be paid if sufficient funds are realised from the company's assets.

Redundancy payment covers the payment that the redundant individuals would normally have been entitled to from their employer. To qualify for a redundancy payment from the NIF, an employee must have worked continuously for the employer for two years or more. However, this qualifying period does not apply to other claims, such as notice pay, holiday pay or compensation for unfair dismissal, which have various qualifying periods.

To claim redundancy payment (as well as other claims, e.g. wages, holiday pay), redundant employees have to first write to their employer asking for redundancy pay. If the employer is unable to pay, the employee should then fill out a RP1 form, available from the Insolvency Service (Directgov, 'Redundancy pay').

¹¹ Information provided by representatives of trade unions.

¹² The unpaid wages are calculated as follows: the number of weeks (or part-weeks) for which the employee was not paid (up to the eight-week limit) is multiplied by the weekly wage up to the statutory limit in force at the date of insolvency (GBP 350 a week).

¹³ The basic award is calculated as a multiple of a week's pay, taking into account years of service and age of the claimant.

Arrears of pay may include unpaid wages, overtime, bonuses, payment under protective award made by a tribunal if the employer has failed to consult employee representatives about a collective redundancy etc. Under the Employment Rights Act 1996 (section 184), wages include a protective award made by an employment tribunal if the employer has failed to consult the employee representative about a collective redundancy. Unpaid maternity pay or sick pay can only be claimed from HMRC and from the Department of Work and Pensions, respectively.

An employment tribunal can make a 'protective' award of up to 90 days' pay, depending on the seriousness of the employer's failure to consult. As it is paid out from the NIF, the protective award sum is also capped. A payment due to an employee under a protective award made by an employment tribunal under section 189 of the Trade Union and Labour Relations Consolidation Act 1992 is payable in insolvency cases and is treated as arrears of pay.

Holiday pay can be paid for up to six weeks, to the limit of GBP 350 a week.

Compensatory notice pay: Employees can also claim compensation if the insolvent employer failed to give them the minimum statutory notice.

Under Section 86 of the 1996 Employment Act, 'the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more

- (a) is not less than one week's notice if his period of continuous employment is less than two years,
- (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years, and
- (c) is not less than 12 weeks' notice if his period of continuous employment is 12 years or more'.

In such situations, employees can get what they would have earned if they had been allowed to work during the notice period. Compensatory notice pay is the equivalent of one week after the first calendar month's service, increasing to one week per year of service up to a maximum of 12 weeks (subject to mitigation of income received during that period). The statutory maximum of GBP 350 also applies to notice pay.

Unfair dismissal

Unfair dismissal is a statutory right giving employees with one year's service the right to complain to a tribunal that their employment ended unfairly or unreasonably. Under certain circumstances, dismissals may be 'automatically unfair' without requiring a minimum qualifying period.

Certain categories of workers are excluded from the insolvency provisions of the 1996 Employment Act. These categories include self-employed or a member of a partnership as well as employees who normally work outside the UK, 'unless they have enough connection with the UK to bring themselves within the scope of the ERA' (Insolvency Service, 2008b). Connection is defined in relation to the employee's contract of employment, paid taxes and received benefits (if any). If the sale of a company's assets realises enough money, these categories of employees may be paid directly from the insolvency. People who are usually not covered by the term of employee, e.g. partners of a business, company directors, independent contractors or freelancers, do not qualify for the pay either.

The minimum statutory redundancy payments are calculated by taking three factors into account:

- the employee's amount of continuous service, subject to the minimum of two years and a maximum of 20 years;
- the employee's age:
 - a) persons aged under 22 receive 0.5 week's pay for each full year of service;
 - b) persons aged between 22 and 41 receive one week's pay for each full year of service;
 - c) persons aged 41 and above receive 1.5 week's pay for each full year of service;
- the employee's weekly pay, up to a limit imposed by law (currently GBP 350 per week).

It is worth noting that income tax and national insurance at the basic rate are deducted from this amount. The statutory limit of a week's pay of GBP 350 is reviewed annually and adjusted in accordance with the September Retail Price Index (i.e. prior to 1 February 2009).

Furthermore, there is another factor that relates to the potential entitlements that are lost in insolvency: if the employees win a protective award because the employer failed to meet the notification and consultation requirements, then the award, together with all other arrears of pay, will count towards the limit of eight weeks of pay, capped at GBP 350 a week. Therefore, in such situations the employee is likely to be left a long way short of the full protective award, which is based on actual salary, not capped.

