TERMINATION OF EMPLOYMENT:

THE LAW IN NORTHERN IRELAND

1. In Northern Ireland statutory protection against unlawful dismissal is found primarily in Part XI of the Employment Rights (NI) Order 1996.

2. The statutory definition of a 'dismissal' is found in Article 127. It includes the termination of a fixed term contract, a constructive dismissal and a forced resignation.

3. Article 126 provides for the right not to be unfairly dismissed. Preserving the industrial balance, the statutory framework at Article 130 provides a statutory power to dismiss on specific grounds, subject to the requirements of reasonableness and fairness.

4. Articles 126-130 provide protection from unfair dismissal for employees with one year continuous service.[1]

5. There is also protection against automatically unfair dismissal i.e. protection against dismissal where the employer has dismissed the employee for a proscribed reason e.g. pregnancy, non payment of the minimum wage or making protected disclosures (whistleblowing).[2] Generally automatically unfair dismissal protection does not require a qualifying period of service.[3]

6. On the concept underlying automatically unfair dismissal, ACL Davies states:

[1] Article 140(1)
[2] See Articles 130B to 137.
[3] In most cases; one important exception is under TUPE; one years service is required to avail of protection - see regulation 7.

> *Automatically unfair reasons are those which can never be relied upon by the employer, whatever the circumstances….. They reflect the argument … that certain grounds for dismissal violate the employee's dignity and should not be permitted. They also reflect the role of unfair dismissal law in protecting other fundamental rights such as the right to the minimum wage. There is little point in providing employees with these rights if the employer is allowed to dismiss them whenever they bring a claim.*[4]

7. In passing it is of course the case that a dismissal can be unlawful by reason of it being a discriminatory dismissal e.g. on the grounds of religious belief or gender. This talk focuses on unfair dismissal law.

POTENTIALLY FAIR DISMISSAL

8. The concept of 'fairness' appears premised upon the idea or concept that an employer should only be required to retain employees where there is a job for them to do, they are fit and able to do the job and they are not guilty of misconduct meriting dismissal; but that if those boxes are ticked employees should generally have the right to continue in their employment.

9. To establish that a dismissal is a potentially fair dismissal the employer must demonstrate a fair ground for the dismissal Article 130(1).

10. Article 130(1-2) provides for five 'fair' grounds for dismissal:
    a. Capability;
    b. Misconduct;
    c. Redundancy;
    d. Contravention of a statutory provision;
    e. Some other substantial reason.

[4] *Perspectives on Labour Law*; Cambridge University Press; [2004] page 165

11. If there is a potentially fair ground for dismissal, the Tribunal must consider Article 130(4) which reads as follows:

> *(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b)shall be determined in accordance with equity and the substantial merits of the case.*

12. In an unfair dismissal case the burden of establishing a 'fair' reason under Article 130(1) lies on the employer. The employer / respondent goes first seeking to establish a fair reason for the dismissal. (In constructive dismissal the burden is upon the employee to prove that there has been a dismissal and therefore will give evidence first.) Where there is a potentially fair reason, the Tribunal must consider the 'fairness' of the dismissal in the light of the 'merits' test in Article 130(4). The standard of proof is the balance of probabilities.[5]

13. Finally no introduction to unfair dismissal law is complete without reference to the statutory dismissal procedures. Where an employer is contemplating dismissing an employee, the Employment (NI) Order 2003 Schedule 1 requires that employer to comply with three statutory requirements or steps:

    a. Step One – a written invitation to a meeting which explains that dismissal is a possible outcome;
    b. Step Two – a meeting;
    c. Step Three – an appeal.

[5] See *Rogan v South Eastern Health and Social Care Trust* [2009] NICA 47 paragraph 15 of the judgment of Morgan LCJ and paragraph 2 of the judgment of Girvan LJ.

14. The Labour Relations Agency *Code of Practice on Disciplinary and Grievance Procedures* 2013 provides useful guidance on the operation of the dismissal procedures.[6] Consideration of the Guidance will assist employers in avoiding a breach of the procedures.

15. Article 12 of the Employment Relations (NI) Order 1999 provides for a right of accompaniment at a disciplinary hearing which could result in a dismissal. The employee has the right to be accompanied by a work colleague or trade union representative.[7]

16. A failure to comply with the statutory dismissal procedures set out above results in an automatically unfair dismissal.(Article 130A(1)) This provision overrides the 'Polkey-type' exception at Article 130A(2) which protects an employer against a finding of unfair dismissal pursuant to Article 130(4)(a) for other procedural unfairness where the employer can show that the employee would have been dismissed anyway.[8]

THE JURISDICTION OF THE INDUSTRIAL TRIBUNAL

17. The Industrial Tribunals are 'creatures of statute', specifically the Industrial Tribunals (NI) Order 1996. The Department of Employment and Learning has issued regulations governing the procedure of Industrial Tribunals – the current regulations are the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (as amended).

[6] Annex A page 44
[7] See the LRA Code at pages 36-40
[8] For background purposes see *British Labour Pump Services v Byrne* [1979] ICR 347; *Polkey v AE Dayton Services* [1987] IRLR 503. One useful Northern Ireland Industrial Tribunal decision on the statutory dismissal procedures is *Conn v DSD* [2012] NIIT.

18. In an unfair dismissal claim the Industrial Tribunal adjudicates upon the lawfulness of the dismissal, applying the legislation referenced above. It is for the Industrial Tribunal to determine if there has been a fair dismissal.

19. The hearing is not an appeal involving a re-hearing of the evidence and the Tribunal taking a fresh decision.

20. In *Iceland Frozen Foods v Jones* [1983] ICR 17 the employee, a night shift foreman, was dismissed for misconduct. The tribunal found the dismissal unfair by considering whether in their opinion the employer had acted reasonably and found that the employees misconduct was not sufficiently serious to warrant dismissal. The Employment Appeal Tribunal overturned the decision asserting that the correct test was whether the employer's decision to dismiss fell within the band of reasonable responses to the employees conduct which a reasonable employer could adopt. A Tribunal must not substitute its view of the case where an employer has acted within the band of reasonableness. The EAT stated as follows:

> *Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57 (3) of the Act of 1978 is as follows: (1) the starting point should always be the words of section 57 (3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which* ****25*** *one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstance of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*
>
> *……. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses and industrial tribunals would be well advised to follow the formulation of the*

> *principle in N. C. Watling & Co. Ltd. v. Richardson [1978] I.C.R. 1049 or Rolls-Royce Ltd. v. Walpole [1980] I.R.L.R. 343* .

