THE INDUSTRIAL TRIBUNALS

CASE REF: 2015/21

CLAIMANT: **John David Dempster**

RESPONDENT: **The Gill Corporation Europe Limited**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was automatically unfairly dismissed by the respondent and is entitled to a total monetary award of £4,114.84, subject to the Recoupment Notice appended to this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Crothers**

Members: **Mrs C Stewart**
Mr D Walls

APPEARANCES:

The claimant appeared in person.

The respondent was represented by the Managing Director, Mr G Morrison.

THE CLAIM

1. The claimant, who had withdrawn his claim of unlawful discrimination on the ground of disability, claimed unfair dismissal, and automatic unfair dismissal by reason of the respondent's failure to follow the statutory dismissal procedures. The respondent denied the claimant's allegations in their entirety.

THE ISSUES

2. The issues for determination were:-

   (1) Whether the claimant was unfairly dismissed by the respondent according to the ordinary principles of unfair dismissal law.

   (2) Whether the claimant was automatically unfairly dismissed.

   (3) If the claimant was automatically unfairly dismissed should there be an uplift in any compensation and, if so, at what percentage?

(4) Should the claimant be successful in his claim for unfair dismissal, what is the appropriate remedy?

FINDINGS OF FACT

3. (i) The claimant, whose date of birth is 25 March 1976, was employed by the respondent ("The Gill Corporation") from 4 April 2016 until the effective date of his termination of employment on 30 October 2020. He was employed as a General Operative.

(ii) The respondent, which is a subsidiary of The Gill Corporation USA, had 16 employees. It was obvious to the tribunal from the evidence that the Gill Corporation was under considerable financial and trading pressures during the Covid pandemic, which involved furlough arrangements for employees, including the claimant. A change in the furlough arrangements was scheduled for 30 October 2020. As revealed by correspondence from the claimant to the respondent dated 17 April 2020 the claimant sought approval to be furloughed under the Government Furlough Scheme. In that correspondence he pointed out that he was living at home with an elderly parent and brother with learning difficulties and (as yet) an undiagnosed respiratory illness. The claimant also referred to having to help out his fiancée with the care of her father after his care package was cut from four visits to one visit a day. This individual was over 70 years of age and had several underlying health conditions. There is no dispute that the Gill Corporation and the claimant engaged in discussions in relation to this matter prior to 30 October 2020. At that point the claimant was prepared to return to work with the respondent, if only on a part-time basis. In the subsequent period the claimant was clearly under pressure to obtain employment and sustain himself and his family and sought and obtained Jobseekers Allowance up until the commencement of a new job on 4 January 2021. It was a requirement, in order to obtain Jobseekers Allowance, for the applicant to actively seek employment.

(iii) At the date of termination of his employment, the claimant was earning £368.52 gross per week (£308.96 net per week). The claimant had already been paid statutory redundancy amounting to £2,026.86 together with £1,474.08 for payment in lieu of notice and £1, 207.95 for outstanding leave, totalling £4,708.89.

(iv) The respondent did not have a redundancy policy and, pursuant to legal advice, approached the redundancy situation which arose on an ad hoc basis using a multifactor matrix.

(v) Although there had been a stream of correspondence relating to the furlough arrangements and the difficulties pertaining within The Gill Corporation, the first item of correspondence specifically referring to redundancies is dated 14 October 2020. This was received by the claimant on 16 October. The tribunal finds it necessary to set out this correspondence below:-

"Covid-19 Pandemic: End of Furlough Scheme/Future

Dear

The current situation is not good. GillEurope have tried every available way of retaining our current workforce and trying to bring forward work scheduled for Q1 & Q2 2021 in the hope of an early recovery from the current Aerospace Sector decline. Unfortunately there is no sign of recovery.

- Immediate demand is below 40% of 2019 average.
- GillEurope cannot bring forward work from Q3/Q4 2020 or later.
- GillEurope returned a loss on September 2020 trading.
- Current (provisional) customer build programs show no improvement until Q3 2021 and then a limited demand equivalent to 60-70% of 2019 monthly levels.
- More general analysis of Aerospace recovery potential is now suggesting that this may continue until 2023/24.
- UK Government's Job Support/Job Retention Schemes (replacing Furlough 30/10/20) offer employees 78% of normal wages for minimum 33% normal hours worked but at a 55% cost to GillEurope [as opposed to 0% (Apr-Aug), 10% (Sept) and 20% (Oct)].