The procedure stipulates that employees must first claim the pay directly from the employer. If the employer is unable to pay, the employees can apply to the NIF by filling out a RP1 form, available from the Insolvency Service. The insolvency practitioner dealing with the affairs will usually issue the RP1 forms and the relevant guide for employees on the insolvency of their employer (Insolvency Service, 2008b). The employees must then return the completed RP1 forms to the insolvency practitioner, who will verify and forward the claims to the relevant RPO as soon as possible. According to the Insolvency Service, the RPO usually processes the claims within three weeks of receipt (78% of claims) to six weeks of receipt (92% of claims), checking the information from both employees and insolvency practitioners. According to the Insolvency Service, the majority of claims made by the former employees at XL Leisure were paid within this timeframe.

However, the overall payment process may take longer for some employees, depending on how quickly the redundant employees fill out the forms. It is acknowledged that in the XL Leisure case, the process can take between three weeks and up to one year.

The redundant employees can dispute the amount paid from the NIF by taking the matter to an employment tribunal (Directgov, 'Your rights').

Summary

Drawing upon the information above, one could summarise the employees' main problems in insolvency cases as follows. When a company decides to make employees redundant and is not placed in administration, trade unions can step in to attempt to obtain the greatest payout possible for its members in such circumstances. First, employee representatives open a dialogue with the company with the aim of finding a way of reducing the

numbers of members dismissed in the first place and to work together to find a way for the business to continue. Second, trade unions can lead talks to ensure better redundancy terms for their members. However, in administration cases when the company goes out of business, there is limited, if any, scope for negotiation, as there is no interest in maintaining a good relationship with the union and its retained staff.

Furthermore, because of the administration process in the UK (see the next chapter), administrators usually have to move quickly under these circumstances, and they often act in breach of the consultation and notification requirements as well as other statutory dismissal procedures. Hence, employees and their representatives have little time to prepare for the negative impact of the collective redundancy. Although employees may be entitled to an award for unfair dismissal and a protective award for lack of consultation, their payments guaranteed under the insolvency provisions will be subject to the statutory limits mentioned above. As a rule, the cap of GBP 350 per week's pay (due to increase to GBP 380 in 2009), which applies to all payments under these circumstances, is still below the average weekly pay, which at the time of the report stood at GBP 505 (Peacock, 2009). In relation to this, trade unions in the UK have recently been calling for the figure to be raised to GBP 500 a week to reflect the real cost of losing a job. It is also acknowledged that when employers are able to pay the redundancy pay, they can often pay more than the legal requirements (Taylor, 2009). As a rule, when there are no assets left from which to pay the entitlements due to employees, employees receive sum payments that rarely reflect all the losses. Any additional payments due to the employees are only paid if there are sufficient sums realised from the asset sales. Due to the huge debts of XL Leisure, it is highly unlikely that the former employees will benefit in any way from the company's liquidation.

There is also another aspect. As was already mentioned, when employers fail to fulfil their consultation duties, administrators can do little about it within the given time and financial constraints. This is particularly challenging for employees who are not members of a trade union. In the case of XL Leisure, a great number of employees (approximately 1,000)¹⁴ were not members of a trade union. In such cases, should they wish to apply for an award for unfair dismissal, the employees have to complete and submit their own applications on an individual basis to the employment tribunal. Otherwise, in the case of trade union members, trade unions can submit applications for unfair dismissal to the employment tribunal on behalf of the former employees or directly assist the employees throughout the process.

¹⁴ Based on the number of union members that was provided by the two trade unions involved, UNITE and BALPA.

Administration and redundancy process at XL Leisure

4

Administration strategy

Being unable to pay its debts, XL Leisure applied to go into administration on 11 September after a hearing overseen by a high court judge. The court ordered that the 11 companies belonging to the XL Leisure Group be placed into administration at 01.00 on 12 September 2008. Alastair Paul Beveridge, Mark Nicholas Cropper, Simon Jonathan Appell and Stuart Charles Edward Mackellar, who are licensed insolvency practitioners, all of Zolfo Cooper, were appointed joint administrators of the company. Administrators take control of a company with the aim of rescuing it or, if that proves impossible, of trying to achieve a better result for the creditors than would be possible if the company was directly wound up (i.e. by liquidation).¹⁵ In such situations, a company's funds are automatically placed in the control of administrators, whose principal duty is to the creditors of that company while preserving employment is far down in the list of priorities.