21. This was a seminal decision and the tribunals and courts have generally interpreted the legislation on this basis ever since. In Northern Ireland the test received the approval of the Court of Appeal in the case of *Citybus Limited v Dobbin* [2008] NICA 42 where it overturned a Tribunal finding that Mr Dobbin had been unfairly dismissed.[9]

22. In *Rogan v South Eastern Health and Social Care Trust* [2009] NICA 47 the Lord Chief Justice endorsed the *Iceland Frozen Foods* decision and the law as subsequently set out by Higgins LJ in the *Dobbin* case.

23. ACL Davies comments that this Iceland Frozen Foods based jurisprudence

> *…suggests that the employer has a large area of discretion when deciding how to respond to the situation and that the tribunal should only interfere when the employer's reaction is extreme. The approach is analogous to the test of Wednesbury unreasonableness in administrative law. It has led many commentators to suggest that tribunals are not performing their intended role under the Act. Instead of setting standards for employers which indicate how employees' dignity and autonomy should be respected, tribunals are simply reflecting normal behaviour on the part of employers. Thus, if it is 'normal' for employers to dismiss employees for behaviour which takes place outside working hours and does not impinge on their work, for example, this will be a fair dismissal even though it is arguably an infringement of those employees' autonomy."*[10]

24. The jurisdiction of a tribunal under Part XI of the 1996 Order appears to fall somewhere between that of a court hearing an appeal on law and facts (e.g. a High Court hearing a County Court appeal) and a judicial review court; whilst the Tribunal hears evidence and reaches factual findings, its focus is whether the employer acted within the band of reasonableness in treating the reason as sufficient to dismiss the

[9] See case-note commentary attached.
[10] Page 166.

employee, not its own view as to the reasonableness or otherwise of the dismissal in all the circumstances.[11]

25. Whether an employer has acted reasonably i.e. within the band of reasonable responses, or unreasonably is a matter of fact and law. The Tribunal must properly determine the scope of the band of reasonableness and whether the employer's decision falls within or without. In *Dobbin* the Court of Appeal found the Tribunal's band of reasonableness too narrow impermissibly excluding a reasonable dismissal by Citybus.

26. Where an employer has dismissed an employee for a potentially fair reason (under article 130(1-2), the Tribunal may only reach a substantive finding of unfair dismissal where no reasonable employer would have dismissed the employee in all the circumstances (article 130(4)) . This gives employers some leeway in terminations: it does not matter if an employer could or should have given the benefit of the doubt to the employee as long as dismissal was within the 'band' of reasonableness; this applies even if the decision was 'barely' reasonable i.e not unreasonable in all of the circumstances.

27. Nonetheless questions of reasonableness and fairness lie within the jurisdiction of the Tribunal i.e. the circumscription of the boundaries of reasonableness and whether or not the dismissal lies within or outwith such boundaries. In setting those boundaries the Tribunal will take into account case law and other relevant material such as Labour Relations Agency Codes of Practice.

[11] One suggestion is that the law should adopt a proportionality test. Collins Ewing McColgan *Labour Law* Cambridge University Press 2012 at page 832.

28. It seems obvious to state that where dismissal is obviously warranted on the facts and a fair procedure has been followed, there is virtually no chance of a tribunal or court interfering with the decision. But where the reasonableness of a dismissal is highly questionable, a tribunal will have much more discretion in determining whether it is Article 130 compliant.

29. Whilst a Tribunal is not permitted to substitute its view for that of the employer where the dismissal falls well within the relevant band of reasonableness, a Tribunal has greater discretion where a dismissal lies at the outer margins of reasonableness. Arguably there is potentially a fine distinction to be drawn between a Tribunal circumscribing the boundaries or band of reasonableness before finding that the dismissal falls outside that band, and the tribunal substituting its decision for that of the employer. Likewise there is potentially a fine line between a Court finding that a Tribunal impermissibly stretched the band of reasonableness to squeeze in a highly questionable dismissal, and the Court unlawfully substituting its view that the dismissal was unfair.

THE JURISDICTION OF THE COURT OF APPEAL

30. The right to appeal from the Industrial Tribunal to the Court of Appeal is found in Article 22 of the Industrial Tribunals (NI) Order 1996. An appeal is on a point of law.

31. The Rules of the Court of Judicature (NI) 1980 were amended a few years ago to permit dissatisfied parties to appeal by notice directly to the Court of Appeal, rather than having to apply to the Tribunal to State a Case.(See Order 60B)

32. The powers of the Court of Appeal in the hearing of appeals are broad – see sections 34 and 38 of the Judicature Act (NI) 1978.[12]

33. The most recent decision of the Northern Ireland Court of Appeal on unfair dismissal addresses the jurisdiction of the Court in unfair dismissal appeals. In *Dr Stadnick-Borowiec v Southern Health and Social Care Trust and Health and Social Care Board* [2016] NICA 1 the Appellant was dismissed because she could not perform her duties by reason of General Medical Council conditions on her registration which could not be accommodated in her employment. The employer argued that the dismissal was fair on the grounds of 'capability', 'some other substantial reason' and 'contravention of a statutory provision'. The Tribunal found that the dismissal had been fair: *"The claimant was fairly dismissed on all three grounds relied upon. The actions of the employer as regards procedure and penalty were within the band of reasonable response for a reasonable employer in the circumstances"*.