Unfortunately, under these circumstances we have no option but to reduce our costs and align our staffing levels with the projected throughput. This, regrettably, must include redundancies.

As a first step in this process **we are asking anyone who, for whatever reason, is prepared to volunteer for redundancy to contact Gary Morrison before 9.00am Monday 19/10/20.**

Subsequent redundancy selection from shopfloor & office will be informed by the projected needs of the company and be conducted in a fair manner including a consideration of:

- Flexibility
- Quality/Efficiency
- Specific skills
- Duplication of skills
- Years' Service/training

Selected candidates will be given the opportunity to meet with management before issue of a notice of redundancy: they may be accompanied by a witness of their choice to any such meeting.

Redundancy will be paid in accordance with statutory redundancy entitlement guidelines*.

You will receive an update to this letter after 19/10/20 closure of voluntary redundancy applications.

Yours sincerely: _____

Gary Morrison

Managing Director

*https://www.nidirect.gov.uk/articles/redundancy-pay"

(vi) The claimant interpreted the correspondence of 14 October 2020 as bearing upon the issue of voluntary redundancy which was not of any interest to him. The claimant consistently made the case that no at risk of redundancy correspondence had ever been sent to him, and that no meaningful consultation had been held by way of a meeting. It was accepted, in the circumstances of a redundancy, that the initiative rests with the respondent to arrange a meeting and consult with the individual concerned accompanied, in this case, by *"a witness of their choice"* at the consultation meeting. The parties at the hearing were aware that the issues in the case involved the fairness of the selection procedure including consultation, and the issue of suitable alternative employment. In addition both sides were aware of the three step statutory procedure in the context of an automatic unfair dismissal claim.

(vii) At this stage, the tribunal considers it helpful to set out the three step procedure found at Schedule 1 to the Employment (Northern Ireland) Order 2003.

"CHAPTER I
STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1.—(1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2.—(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3.—(1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

(viii) The respondent forwarded further correspondence dated 27 October 2020 to the claimant. He received this correspondence by email on 28 October 2020 at 5.51 pm. It is necessary to set out the correspondence in full (amended to refer to four weeks and not 12 weeks in relation to the payment in lieu of notice):-

"Dear John Dempster

Further to your letter of 14/10/20

As you know Gill-Europe has been very badly affected by the huge downturn in the aerospace sector and the current prospects mean that we must adjust our capacity immediately to match this low demand and possibly make further changes as we move into 2021.

To that end we have carried out an extensive review of required manning levels including, as noted in the above letter, identification of potential candidates for redundancy: unfortunately you qualify for the first round of staffing adjustments.

You are of course entitled to a consultation to discuss why you have been chosen and what alternatives have been/may be considered. If you wish to take advantage of this offer please contact me as soon as possible to arrange a person to person or webex meeting. You are entitled to be accompanied by a witness during any such meeting.

Please find below & attached details of proposed final settlement payment and termination of your contract with the Gill Corporation Europe…

Details used for calculation purposes:-

Start Date:	04/04/2016
Date of Birth:	25/03/1976
Termination Date:	30/10/2020

Proposed settlement details:

Statutory Redundancy:	£2,026.86 (see attached)

Payment in lieu of notice: £1,474.08 ([4] weeks at £368.52 per week)
O/S annual leave: £1,207.95

C/F from 2019	5.00
Holidays 2020 10 months	19.16 (23/12x10)
Factory closures to 30/10/20	-5.00
Holidays taken	-4.00
Balance:	15.16 days

Total: **£4708.89**

Entitlements & calculations have been calculated in accordance with Government guidelines.

If you agree to these changes, please indicate your acceptance by returning a signed copy of this letter.
Your final working day will be 30/10/20 and full payment of above will be made on 5/11/20.

You should keep a signed copy of this letter safe as a record of termination of your Employment Contract with The Gill Corporation Europe Ltd.