As specified in the Joint Administrators' Report and Statement of Proposals (Zolfo Cooper, December 2008) and in line with the Enterprise Act 2002, the role of the administrators of XL Leisure Group is:

'Rescuing the Company as a going concern, or

Achieving a better result for the Company's creditors as a whole than would be likely if the Company were wound up (without first being in Administration), or

Realising property in order to make a distribution to one or more secured or preferential creditors.'

The first option would contemplate the survival of the existing companies through a Company Voluntary Arrangement (CVA) or a Scheme of Arrangement under Section 425 of the Companies Act. However in the case of XL Leisure, this option was not considered feasible because it would have required an injection of a large sum of money that was not available from the banks. Administrators finally decided to pursue the second objective through the sale of the tour brands and/or assets of the companies with the view to making at least a partial payment to its preferential creditors e.g. banks, employees (Joint Administrators' Report and Statement of Proposals, 2008).

It is worth emphasising that the primary duty of the administrator in such cases is 'to look after creditors and try to get back the maximum he can from the assets of the company', i.e. maximising the realisation of value for creditors. In different civil law jurisdictions, e.g. French jurisdiction, the overriding duty in cases of insolvency is different, that is, to preserve employment. Only after this objective has been fulfilled are creditors taken care of.

The administrators were familiar with the case of XL Leisure Group before the company filed for bankruptcy, as they had acted as advisors of one of the creditors financing the XL Leisure Group. By July 2008, one of the banks was worried about the cash position of the Group and asked for expert advice from Zolfo Cooper. Zolfo Cooper, a corporate restructuring specialist, looked into the Group's performance to try to understand the company's cash flow, taking into account the business cycle in this sector, where cash flow is not constant, depending as it

¹⁵ Liquidation refers to the winding up of a company after a petition to the court, usually made by a creditor owed a certain amount of money (Insolvency Service, 2008).

does on seasonal consumer demand. The experts reached the conclusion that funding sources may not be able to finance the company adequately in the near future, and therefore, preparation plans should be made in the eventuality of insolvency. Zolfo Cooper did a significant amount of planning work, taking into account the size of the business as of late summer 2008. Consequently, when the administrators at Zolfo Cooper were formally appointed on 12 September 2008, they felt they were prepared to answer enquiries from employees, the Civil Aviation Authority (CAA), auditors, etc.

Having said that, however, it is reasonable to contend that the planning work was not used by the employer to take any meaningful steps towards consulting the employee representatives about the imminent financial collapse and redundancies. At that time, it is reasonable to assume that the employer was fully aware of the severe financial problems through his daily dealings and bookkeeping.

Sale of the French and German subsidiaries

The French and German operations of the XL Leisure business were profitable and the joint administrators decided to sell the shares of XL Group in these two assets on 12 September 2008. According to administrators, the two businesses were not generating enough cash to compensate for the losses occurred on the UK side. The sale proceeds (minus associated professional costs) were to be distributed to Straumur-Burdaras Investment Banks, XL's main lender (Joint Administrators' Report, 2008). When the Group was placed in administration, Straumur bank – the main investor in the XL Leisure Group – agreed with each company of the XL Group to provide a loan to ensure a controlled wind-down of the businesses. The loan was expected to be paid back from asset realisations from each of the Group's companies (Joint Administrators' Progress Report, 2009).

The administrators emphasise that the French and German companies were completely separate from the English companies and were based on a different business model. The strong long-haul market and the different business model, which was more resilient in economically distressed times, enabled XL Airways France 'to generate a highly profitable operating income in 2006/2007 and 2007/2008' (XL Airways France, 2008).

However, trade unions reported that they were not consulted when XL Airways France and XL Airways Germany, the only profitable and financially viable operations within the XL Leisure Group UK, were sold to Straumur-Burdaras Investment Bank in a pre-pack deal. During the late summer and early autumn of 2008, when the trade unions were aware of the Group's financial difficulties, it was believed that the two debt-free companies could have covered a great part of the Group's debts.