34. The Appellant appealed raising multifarious grounds of fact and law. In the Court's decision Weir LJ stated as follows:

> *[50] Although categorised by the appellant as ""points of law"" almost all these points involve a challenge to the factual findings of the Tribunal. We*

[12] **Section** 38 Powers of court for purposes of appeals.
(1)For all the purposes of and incidental to the hearing or determination of any appeal, other than an appeal under the Criminal Appeal Act, against any decision or determination of a court, tribunal, authority or person (in this section referred to as "the original court") and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal shall, in addition to all other powers exercisable by it, have all the jurisdiction of the original court and may—
(a)confirm, reverse or vary the decision or determination of the original court;
(b)remit the appeal or any matter arising thereon to the original court with such declarations or directions as the Court of Appeal may think proper;
(c)in the case of an appeal from a decision or determination of the High Court, order a retrial or make any such order as could be made in pursuance of an application for a new trial;
(d)adjourn the hearing from time to time;
(e)draw any inference of fact which might have been drawn or give any judgment or make any order which might have been given or made by the original court and make such further or other order as the case may require;
(f)where the appeal is by case stated, amend the case stated or remit it, with such declarations or directions as the court may think proper, for hearing and determination by the original court or for re-statement or amendment or for a supplemental case to be stated thereon;
(g)make such order as to costs and expenses incurred in the appeal and in the proceedings in the original court as the Court of Appeal thinks fit;
(h)in special circumstances order that such security shall be given for the costs of an appeal as may be just;
(i)make such other order as may be necessary for the due determination of the appeal.

therefore remind ourselves of the principles governing the role of this court when the factual findings of a Tribunal are criticised. These were conveniently drawn together by Coghlin LJ in the appeal to this court in Mihail v Lloyds Banking Group [2014] NICA 24 at paragraph [27]:

> *‘"This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court. (McConnell v Police Authority for Northern Ireland [1997] NI 253 per Carswell LCJ; Carlson Wagonlit Travel Limited v Connor [2007] NICA 55 per Girvan LJ at paragraph [25]. In Crofton v Yeboah [2002] IRLR 634 Mummery LJ said at paragraph [93] with reference to an appeal based upon the ground of perversity:*
>
> > *‘'Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in the cases where the Appeal Tribunal has ‘"grave doubts’" about the decision of the Employment Tribunal, it must proceed with ‘"great care’", British Telecommunications PLC v Sheridan [1990] IRLR 27 at para [34].’'*

In Curley v Chief Constable of the PSNI [2009] NICA 8 this court observed at paragraph [14]:

> *‘'It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal the appellate court should not interfere with the decision even though themselves might have preferred a different inference….’'"*

35. Ultimately whether a ground of appeal is a question of fact or law is a question of law for the Honourable Court. Moreover whether any finding of fact falls within the band of permissibility or is perverse is a matter for the Honourable Court. In reaching its determinations of course the Honourable Court must itself act lawfully.

36. Consequently once a Tribunal has reached a finding of fact, it becomes more difficult for an unsuccessful litigant to overturn such a finding and succeed in the litigation

unless there is a reasonable prospect of establishing perversity. It could be said that the approach of the Court is reminiscent of the 'margin of appreciation' doctrine in human rights law.[13] Cases such as *Stadnick-Boroweic* and *Mihail* appear to indicate that the Court is disinclined to interfere with a Tribunal's factual findings unless it is persuaded that the Tribunal manifestly erred in fact and in law. Indeed it is worth quoting Lord Denning in the *Hollister* case on this point:

> *In these cases Parliament has expressly left the determination of all questions of fact to the industrial tribunals themselves. An appeal to the appeal tribunal lies only on a point of law: and from that tribunal to this court only on a point of law. It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these tribunals with a toothcomb to see if some error can be found here or there — to see if one can find some little cryptic sentence.*[14]

37. It is much easier to win an appeal where the Tribunal has made an error in its interpretation and application of relevant law; or where it has failed to provide adequate reasons for its decision as required by law;[15] or where it has failed to address all of the issues.

---

[13] See for example *Pace Telecom Ltd v McAuley* [2011] NICA 63 and paragraphs 19-24 of that decision where the Court recognized the decision of the Tribunal was far from perfect but was not persuaded the inadequacies were sufficient to make the decision wrong in law.

[14] *Hollister v National Farmers Union* [1979] ICR 542 at 533

[15] For example *McCann v Extern* [2014] NICA 65

Reasons - Regulation 30.—(1) A tribunal or chairman must give reasons (either oral or written) for any –
(a)decision; or
(b)order, if a request for reasons is made before or at the hearing at which the order is made.
(2) Reasons may be given orally at the time of issuing the decision or order or they may be reserved to be given in writing at a later date. If reasons are reserved, they shall be signed by the chairman and sent to the parties by the Secretary.
(3) Where oral reasons have been provided, written reasons shall only be provided –
(a)in relation to decisions if requested by one of the parties within the time limit set out in paragraph (5); or
(b)in relation to any decision or order if requested by the Court of Appeal at any time.
(4) When written reasons are provided, the Secretary shall send a copy of the reasons to all parties to the proceedings and record the date on which the reasons were sent. Written reasons shall be signed by the chairman.
(5) A request for written reasons for a decision must be made by a party either orally at the hearing (if the decision is issued at the hearing), or in writing within 14 days of the date on which the decision was sent to the parties. This time limit may be extended by a chairman where he considers it just and equitable to do so.
(6) Written reasons for a decision shall include the following information –
(a)the issues which the tribunal or chairman has identified as being relevant to the claim;
(b)if some identified issues were not determined, what those issues were and why they were not determined;
(c)findings of fact relevant to the issues which have been determined;

RESTRUCTURING AND REDUNDANCY

38. The first of the two 'potentially' fair reasons for dismissal addressed in this talk is redundancy. Redundancy is defined in Article 174 of the 1996 Order:

> ***Redundancy***
> ***174.****—(1) For the purposes of this Order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *(a)the fact that his employer has ceased or intends to cease—*
> *(i)to carry on the business for the purposes of which the employee was employed by him, or*
> *(ii)to carry on that business in the place where the employee was so employed, or*
> *(b)the fact that the requirements of that business—*
> *(i)for employees to carry out work of a particular kind, or*
> *(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish.*
> *(2) For the purposes of paragraph (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in sub-paragraphs (a) and (b) of that paragraph would be satisfied without so treating them).*
> *(3) Where—*
> *(a)the contract under which a person is employed is treated by Article 171(5) as terminated by his employer by reason of an act or event, and*
> *(b)the employee's contract is not renewed and he is not re-engaged under a new contract of employment,*
> *he shall be taken for the purposes of this Order to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in sub-paragraphs (a) and (b) of paragraph (1).*
> *(4) In its application to a case within paragraph (3), sub-paragraph (a)(i) of paragraph (1) has effect as if the reference in that paragraph to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.*
> *(5) In paragraph (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.*

39. There are four main types of redundancy situation:

    a. a disappearing business;

    b. a disappearing business at a particular location;

(d)a concise statement of the applicable law;
(e)how the relevant findings of fact and applicable law have been applied in order to determine the issues; and
(f)where the decision includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated.

c. a disappearing job; and,

d. a disappearing job at a particular location.