Yours sincerely: _____
Gary Morrison
Managing Director

Agreed as full & final settlement & termination of my contract with The Gill Corporation Europe Ltd:

_____ _____"
John Dempster Date

(ix) The claimant viewed this correspondence as constituting a decision to dismiss him on the ground of redundancy without prior notice by way of a redundancy risk letter or a meaningful consultation. The correspondence does refer to the fact that *"you are of course entitled to a consultation to discuss why you have been chosen and what alternatives have been/may be considered"*. However, the tribunal is satisfied that before this correspondence was forwarded to the claimant, he ought to have received specific correspondence informing him precisely of his individual situation and inviting him to a proper consultation meeting. The tribunal considers that the claimant's understanding of this correspondence was reasonable as clearly a decision had effectively been made to make him redundant without proper consultation in advance.

(x) The respondent, in a further email to the claimant dated 28 October 2020, after reflecting upon the state of the respondent's business and the fact that the current situation was going to last well into 2021, if not beyond that, states, *"as noted in the letter you can contact us to arrange an actual or virtual meeting to discuss this if required"*.

(xi) The claimant sought advice at this stage within the limited timeframe available and considered, in the tribunal's view reasonably, that his only real option in light of the pace of events was to appeal against the decision to dismiss him because of redundancy. He did this in correspondence dated 30 October 2020 providing reasons for appeal as follows:-

"• The final decision was made with out following the procedure as out lined in the letter send 14/10/2020
- I was unfairly selected as I was not given the opportunity to put my case forward to management as set out in the letter sent 14/10/2020.
- The letter (emailed) 28/10/2020 states that I get £1,474.08 Payment in lieu of notice, but that it calculated at 12 weeks at £368.52 making the above figure wrong.

I would be grateful if you could let me know when and where we can meet to discuss my appeal."

(xii) At this stage, the claimant had limited information and had not seen the matrix used by the respondent. This matrix had been prepared pursuant to legal advice and is reproduced below:-

										JOHN DEMPSTER	
	DOB									25/03/1976	
	AGE									44.62	
	PREV	1990-91, 93-96, 98-01 & 03-07	26/4/93 to 1/4/97								
	CURR	1/1/08	2/4/97	22/11/99	4/8/08	12/11/11	23/1/12	31/3/14	28/4/14	4/4/16	8/1/
	SERV	12.82	23.58	20.94	12.23	8.96	8.76	6.58	6.50	4.56	2.8
										OPERATIVE	
Flexibility	OT RESPONSE	1	0	1	1	1	0	1	0	0	1
	ADDT HOURS	1	0	1	1	1	1	1	0	0	1
Quality		1	1	1	1	1	1	1	1	0.75	0.7
Efficiency		1	1	1	0.75	1	0.75	1	1	0.75	0.7
Special Skills	CNC	0	1	1	0	0	0	1	0	0	0
	FORKLIFT	0	0	0	1	1	0	1	1	0	1
	FIRST AID	0	0	0	0	0	0	0	0	0	0.5
UNIQUE Skills		1	0	1	0	1	1	0	0	0	0
ATTITUDE		1	0.5	1	1	0.75	1	1	0.5	0.5	1
EXPERIENCE		1.25	1.5	1.5	1.25	1	1	0.75	0.75	0.5	0.5
		7.25	**5**	**8.5**	**7**	**7.75**	**5.75**	**7.75**	**4.25**	**2.5**	**6.5**

	PREV	1/4/86 to 1/4/97	2/3/05 to 25/10/09					
	CURR	2/4/97	2/3/05	###	16/6/06	1/2/11	26/3/18	16/9/19
	SERV	23.58	15.66	###	14.37	9.74	2.59	1.11
Flexibility	OT RESPONSE	1	0		1	1	0	0
	ADDT	1	0		1	1	0	1

HOURS							
Quality	1	1		1	1	1	0.75
Efficiency	1	0.75		1	1	0.5	1
Special Skills CNC							
FORKLIFT							
FIRST AID							
UNIQUE Skills	1	0		1	1	0	1
ATTITUDE	1	0.5		1	1	0	1
EXPERIENCE	1.5	1.25		1.25	1.25	0.25	0.25
	5	**1.75**	**0**	**5**	**5**	**1.5**	**3.75**