It seems that prior to filing for bankruptcy, the management had a similar view on this matter but decided not to sell the two assets before having explored all the possibilities of refinancing XL Leisure. Phil Wyatt, former chief executive of the XL Group, said: 'If we had sold those two assets in an orderly market, we would have covered the majority, if not all, of our debts ... In July we had tested the market with a short teaser on XL France. This was carried out by an investment bank and we received positive replies from Thomas Cook and Tui' (Huxley, 2008). In the context of the economic downturn, however, Wyatt admitted that that decision turned out to be erroneous: 'Unfortunately, we were so confident of the banks refinancing XL that we did not take this process any further. In hindsight, this was a mistake' (Huxley, 2008).

The two companies continue to operate today with around 600 employees. Straumur-Burdaras Investment Bank eventually acquired both XL Airways France and XL Airways Germany (XL Airways Germany, 2008).

Redundancies

Redundancy notification

Across the Group, 1,525 employees, including ground staff, cabin crew and flight crew staff, were made redundant upon appointment of administrators in the early morning of 12 September 2008 (the administrators were appointed at 01.00). BALPA and UNITE representatives confirmed that they were informed of the planned redundancies in the early hours of 12 September. According to the BALPA representative, a few hours later, before 08.00 employees as well as trade union representatives met onsite with the management of the company and were informed of the bankruptcy and immediate redundancies. As one of the former employees of XL Leisure Group said, the news 'was a shock to everyone'.

Strong reactions came on the same day. 'This is a terrible and brutal experience for passengers and staff alike,' said Jim McAuslan, general secretary of the British Airline Pilots' Association. 'Passengers have lost their holidays, our pilots have lost their jobs. Over the past months, we have worked to keep XL going, including foregoing pay rises, so the announcement is a major blow' (BBC News, 2008a). Brian Boyd, the national officer of UNITE, the trade union that represented more than 300 cabin crew and ground staff, said, 'Airlines that are struggling in the present climate are treating their workforce and the trade unions representing them with contempt' (BBC News, 2008b). 'There are a lot of people who woke up this morning without work, but we will have to just try and stay upbeat', remarked one of the former XL air stewards (BBC News, 2008b).

BALPA representatives suggested at the time that the company could keep trading by allowing XL pilots to play a role in the extensive plan to repatriate XL customers who were abroad at that time. However, due to the company's insolvency, this was not possible and no alternatives to redundancies were considered. Administrators reported that 'all known employees of the Companies were notified as soon as reasonably practicable following the appointment of the Joint Administrators with Zolfo Cooper staff in attendance from 1 a.m. on 12 September 2008 on site at each of the airports and offices' (Joint Administrators' Report and Statement of Proposals, 2008). The short notice given by administrators needs to be understood in the broader UK legal context, where, as administrators suggest, there seems to be a potential 'mismatch' between the consultation requirements and insolvency legislation. When an employer decides to put the company in administration without having consulted the employees in due course, the administrators do not have the financial resources and time to delay the implementation of this decision, since during the consultation process, employees have to be employed and paid for a longer period of time than would otherwise be the case, which was not possible in the XL case. In situations of financial distress, redundancy notification and consultation with employee representatives in advance is considered to be difficult, if not impossible. In this particular case, the immediate redundancy plan was deemed to be the only measure that could be taken, as the 32 planes across the insolvent airline's aircraft could no longer operate. To keep the aircraft operating, the administrators would have required 'an indemnity agreement' to cover them against the liabilities associated with running an airline in such situations. Although the CAA and administrators were willing to use the XL aircraft for the repatriation of customers, the indemnity had to be first approved by the Department for Transport, which declined to extend such an indemnity. In a letter from the secretary of state (dated 10 October 2008), Geoff Hoon of the Department for Transport asserted that a measure

that would allow XL's aircraft to fly their customers home was not possible: 'It was not possible to reach a solution which did not involve an unacceptable level of risk to taxpayers' money. Like anything else to do with companies in administration this is a complex area.'

Because of the reasons mentioned above, only the CAA alongside the Department for Transport led the operation to help the 80,000 affected holiday-makers return to the UK. In a letter of 17 September 2008 to Transport Secretary Ruth Kelly, Jim McAuslan, BALPA general secretary, contended that some of the repatriation costs were unnecessary, as the XL members had flown empty aircraft back to the UK (BALPA, 2008).