40. The Tribunal cannot undertake an inquiry into the commercial and economic reasons that prompted a business closure. This off limits.[16]

41. One of the leading cases on whether a dismissal is attributable to redundancy is a Northern Ireland House of Lords decision *Murray v Foyle Meats Ltd* [1999] ICR 827. The need for employees in the slaughter house had decreased and the employer selected people for redundancy out of a pool of slaughterhouse workers only. The Appellants' argued that the dismissed employees had not been dismissed because of redundancy within the meaning of the legislation because (on their argument) all workers were employed on the same contractual terms and the statutory term 'requirements … for employees to carry out work of a particular kind' meant 'requirements for employees contractually engaged to carry out work of a particular kind'.

42. The House of Lords dismissed the argument as a misinterpretation of the statutory provisions, Lord Clyde stating as follows:

> *it is an elementary rule in the interpretation and the application of statutory provisions that it is to the words of the legislation that attention must primarily be directed. Generally it will be the ordinary meaning of the words which will require to be adopted. On appropriate occasions it may be proper as matter of interpretation to adopt extended meanings to words or phrases, particularly if thereby the purpose of the legislation can be best effected or the validity of the legislation preserved. On other occasions it may be appropriate to adopt a strict or narrow meaning of the language used. But whatever the intensity of the process the temptation of substituting other expressions for the words of the statute in the course of interpreting it is to be discouraged, however attractive such a course may seem to be by way of explaining what it is thought the legislature is endeavouring to say. It may certainly be useful to analyse a statutory provision so as to identify the successive elements of which it is composed and so focus attention on the particular word or words which call for interpretation, or isolate the*

[16] *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716.

particular requirements which have to be met for its application…. But such an exercise should not involve any significant departure from the actual language which has been used.

43. Lord Irvine explained how the statutory provision should be applied:

> *….., the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the applicants being dismissed. That, in my opinion, is the end of the matter.*

44. Where redundancy is the basis for the dismissal most unfair dismissal claims focus upon the fairness of the selection process, and whether there has been adequate consultation and sufficient effort to identify suitable alternative employment. [17]

45. A voluntary phase in redundancy processes is common and encouraged by law to avoid or reduce compulsory redundancies.

46. Guidance on fairness in redundancy dismissals was provided by the EAT in *Williams and Compair Maxim* [1982] IRLR 83, para 19. Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

> *"…. there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:*
>
> *1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship*

[17] See the *Redundancy Toolkit,* published by the Law Centre (NI) in 2010 www.lawcentreni.org

to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

47. These guidelines have been expressly approved by the Northern Ireland Court of Appeal in *Robinson v Carrickfergus Borough Council* [1983] IRLR 122. Breach of the guidelines does not necessarily mean a dismissal is unfair.[18]

48. As already discussed above, the question for a Tribunal is not whether there was a fairer means of approaching the pool selection. Rather it is determining whether the Respondent approach is outside the band of reasonableness and 'unfair' for the purposes of Article 130(4).

49. In *Shorts Brothers Plc v McCormick* [2010] NICA 14, the Court of Appeal reversed a Tribunal determination that Mr McCormick had been unfairly selected for

[18] *Employment Law An Adviser's Handbook,* (Tamara Lewis) LAG Eleventh Edition [2015] page 276.

redundancy. The case demonstrates the breadth of discretion accorded by the law to employers when selecting employees for redundancy.[19]

50. In *Capita Hartshead Ltd v Byward* [2012] IRLR 814 the Claimant was one of a number of actuaries but was made redundant in a pool of one. The Tribunal found that by confining the pool to the Claimant the Respondent had unfairly selected her for redundancy. The EAT upheld the Tribunal's decision and Silber J carefully reviewed the authorities and set out the applicable principles in redundancy pool selection cases including a core principle that the employer must genuinely apply its mind to the issue:

> *Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that*
>
> . *(a) 'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne-Wilkinson J in Williams v Compair Maxam Ltd [1982] IRLR 83 [18]);*
>
> . *(b) '[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in Hendy Banks City Print Ltd v Fairbrother [2005] All ER (D) 142 (May));*
>
> . *(c) 'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem' (per Mummery J in Taymech Ltd v Ryan [1994] EAT/663/94, 15 November 1994, unreported);*
>
> . *(d) The employment tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that*
>
> *(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.*

51. In a test case before the Industrial Tribunal, *Marie Neill v British Airways PLC,* the claims in respect of a redundancy exercise which allegedly was unfair and

[19] See case-note commentary attached.

discriminatory because of the employees included and excluded from the redundancy pool were dismissed.[20]

52. The principle of 'bumping' emanates from the case *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 where Mrs Harding had worked as a packer but later primarily worked on fittings. She need for fittings decreased and she was dismissed for redundancy. The Tribunal found that the dismissal was unfair because she should have been considered for packing work even if that would have meant dismissing a more recently recruited packer. The EAT and the Court of Appeal upheld the Tribunal's decision. The principle of bumping is not particularly popular with Tribunals: in *Byrne v Arvin Meritor LUS (UK) Ltd UKEAT/0239/02* Burton P put it thus:

> *"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"*

53. The employer must consider the question of suitable alternative employment.(*Vokes v Bear* [1973] IRLR 363) What constitutes suitable alternative employment is fact specific. In defending an unfair dismissal claim brought on this claim, the employer will seek to establish that such consideration occurred and/or there were no suitable alternative vacancies.

54. Individual consultation: an employer is expected to enter into consultation with any employee who is being considered for redundancy. Such consultation should be meaningful and adequate. (*Mugford v Midland Bank plc* [1997] IRLR 208) A

[20] [2014] NIIT

consultation failure may well render a dismissal unlawful. However notably in the legislation in Northern Ireland has been amended to resurrect the 'no difference rule' – Article 130A(2) – so a consultation failure may not render a dismissal unfair if the employer can establish consultation would have made no difference to the outcome.