(xiv) The claimant maintained that the criteria in the matrix did not match the criteria notified to him in the correspondence of 14 October 2020. The respondent rejected this contention although acknowledged that the matrix, as produced, was inaccurate in that the individual who scored 4.25 was retained, as someone else volunteered for redundancy. Furthermore, the claimant's forklift licence had expired in August 2020 and it appears that due to his personal circumstances retraining was not possible at that stage to renew his licence. The matrix scored one individual as having a forklift licence in error. The respondent accepted this. The respondent's contention was, despite these factors, that the claimant would still have been made redundant. The respondent also acknowledged that the "attitude" factor in the matrix was "terribly" subjective but was designed to ensure that people work together. The claimant also questioned the factor relating to a first aider as he had not volunteered for such a role. He also queried the score regarding overtime as, due to his domestic situation, he was not in a position to do overtime. He felt that his previous eight years' experience in the aerospace industry should have been taken into account in relation to experience. The tribunal however accepts the respondent's approach in stating that such experience had been gained outside The Gill Corporation which generally was not taken into account by the company. The matrix was applied to all 16 employees divided into two pools: office/management (6) and shop floor (10). The claimant was one of the shop floor employees. Two employees out of each pool were made redundant.

(xv) The Gill Corporation responded to the claimant's letter of appeal on 30 October at 17.55 pm as follows:-

> "Reference your letter of 30th October 2020.
>
> We are very surprised to receive your response 5 hours after the end of your final working week.
>
> We will try to address your concerns
>
> The final decision *could* have been influenced by any additional information presented at a Consultation Meeting as offered in the letter of 27/10/20.
> You did not reply to the letter or request a meeting.
> The letter set out your potential redundancy payment entitlements to allow you to check all data presented.
> You did not reply to this letter or point out any errors.

Fairness. The previous letter of 14/10/20 “Covid 19 Pandemic: End of Furlough Scheme” clearly presented the criteria being used for selection and your potential redundancy payments: we can assure you that the evaluation was carried out fairly and payments calculated in accordance with LRA, FSB, Government & other guidelines.

Following this advice we:

- Identified 2 pools (Office & Shopfloor) and
- Abandoned the old last-in/first-out method for a fairer detailed review of all capabilities & attributes as noted.
- Scoring & selection was reviewed by 3 senior managers.

Under the rules above we cannot share other employees’ scores but can confirm that, unfortunately, your score left you in a position which “qualified” you for redundancy.

Notice error.
The 27/10/20 letter does include an error in the notes to payment in lieu notice: while the total is correct for your 4 weeks entitlement the note should read 4(not 12) weeks at £368.52 per week).
Please see attached a revised letter of 30/10/20 correcting this letter with my apologies.

Meeting/Appeal
We would only be prepared to consider any further discussion if you can identify any specific reason for your allegation of unfairness.

We would have preferred not to make anyone redundant but, being forced to these measures, we went to considerable lengths to ensure that the process was fair, within all available guidelines and followed the criteria identified to ensure the best future for the company and its’ attempts to survive and recover from the current situation.

If you can provide this specific information we would be pleased to review the details and, if necessary, arrange a meeting.

Again were deeply regret having to terminate your contract and wish you every success in securing alternative employment.
As noted payments due can be made 5/11/20 on receipt of a signed copy of the (revised) redundancy letter attached.

Regards
Gary Morrison
Managing Director”

(xvi) As the above correspondence shows, the claimant did not have access to the other employees’ scores and was therefore not in a position to identify any specific reason for his allegation of unfairness.

(xvii) Since being dismissed the claimant sought and obtained Job Seekers

allowance for the period 8 November 2020 – 3 January 2021 at the rate of £74.35 per week paid fortnightly, totalling £605.43. From a perusal of the claimant's wage slips from 14 January 2021 to 13 May 2021, he was consistently paid at a higher net weekly rate than pertained in his employment with The Gill Corporation at the effective date of termination of his employment.