A large proportion of the XL customers were covered by the Air Travel Organisers' Licensing (ATOL) scheme. CAA arranged the repatriation of the ATOL-protected customers by covering the costs with the ATOL bonds provided by the Group. The joint administrators' role was to provide CAA with the necessary information and resources (including temporarily retained XL employees) in order to assist the CAA in repatriating all customers and staff overseas back to the UK. All customers were successfully repatriated.

With regard to whether the lack of consultation about planned redundancies is common or not in the UK, the answer is not clear-cut. When companies are still financially viable, it seems that employers generally follow the rules of consultation and notification. Good practices are noticed in this sector e.g. Virgin Atlantic. Virgin Atlantic has recently followed the 90-day consultation period and established an outplacement agency for the redundant workers.

In insolvency cases, however, not all employers follow the consultation requirements (the duty falling to the appointed insolvency practitioner when the employer becomes insolvent). Such bad practices have recently become more widespread in the travel industry e.g. Zoom Airlines. It is worth mentioning that because of the business model of low-cost, short-haul airlines that was previously described elsewhere, such as seasonality, weaker cash flows, XL Leisure might have been more prone to a quicker financial meltdown, particularly in the larger context of the credit crunch.

As mentioned above, a total of 1,525 employees were made redundant, including the 240 pilots. After the announced redundancies, the joint administrators retained approximately 160 employees for a further three to four months in order to assist administrators with various matters related to the repatriation of customers and Group staff abroad; the controlled wind-down of the businesses; assisting creditors and customers with queries regarding pre-booked holidays; and updating and complete financial records, etc.. As of December 2008, all employees were made redundant. As specified by the administrators, a few employees were employed on a consultancy basis to assist the administrators.

Table 2: Total number of employees affected by redundancies within the XL Group

Name of company affected within the XL Leisure Group	Nature of business	Total number of employees before announced redundancies	Employees made redundant immediately upon the appointment of administrators	Total final number of redundancies as of 31 December 2008
XL Leisure Group plc (parent company)	Parent of the UK, French and German divisions	38	24	38
XL Airways UK Ltd	Charter passenger airline	1,193 (plus 18 permanently based in Ireland and 17 permanently based in Cyprus)	1,117	1,193 (plus 35 employees overseas based in Cyprus and Ireland)
Travel City Flights Ltd	Agency company of its immediate parent company, The Really Great Holiday Company plc	0	0	0
Excel Aviation Ltd	Air travel seat broking and chartering	8	5	8
Explorer House Ltd	Property rental (non-trading entity)	0	0	0
The Really Great Holiday Company plc	Tour operator	308	273	308
Medlife Hotels Ltd	Online accommodation and transfer provider	18 (plus 13 employees based in Greece)	0	18
Aspire Holidays Ltd	Tour operator specialising in luxury holidays	9	1	9
Freedom Flights Ltd	Charter aircraft seat brokering, including internet seat sales	27	26	27
Freedom Flights (Aviation) Ltd	Trade licence transport provider	0	0	0
Kosmar Villa Holidays plc	Operator of tour packages and flights which were sold through travel agents, call centres and via the internet	97	83	97
TOTAL		Total number of employees based in the UK before redundancies 1,698 (excluding 48 overseas)	Total number of immediate redundancies 1,525	Total number of redundancies 1,698 (excluding 48 overseas made redundant)

The administrators were unable to provide more details on the type of contracts employees had with the XL Group.

Remuneration of former employees

In the Administrators' Progress Report issued in April 2009, it was specified that a large number of former employees have made enquiries regarding their redundancy and claims, access to HR records and files and to obtaining references required by new employers.¹⁶ In insolvency cases, employees are entitled to the various claims described above.

According to the UNITE representative, only 12 former employees out of all the UNITE-represented staff did not claim payments from the NIF because they did not submit their RP1 forms to the RPO.