55. Collective consultation: such obligations arise where an employer is proposing making 20 or more employees redundant.(Article 216 Employment Rights (NI) Order 1996) Where the employer is proposing dismissing more than 20 employees but less than 100 employees, the consultation must begin 30 days before the first dismissal takes place. Where it is proposed to make 100 or more employees redundant, consultation must begin 90 days before the first dismissal takes place. The employer must consult with the appropriate representatives of the affected employees e.g. a trade union. A failure to comply with these requirements may result in a protective award.(Article 217-218.)

56. In respect of the duty of an employer to consult employee representatives under Article 216 of the Employment Rights (NI) Order 1996 (a breach of which gives rise to a protective award), 'dismissal as redundant' has a distinct meaning: i.e. "dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related", Article 223 (1) .

57. By way of illustration, if an employer wants to introduce a change in terms and conditions but cannot secure the agreement of employees to the change, the usual course is to terminate existing contracts and issue new ones incorporating the desired variation. These facts would be unlikely to fall within the article 174 definition of 'redundancy', and so would not give rise to statutory redundancy payments (although they may give rise to unfair dismissal claims). However, under Article 223 such dismissals - not being related to the individuals concerned - would trigger the Article

216 statutory consultation procedure, requiring the employer to negotiate with the appropriate representatives of the employees etc.[21]

58. A recent decision of the Court of Justice of the European Union (CJEU) provides that the Article 223 concept of 'dismissal' is to be construed broadly. In *Pujante Rivera v Gestora Clubs Dir SL and anor* [2016] IRLR 51, the CJEU held that where an employee seeks the termination of his or her employment in response to a pay cut imposed by the employer for economic reasons unrelated to the individual employee, the termination counts as a 'redundancy' for the purpose of the collective consultation obligations imposed by Article 1(1)(a) of the Collective Redundancies Directive. This can ostensibly embrace a constructive dismissal scenario.[22]

59. There is a crop of recent caselaw concerning the situation where employees are made redundant and invited to apply for newly created positions.[23] In *Slade* the EAT stated at paragraph 39:

> *In our judgment the large number of cases in this area point up the wholly fact sensitive nature of this area of the law and the fact that there is no "one size fits all formulation". In our judgment the Tribunal applied itself to the correct test and came to a conclusion which was open to it, namely that what the Respondent did was within the bands of reasonable responses to the situation in which it found itself.*

---

[21] *GMB v Man Truck and Bus UK Ltd* [2000] ICR 1101

[22] The Industrial Relations Law Reports 'Highlights' commentary reads as follows: "The main issue of UK relevance in the Spanish reference, ***Pujante*** *Rivera v Gestora Clubs Dir SL* [2016] IRLR 51 is whether a resignation in response to a 25% unilateral pay cut by the employer made for economic reasons – what we would regard as a constructive dismissal – counts as a **"redundancy"** for the purpose of the consultation obligations, and the trigger numbers, imposed by the Directive. The Directive contains no express definition of "redundancy" but the Court of Justice points out that its objective is "to afford greater protection to workers in the event of collective redundancies", so that it "must be interpreted as encompassing any termination of an employment contract not sought by the worker, and therefore without his consent", and "a narrow definition cannot be given to the concepts that define the scope of that Directive …".

[23] *Morgan v Welsh Rugby Union* [2011] IRLR 376; *Slade and others v TNT(UK) Ltd* [UKEAT 113/11/]; *Samsung Electronics UK v Monte D'Cruz* [UKEAT / 39/11/.

60. A claim in Northern Ireland against a solicitors firm who operated such a process was unsuccessful.[24] Whilst the practice has been broadly approved by Tribunals to date but the law remains uncertain as discussed at some length in *Harvey on Industrial Relations and Employment Law* Part D1 paras 1724-1725.

SOME OTHER SUBSTANTIAL REASON: ORGANISATIONAL / BUSINESS REASONS

61. Article 130 reads as follows:

> **130.**—(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within paragraph (2) or **some other substantial reason of a kind** such as to justify the dismissal of an employee holding the position which the employee held.

62. Both redundancy and some other substantial reason (SOSR) are potentially fair reasons for an economic dismissal. SOSR will cover most economic dismissals that do not fall within the category of redundancy.

63. The type of reason which the employer needs to put forward was described in the case of *Hollister v National Farmers Union* [1979] ICR 542 as a 'sound good business reason'. The burden of proof on the employer is easily met.[25]

64. The Applicant Hollister who worked in Cornwall was employed on different terms and conditions than other group secretaries working elsewhere for the National Farmers Union. He complained that his terms were inferior and the employer harmonized the Cornwall branch's terms in line with those of other branches. The

[24] *Thomas McKeever v Patrick McCollum t/a McCollum and Company Solicitors (Respondent)* [2012] NIIT

[25] *Banerjee v City and East London Area Health Authority* [1979] IRLR 147

Applicant refused to sign the new contract because he believed the terms were still not adequate. The Court of Appeal found that the re-organisation of the business which the employers had felt obliged to undertake, coupled with the applicant's refusal to accept the new contract, had rightly been found by the tribunal to be a "substantial reason of a kind such as to justify the dismissal". Lord Denning stated:

> *The question which is being discussed in this case is whether the reorganisation of the business which the National Farmers' Union left they had to undertake in 1976, coupled with Mr. Hollister's refusal to accept the new agreement, was a substantial reason of such a kind as to justify the dismissal of the employee. Upon that there have only been one or two cases. One we were particularly referred to was Ellis v. Brighton Co-operative Society Ltd. [1976] I.R.L.R. 419 , where it was recognised by the court that reorganisation of business may on occasion be a sufficient reason justifying the dismissal of an employee. They went on to say, at p. 420:*
>
> > *"Where there has been a properly consulted-upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangements may well — it is not bound to, but it may well — constitute 'some other substantial reason.'"*
>
> *Certainly, I think, everyone would agree with that. But in the present case Arnold J. expanded it a little so as not to limit it to where it came absolutely to a standstill but to where there was some sound, good business reason for the reorganisation. I must say I see no reason to differ from Arnold J.'s view on that. It must depend on all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contract unless he would agree to a new arrangement. It seems to me that that paragraph may well be satisfied, and indeed was satisfied in this case, having regard to the commercial necessity of rearrangements being made and the termination of the relationship with the Cornish Mutual, and the setting up of a new relationship via the National Farmers' Union Mutual Insurance Society Ltd. On that rearrangement being made, it was absolutely essential for new contracts to be made with the existing group secretaries: and the only way to deal with it was to terminate the agreements and offer them reasonable new ones. It seems to me that that would be, and was, a substantial reason of a kind sufficient to justify this kind of dismissal. I stress the word "kind."*

65. SOSR is not confined to economic dismissals. It was a ground of dismissal in the recent case *Dr Stadnick-Borowiec v Southern Health and Social Care Trust and Health and Social Care Board* [2016] NICA 1 where the Trust could not accommodate the training requirements placed on the Appellant's registration by the General Medical Council.

66. However the provision of a sound business reason only raises a potentially fair reason for dismissal – that does not mean the dismissal is fair in terms of the tests of reasonableness, equity and substantial merits.

67. In *Evans v Elemeta Holdings Ltd* [1982] IRLR 143 the employee was offered new terms, as part of a reorganization which would have required him to work overtime unpaid up to an unspecified number of hours per week. He claimed constructive dismissal and the EAT found that the unreasonableness of the terms made the dismissal unfair.

The Transfer of Undertakings (Protection of Employment) Regulations 2006

68. TUPE 2006 applies in NI.[26] For our purposes the key provision is regulation 7. It is automatically unfair for the transferor or transferee to dismiss an employee if the sole or principal reason is the transfer, or a reason connected to the transfer.[27]

69. It is not automatic unfair dismissal if the sole or principal reason for dismissal is *an economic technical or organization reason (ETO) connected to the transfer entailing changes in the workforce.*[28] The dismissal must involve changes to the overall numbers of the workforce.[29]

70. Two recent cases are worth considering in some detail to illustrate the application of the TUPE regulations to termination scenarios. In *Manchester College v Hazel and another* [2014] ICR 989 a large number of staff teaching and training in prisons had disparate contracts. The work was transferred to Manchester College. Trying to

[26] Note that the changes introduced in England and Wales in 2014 do not apply to Northern Ireland.
[27] See footnote 23
[28] The *Transfer of Employment (NI) Regulations 2006*, regulation 7(1).
[29] *Delabole Slate Ltd v Berriman* [1985] IRLR 305; *Nationwide Building Society v Benn* [2010] IRLR 922; *Manchester College v Hazel* [2014] IRLR 392.

rationalize and more efficiently organize the work, the College made some redundant and offered the rest new contracts with lower salaries. Staff initially refused to accept the new contracts, but after they were threatened with dismissal they accepted the contracts under protest and 'without prejudice' and claimed unfair dismissal. The ET held that they were dismissed and the reason for the dismissal was the refusal to accept the new contracts. They held that the College could not rely upon regulation 7 of TUPE, i.e. an ETO entailing changes in the workforce. The EAT dismissed the College's appeal. The EWCA also dismissed the appeal and held that changes in terms and conditions of employment to harmonise the workforce did not entail changes in the workforce. Redundancies entailed changes in the workforce. The statutory question concerned the sole or principal reason for the Claimants dismissals. In this case it was their refusal to agree to the new terms as to pay – it had nothing to do with the redundancies, and was not some other substantial reason being an ETO.

71. In *RR Donnelly Global Document Solutions Group Ltd v Besagni*. [2014] ICR 1008 - the Claimants were civil servants. Their role was outsourced. The Claimants refused to relocate to new work locations some distance away and as a result they were made redundant. The Claimant's claimed automatically unfair dismissal under TUPE claiming that the reason for the dismissal was not an economic, technical or organizational reason ETO entailing changes in the workforce.[30] The Claimants succeeded in the ET and the EAT dismissed the employer's appeal. The EAT found:

[30] Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides:

> **7.** (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—
>
> (a) the transfer itself; or
>
> (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
>
> (2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies—
>
> (a)paragraph (1) shall not apply;

a. 'workforce' is about numbers of people;

b. workplace is to be differentiated from workforce;

c. a change in the location of the workplace of itself did not constitute a change in the workforce.[31]

72. A valid ETO is a potentially fair ground for dismissal (either redundancy or SOSR) but the dismissal may still be unfair pursuant to the merits test in Article 130(4).[32]

Michael Potter

Bar Library

25th February 2016

(b)without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919(**1**) to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

[31] The judgment in this case provides a comprehensible analysis of TUPE law. See also the recent case of *Mustafa v Trek Highways Services Ltd* EAT 29th January 2016 for a useful consideration of TUPE law.

[32] TUPE Regulation 7(2-4)

CASENOTE COMMENTARIES

MISCONDUCT

Dobbin v Citybus Limited [2008] NICA 42

The Claimant/Appellant Mr Dobbin was employed for some 27 years and was a Bus Inspector. He worked alongside another inspector Mr Best. They had fallen out. Mr Best made a complaint of harassment against Mr Dobbin relating to a number of incidents where Mr Dobbin had allegedly behaved in an inappropriate manner: leaving a course when Mr Best appeared; reneging on offer of holiday relief for Mr Best; telephoning Mrs Best to tell her how annoyed he was with her husband; making a comment that Mr Best had pocketed money raised to buy another employee a gift and instead of using the money to buy a gift, presented him with a crystal bowl which Mr Best already possessed; and, using a third party to place pressure on Mr Best during the course of the investigation with threats of disclosure of certain information.

Mr Dobbin admitted most if not all of the allegations but sought clemency by reason of his service and good previous character. However he was dismissed for gross misconduct for 'serious and persistent' harassment.