All payments made to the former XL Leisure employees under the insolvency provisions were subject to the maximum statutory limits. The Redundancy Payments Service is entitled to claim back the payments it makes out of the money recovered by the liquidator. The following payments were made by GB Insolvency Guarantee Institution.¹⁷

Table 3: Payments made to the former employees

Company	Employees	Total payments from GB Insolvency Guarantee Institution
Xl Leisure Group plc	40	£69,841.02
Xl Airways UK Ltd	668	£2,847,206.41
The Really Great Holiday Company plc	279	£720,371.64
Freedom Flights Ltd	33	£47,844.42
Excel Aviation Ltd	8	£26,987.96
Aspire Holidays Ltd	3	£6,270.00
Kosmar Villa Holidays plc	93	£108,401.66

Note: There can be minor differences in the numbers of employees per company in Tables 2 and 3. There can be various reasons for this: company records that are not wholly accurate, a number of employees who actually have a contract with a different company within the same group, etc.

No statutory payments were made by the former employer or administrators, and this is highly unlikely to happen in the near future because of insufficient funds from the asset realisations in the debtor company. Out of the 240 pilots, 102 were BALPA members, and BALPA, alongside its solicitors, assisted them in making individual claims to the RPO and developing a collective claim for XL Leisure Group's failures in following statutory procedures (BALPA NEC, 2008 Report).

The former XL Leisure employees represented by the two trade unions – BALPA and UNITE – are currently claiming protective award through the Employment Tribunal in Croydon because the employer failed to consult about collective redundancies. Should a tribunal find in the employees' favour, then all employees, irrespective

¹⁶ Preferential claims include the following: holiday pay, i.e. pay for holidays not yet taken to which the employee became entitled in the 12 months before the insolvency date; wages up to GBP 800; protective award (which is treated as wages); and certain occupational pension contributions (Insolvency Service, 2008b).

¹⁷ Information provided by the Insolvency Service, Redundancy Payments Service.

of whether they belong to a trade union or not, will receive an award of a maximum 90 days each unless there are circumstances justifying awarding a smaller sum (which is likely in this case). However, the tribunal might take up to three months to reach a decision. BALPA and UNITE currently also have applications for unfair dismissal to the Employment Tribunal on behalf of the former employees at XL Leisure who were union members, but no decision has been taken on this matter. With regard to non-trade unionists, no comment can be made as such applications would have been completed and submitted on an individual basis. As previously mentioned, a protective award can only be made in cases of collective redundancies, while compensation for unfair dismissal can be claimed by any individual employee who feels that he or she was unfairly dismissed.

Measures to assist redundant XL Leisure employees

5

It is difficult to trace former XL Leisure employees, as many of them were cabin crew personnel who tried to find jobs overseas after the company's rapid closure. Some of these individuals also registered with various Jobcentres scattered across the UK, some of these centres having been chosen because of their proximity to the airports where former cabin crew used to work. There is little systematic information about the total number of former employees who made benefit claims across the Jobcentres in the UK. This is due to the timeline of the company's collapse as well as the fact that only a limited number of former employees were in contact with Jobcentres. Redundant employees benefited from the general services of Jobcentres open to all jobseekers, but no specific vacancies were offered to staff with particular needs, such as pilots or certain employees responsible for ground-based operational work. One of the Jobcentre Plus offices involved (the Crawley office where the XL Leisure headquarters were situated) can shed light on some of the measures that Jobcentres can take in such situations. The local office made immediate contact with the XL Leisure office and implemented processes to simplify the procedure of claiming a job-seeking allowance. As the bankruptcy news was made public on a Friday, the local Jobcentre Plus in Crawley was opened on the weekend to assist the affected staff. Due to the fact that the case was classified as a 'significant redundancy', the Crawley Jobcentre Plus ensured that former employees had access to immediate financial incentives to support them in attending interview schemes, e.g. travel, accommodation costs for attending interviews. The local Jobcentre Plus arranged interviews with 173 redundant staff. Out of the total booked number, 129 redundant people were interviewed within two weeks of the company's closure. It is understood that the individuals who did not attend the interviews had found various jobs within a couple weeks of dismissal. According to the same source, out of the 129 interviewed employees, 115 got similar jobs, mainly in customer service.

Some practical actions taken by the local Jobcentre Plus to assist the former employees included the following:

- an information letter about claims procedures was sent to administrators to be forwarded together with other documents to the redundant employees based in Sussex and Surrey;
- some 129 redundant people were interviewed within two weeks of the closure by Jobcentre Plus;
- out of 129 individuals, approximately 5% were pilots who were helped to renew their licenses in order to be able to fly again; the incurred costs were covered;
- a customised weekend event was organised with local partners, including the government-funded agency Next Step, to provide information advice and guidance, including CV writing, interview techniques and career advice. The Housing Benefit Department from Crawley Council attended the weekend event to answer various enquiries and take claims for housing benefits;
- Jobcentre Plus assisted redundant individuals in making claims for the jobseeker's allowance and made dedicated staff available who worked with local employers in identifying vacancies 'matched' to the needs of the people out of work, through the drawing up individual action plans.