The Industrial Tribunal found that he was unfairly dismissed but reduced his award for contributory fault. The Tribunal found the dismissal was outside the band of reasonableness being both procedurally and substantively unfair:

procedural unfairness

(a) there was a lack of impartiality on the part of the disciplinary panel (who had both been involved in the investigation);
(b) there had been a failure to properly or adequately investigate how the crystal bowl rumour had been started / spread / disseminated;
(c) that Mr Dobbin's allegations about the crystal bowl were largely made in the course of the investigation, i.e. in the course of answering questions put by investigators;
(d) there was a lack of impartiality on the part of Mr O'Neill the manager who heard the first appeal (i.e. he failed to tell Mr Dobbin that he had spoken to Mr Best and what had been said in the conversation);
(e) Mr O'Neill had failed to disclose new material to Mr Dobbin which he had taken into account in his decision;
(f) that the offences ought to have been dealt with as major misconduct rather than gross misconduct under the relevant procedures;
(g) that the second appeal was limited in its purview and had failed to cure the flaws in the investigation identified above;

substantive unfairness

(h) similar acts of misconduct had been committed by other employees and no action was taken – i.e. there was a lack of consistency;
(i) the classification of Mr Dobbin's actions as serious and persistent acts of harassment did not appear objectively justified i.e. that any harassment was less serious / more low level;
(j) Mr Dobbin never admitted spreading the rumour to other employees;
(k) that there was no consideration given to alternative penalties particularly given his length of service and contribution to the Company over the years;

The Court of Appeal overturned the decision of the Tribunal, its decision is set out in two paragraphs:

> *[58] In the light of those observations relating to the law I turn to consider the Tribunal's decision in the instant appeal. As the respondent had admitted the conduct, the only question for the Tribunal was whether the investigative processes and the disciplinary hearings and appeals were, viewed objectively, within the band of responses by a reasonable employer and whether the decision to dismiss was, similarly viewed, within the band of reasonable responses of a reasonable employer. It is clear that the Tribunal on occasions substituted its own view for that of the reasonable employer – see the many issues mentioned earlier in paragraphs 11 to 16. I mention several of them now. In considering the nature of the conduct which the respondent admitted the Tribunal concluded that undoubtedly there were acts of harassment but they occurred over a short duration and that apart from the comment relating to the retirement gift it was generally of a low grade nature. In addition the Tribunal introduced a comparison with the Platform Agreement, which was irrelevant. Similarly in its treatment of the procedures and appeals the Tribunal expressed its own views as to the correctness of the procedures and the nature of the appeals. The Tribunal concluded that there was a lack of fairness about the process but did not identify how, if at all, the respondent was prejudiced. The appeal to Mr Hesketh was deemed inadequate without reference to and appreciation of, the nature of that appeal. Nowhere in the decision was the conduct relating to the retirement acknowledged for what it was – a serious allegation of theft against a fellow employee.*
>
> *[59] This was a fairly simple case. The conduct was admitted. <u>The only issues were whether the procedures adopted and the decision to dismiss lay within the band of reasonable responses of a reasonable employer. Clearly both were and the Tribunal should have so found. [my emphasis]</u>*

COMMENT
The issue in both the Tribunal and the Court was whether the dismissal was procedurally and/or substantively fair. The Tribunal found that the dismissal fell outside the band of reasonableness for the reasons set out above. However the Court, placing weight on Mr Dobbin's admissions and its perception of the gravity of the misconduct, found the dismissal was within the band of reasonableness.

The Court found that in circumstances where an employee made a serious allegation of theft against a colleague, the employer was entitled to classify it as gross misconduct warranting dismissal, and any concerns of procedural unfairness could be discounted because they would have made no difference to the outcome. Was the Court not entitled to reach such a finding?

Alternatively, was it not open to the Tribunal to form the view that no reasonable employer would have dismissed Mr Dobbin in all the circumstances (i.e. that it was substantively unfair to dismiss him)? Was dismissal not a disproportionate sanction? Moreover, could it properly be said that the significant findings of procedural unfairness reached by the Tribunal were irrelevant in all of the circumstances.

Given the Court's findings that the Tribunal acted erroneously on various issues, a better outcome might have been for the Court to have either remitted the matter for reconsideration by the Tribunal on specified issues or remitted the case for a new hearing before a differently constituted tribunal.

In short this appears to be an instance of the Court of Appeal restoring the employer's decision by substituting its opinion of the case for the Tribunal's opinion but with findings that are too broad-brush. The Court has failed to adequately explain why the Tribunal's findings were wrong in law: either by reason that specific factual findings were erroneous / perverse; and/or, by reason that the Tribunal's perception of the requirements of reasonableness to be applied to any given factual finding was erroneous.

REDUNDANCY SELECTION

McCormick v Short Brothers Plc [2010] NICA 14

In 2001-2002 some 2000 employees were made redundant. The redundancy system was known as the 720 system which selected employees for redundancy under five criteria: productivity, quality of workmanship, attitude, ability to work unsupervised, housekeeping.

Mr McCormick received a low score on 'attitude' and 'ability to work unsupervised'. He received these scores because of his insistence on using drawings to check if parts were matched to the correct paperwork. This had been standard practice but his manager had encouraged him to dispense with this practice. It was a matter of a different approach to the job of checking that parts were correctly matched. A broadbrush approach was taken to the marking of the other criteria which made the scoring on 'attitude' and 'ability to work unsupervised' more significant.

The Tribunal found that the marking down of the Claimant on 'attitude' and 'ability to work unsupervised' was perverse and irrational – no reasonable employer would have dismissed the Claimant for such a reason.

The Company appealed the decision. The Court of Appeal overturned the decision of the Tribunal. Sir John Shiel stated as follows:

> *[8] Mr Lockhart QC, who appeared on behalf of the respondent in this appeal, submitted that the decision of the industrial tribunal was wrong in finding that the marking down of the claimant on the criteria of "attitude" and "ability to work unsupervised" was perverse and irrational and was outside the range of reasonable responses of a reasonable employer. He submitted that while the Tribunal had correctly reminded itself of the applicable legal principles before reaching its conclusions in the present case, the Tribunal had failed properly to apply those principles and essentially substituted its own view for that of the employer. He submitted that the tribunal appeared to be saying that in the absence of a formal working directive that the quality inspection should be carried out as suggested by Mr Bailey, the claimant's failure to follow Mr Bailey's suggestion should not have been taken into account in assessing the attitude of the claimant. Mr Lockhart submitted that it is asking far too much of an employer to require him in every instance to have a formal work practice, which has to be followed, for a particular piece of work, as distinct from a manager making suggestions as to how the work should be done. He submitted that it was entirely proper for Mr Bailey in his assessment of the claimant to have taken into account the fact that the claimant insisted on doing the job the way the claimant preferred and that it cannot be said that Mr Bailey was perverse or irrational to have done so.*