However, both the former employees and trade unions feel that the Jobcentre as well as other public bodies have been unable to help former employees, particularly those with specific expertise and skills, such as pilots. According to a former employee, many of the affected workers (including specialised ground staff) found jobs using informal contacts in the industry. An informal e-mail list advertising vacancies in the airline industry was also set up immediately after the company's collapse.

Trade unions also tried to assist the redundant staff. As previously mentioned, BALPA, alongside its solicitors, assisted the pilots in making individual claims to the RPO and employment tribunal. BALPA also put together a whole package for the redundant individuals. The benefits provided by BALPA usually encompass the following (BALPA Factsheet for Unemployed Members):

- advice from BALPA Financial Solutions Ltd on the financial repercussions of unemployment and how to make the most of savings or pension options and to manage financial hardship;
- access to the Benevolent Fund: members experiencing financial hardship as a result of redundancy are invited to apply for assistance from the Benevolent Fund;
- legal advice from BALPA's legal services on mitigating the negative impact of unemployment on individuals as well as advice about the legal requirements for employers with regard to redundancy consultation process, notice periods, redundancy payments, etc.;
- support for pilots through the Pilot Advisory Group (PAG), whose aim is to counsel, advise and, if necessary, refer any member to specialist assistance in connection with any personal, domestic, medical or professional problem which may arise;
- access to the BALPA website, providing valuable advice and assistance in looking for employment: BALPA maintains regular contact with the majority of aircraft operators and with over 12,000 members sharing information;
- access to the *Log* magazine, sent bi-monthly, as well as a Members' Forum to stay in touch with the aviation industry.

Some help was also provided by administrators who kept a full, up-to-date record of the pilots' flights in order to enhance their chances of finding a new job in their field. The XL administration was assisted by some of the members of the former HR team, who also provided the redundant personnel with reference letters necessary for new jobs. For a limited period, the HR team also kept the former staff informed of any vacancies posted by UK-based or overseas employers in the travel industry. The XL administrators still offer some support to the former employees upon request.

BALPA emphasises its continuous efforts to support the former XL Leisure pilots. However, pilots have a specialised set of skills and in the current economic climate, their employment prospects are not very good. Furthermore, the volume of bookings in the travel sector has also significantly dropped this year relative to the previous years. There is almost no company in the air travel industry that is currently recruiting people at the moment, with the exception of Easyjet. Due to there not being a single licence for cabin crew proficiency, former members of XL's cabin crew may need to go through the full training again for their new airline in order to work. Pay across the board is also being affected, with airlines not honouring long-term pay deals and pushing for pay freezes.

To put the market into perspective, these are just some of the stories emerging in the last few weeks:

- Cathay Pacific has made a record loss of HKD 7.9 billion (GBP 729 million) and is cutting capacity;
- Lufthansa has seen a 9% drop in passenger numbers and as a result has cut capacity by 9.4% in the US, 4.9% in Europe and 4.5% in the Asia-Pacific region;
- Aer Lingus reported an after-tax loss of €107.8 million (GBP 99.3 million), of which €17.6 million is operating losses;
- Air France-KLM traffic fell by 2.6% year on year.

One of the major issues that the collapse of XL Leisure raised is the way in which notification and consultation procedures may be applied to insolvency cases. According to legislation, the duty to inform and to consult employees prior to dismissal applies in insolvency cases unless there are special circumstances. Insolvency itself is not a special circumstance, as employers are aware of the financial difficulties of their businesses. In the case of XL Leisure, the failed attempts to refinance the business in the context of the financial downturn aggravated the company's situation, which might have been otherwise manageable. However, when it is not possible to fully comply with the consultation timescale, employers should consult as far as reasonably possible with the employee representatives. No meaningful steps towards compliance have been taken by the employer in this case.