[9] Mr Potter, who appeared for the claimant, did not fault the "720 system" but submitted that Mr Bailey did not apply the criteria properly, which resulted in unfairness to the claimant. He stated that, while Mr Bailey had taken the broad-brush approach to the criteria of "productivity", "quality of workmanship" and "housekeeping" which were capable of objective assessment, when it came to the criteria of "attitude" and "ability to work unsupervised", Mr Bailey took a subjective element into account with the result that the claimant was made redundant because he was marked down in respect of them. Mr Potter referred this court to Harvey on Industrial Relations and Employment Law at 12/C/3/B where is it stated:

> *"Finally, as the EAT made clear in the Williams and Compair Maxam case, it is important the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment. As the Tribunal pointed out, the purposes of such objective criteria is to ensure that the redundancy is not used as a pretext for dismissing an employee whom some manager wishes to have removed for some other reason. Consequently the criteria adopted in the Williams case itself which involved retaining those 'who, in the opinion of the managers concerned, would be able to keep the company viable' was unsatisfactory."*

In the same paragraph in Harvey the text went on to say:

> *"In Graham v ABF Limited [1986] IRLR 90 the EAT refused to find that a Tribunal had erred in law when it considered that redundancy criteria based on 'quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work' were not so intrinsically nebulous and subjective that they could not form proper criteria for selection. It did, however, emphasise that the vaguer the criteria the more important it was for the employer to consult."*

Mr Potter submitted that the less objectively verifiable a criterion the more susceptible it is to arbitrariness in its application. This is undoubtedly true but, as already mentioned in the present case there is no suggestion of bias or victimisation in the present case. Further in the opinion of this court there is an objective fact, which is not in dispute, namely that the claimant insisted upon doing the work in the manner which he considered more appropriate rather than following the suggestion made by Mr Bailey, his manager, as to how the quality inspection should be done.

[10] This court considers that it cannot be said that it was perverse or irrational for Mr Bailey to take into account the issue as between himself and the claimant when marking down the claimant on the criteria of "attitude" and "ability to work unsupervised" or that to do so was outside the range of reasonable responses of a reasonable employer.

COMMENT

Whilst the case illustrates that there can be a fine line between what may be considered a rational exercise of managerial discretion on the one hand and an arbitrary exercise on the other, the Court's decision confirms that an employer has very broad discretion in the process of selecting employees for redundancy.

Mr McCormick had not disobeyed a management instruction. His using drawings to double-check which parts were required to avoid mistakes in ordering had not interfered with the efficiency of the employer's operation. The impugned redundancy selection markings were based on a managerial perception of a lack of cooperation on the part of the employee, i.e. a subjective managerial view of an employee's preparedness or unpreparedness to comply with a managerial preference (as opposed to an instruction or order) as to how work should be done in circumstances where the non-compliance has no adverse impact on the work (and if anything better ensured that mistakes were not made).

The Court held that a proper basis for adverse marking in the redundancy selection process arose because the employee chose not to do his job in the manner that his manager suggested, persisting with his own method believing it ensured the job was done to a higher standard.

The decision is consistent with how the law has developed elsewhere in the United Kingdom over the last number of years. A relevant extract of commentary in *Harvey on Industrial Relations and Employment Law* Division D1 reads as follows:

> ***[1701]*** *Finally, as the EAT made clear in the Williams v Compair Maxam case, it is important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment. As the tribunal pointed out, the purpose of such objective criteria is to ensure that the* ***redundancy*** *is not used as a pretext for dismissing an employee whom some manager wishes to have removed for some other reason. Consequently the criteria adopted in the Williams case itself which involved retaining those 'who, in the opinion of the managers concerned, would be able to keep the company viable' was unsatisfactory. One way to avoid such a challenge is therefore to rely as far as possible on quantifiable criteria (eg absence record and measurable productivity); even where a criterion is more subjective, such as 'efficiency', it may still be possible to link it into other (less purely subjective) internal procedures such as appraisal reports.*
>
> ***[1701.01]*** *However, objectivity cannot be considered an absolute requirement and ultimately this all remains a question of balance. In the early case of* ***Graham*** *v ABF Ltd [1986] IRLR 90 the EAT refused to find that a tribunal had erred in law when it concluded that* ***redundancy*** *criteria based on 'quality of work, efficiency in carrying it out and the attitude of the persons evaluated to their work' were not so intrinsically nebulous and subjective that they could not form proper criteria for selection (though note the interesting rider that it added that the vaguer the criteria the more important it was for the employer to consult). More recently there has arguably been a move to a rebalancing in this area, stressing that objective criteria are only one factor and, perhaps more importantly, that few criteria can ever be wholly objective; an element of judgment and/or assessment will often be involved and the overall question remains whether that element was carried out fairly. This approach was seen in Samsung Electronics (UK) Ltd v Monte-d'Cruz UKEAT/0039/11 (1 March 2012, unreported) in the specialised context of effecting* ***redundancies*** *by dismissing all and reappointing some (see para [1725] below). However, it was subsequently applied to 'straight'* ***redundancy*** *selection in Mitchells of Lancaster (Brewers) Ltd v Tattershall UKEAT/0605/11 (29 May 2012, unreported) where the EAT upheld as fair the selection for* ***redundancy*** *of one of five members of the senior executive team of a small brewery in financial difficulties, done purely by the directors and largely on the basis of who they could best afford to lose. Obviously, the size of the undertaking and the urgency of the situation were relevant, but more generally the Master of the Rolls said;*
>
> > *''Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment, in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other than the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises.''*
>
> *This was then cited and applied in Nicholls v Rockwell Automation Ltd UKEAT/0540/11 (25 June 2012, unreported), another straightforward case of* ***redundancy*** *selection. Thus, a*

challenge by a selected employee purely on the ground that one or more criteria were too subjective may now be dubious; he or she may also have to show that the subjective element was applied unfairly. On the other hand, from an employer point of view, it is still good advice to make the criteria as objective and measurable as possible in order to minimise challenges in the first place.