As not all employers follow the consultation and notification requirements, there is space to improve the application of these requirements in insolvency cases, whether through legal or industry-level regulatory mechanisms. Raising the penalty for a company's failure to comply with notification requirements (currently GBP 5,000) might deter companies from similar infringements. Nevertheless, such legal amendments would need to take into account that any increase in fine imposes an extra burden on the insolvent employer, and thus reduces any possible repayments due to creditors. Because of this trade-off, it is not always possible (or in the public interest) to seek to prosecute employers who fail to notify collective redundancies in advance. This tension is particularly conspicuous in cases like XL Leisure, where payments are owed to a wide range of creditors.

Also related to notification and consultation duties in insolvency is the role of administrators. It is known that the duty falls to the appointed insolvency practitioner when the employer becomes insolvent. However, as administrators' primary duty under UK legislation is to maximise returns to creditors, they can do little but dismiss employees instantly. In such situations, assistance should be provided to administrators in order to encourage them to consult the employee representatives as soon as they possibly can. On the Insolvency Service website, there is guidance for insolvency practitioners on employment rights claims. It recommends that where an insolvency practitioner is consulted about insolvency, he or she should advise the employer to start the redundancy notification and consultation process immediately so that it is in motion at the time of his or her appointment. They are also encouraged to point the employer in the direction of the Jobcentre and other local service providers for information on local assistance at this early stage in the insolvency proceedings. This case study suggests that there is space for such preliminary discussions.

Another important message arising from this case is that employees affected by restructuring and redundancies in cases of company failure are affected not only by job losses, but can also suffer restrictions in their contractual entitlements to redundancy pay. As has been detailed above, statutory redundancy pay is fixed, and in cases where insufficient assets are recovered by the administrators, additional contractual entitlements to redundancy compensation are lost. In addition, discretionary awards can be capped.

A hostile economic climate such as the current credit crunch can indeed precipitate the collapse of highly leveraged companies such as XL Leisure. In such situations, companies operating in business niches that are known to be more vulnerable to liquidity crises e.g. low-cost carriers, would benefit from general business support. Companies (encouraged by industry bodies) can take preventive measures entailing early warning systems, maximising liquidity and credit control, and restructuring debt. Companies should also draw up workable crisis management programmes in advance.

In insolvency cases that involve collective redundancies, local government offices and agencies should be prepared to take any customised measures to assist or retrain the employees in question. Redundant employees, similar to

the former XL Leisure employees, can have specific expertise and job needs, and general package services that are usually provided for redundant employees can be insufficient or inadequate. In the absence of a clearinghouse as well as free customised training for the former XL employees (particularly pilots and cabin crew), the redundant staff often have to use informal networks to find suitable jobs in the same industry. In this case, the CAA was also unable to finance or provide free training for the former XL pilots. The lack of suitable support for the redundant employees may be particularly detrimental in the current economic climate, where the employment prospects are not very good. In insolvency cases, employees face even more challenges because the sums they recover rarely reflect all the losses. Any additional payments to the limited statutory payments due to the employees are only paid if there are sufficient sums realised from the asset sales, which in cases of heavily indebted companies are highly unlikely. Due to the huge debts of XL Leisure, it is unlikely that the former employees will benefit from the assets realisation.

Trade unions can also play a role by improving their research resources and by gathering more systematic information about former employees from regional offices, workplace representatives and industry contacts. Trade unions could also follow up on their former members after they have been made redundant through building informal networks and waiving the membership fee for them in special circumstances.

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Annex 1

Table A1: Individuals consulted

Name	Institution	Position	Date of consultation/interview
Alastair Beveridge	Zolfo Cooper	Partner (joint administrator of XL Group)	15 April 2009
Nick Cropper	Zolfo Cooper	Partner (joint administrator of XL Group)	15 April 2009
Dave Kelly	UNITE	Regional officer	29 April 2009
Brian Boyd	UNITE	National officer	
Colin Potter	UNITE	Research officer	2 April 2009
Jim McAuslan	BALPA	General secretary	2 April 2009
X	Former XL Group	Former employee	23 April 2009
Sophia Sami	Crawley Jobcentre Plus	Manager	28 April 2009
Debby Gill	Job Centre Plus-District Surrey and Sussex	Manager	20 May 2009
Barbara Roberts	Redundancy Payments Service, Insolvency Service	Senior policy advisor	21 May 2009

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