THE LAW

4. (1) To establish that a dismissal is not unfair an employer must establish the reason for the dismissal and that it is one of the statutory reasons that can render a dismissal not unfair. If an employer establishes both of these requirements then whether the dismissal was fair or not depends on whether in all the circumstances the employer acted fairly and reasonably in treating the reason as a sufficient reason for dismissing the employee (Article 130 The Employment Rights (Northern Ireland) Order 1996).

(2) Where an employee is dismissed and the statutory dismissal procedure is applicable but has not been completed and the non-completion is wholly or mainly attributable to the failure of the employer to comply with its requirements the dismissal is automatically unfair (Article 130A The Employment Rights (Northern Ireland) Order 1996).

(3) Where the circumstances set out at paragraph 5(2) above apply, a tribunal shall increase any award to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances, increase the award by up to 50 per cent, unless there are exceptional circumstances which would make such an increase unjust or inequitable (Article 17(3) and (4) The Employment (Northern Ireland) Order 2003).

(4) The failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4) (a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the appropriate procedure (Article 130A(2) The Employment Rights (Northern Ireland) Order 1996).

(5) In the case of ***BL Cars v Lewis [1983] IRLR 58***, Mr Justice Browne-Wilkinson states at paragraph 12 of his judgement:-

> "It also seems to us that it is possible that the majority were not correctly directing themselves to their function. The passage which we have read indicates that they may have thought that it was the function of the tribunal to decide whether they (the tribunal) thought that the correct selection had been made, in the sense of being a selection that they would have made. The correct question they had to ask themselves was whether the selection was one that a reasonable employer, acting reasonably, could have made".

(6) In relation to using absence as a criterion for redundancy Lord McDonald at page 80C of his judgement in the case of ***Dooley v Leyland Vehicles Ltd [1987] SLT 76***, states as follows:-

> "The method of selection refers to absence, and is silent as to the reason for or cause of any absence. That that should be so, it is quite intelligible. The reason for or cause of any particular absence may not be clear, and, if it is disputed, some inquiry would be necessary to determine what the reason for or cause of the absence was. In the context of selecting for redundancy, such an inquiry would not be practical".

(7) At paragraph 15 of his judgement in the case of ***Drake International Systems Ltd [T/A Drake Ports Distribution Services] v Colin O'Hare. EAT/0384/03/TM EAT/0577/03/TM*** Judge Ansell states, in relation to the tribunal's function in such cases, as follows:-

> "We are left in no doubt that the tribunal were in error in this case in seeking to impose their own views as to the reasonableness either of the criteria or the implementation of those criteria, as opposed to asking the correct question which was whether the selection was one that a reasonable employer acting reasonably could have made".

(8) Judge D Serota at paragraph 27 of his judgement in the case of ***Mrs J K Bansi v Alfa Flight Services UKEAT/0652/03/MAA*** states:-

> "… However it is for the employer to select the appropriate skills it wished to retain".

(9) The tribunal also considered the guidance given by Glidewell LJ in the case of ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72***. At paragraph 24 of his judgement he states:-

> "It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in **R -v- Gwent County Council ex parte Bryant**, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:-
>
> > "Fair consultation means:-
> >
> > (a) consultation when the proposals are still at a formative stage;
> >
> > (b) adequate information on which to respond;
> >
> > (c) adequate time in which to respond;
> >
> > (d) conscientious consideration by an authority of the response to consultation".

(10) The tribunal also obtained useful guidance from Judge Peter Clark's judgement in the case of ***Langston v Cranfield University [1988] IRLR 172*** at paragraph 33ff:-

> "(4) Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer.
>
> (5) Because there is now no onus on either party to establish the reasonableness or unreasonableness of the dismissal under s.98 (4) it is for the industrial tribunal to determine that question 'neutrally'.
>
> (6) In these circumstances we think it is incumbent on the industrial tribunal to consider each of the three questions mentioned in (4) above, in the same way that an industrial tribunal will consider the threefold *Burchell* test in an appropriate conduct case. It is desirable that at the outset of the hearing the live issues are identified by the industrial tribunal.
>
> (7) Normally, an employer can be expected to lead some evidence as to the steps which he took to select the employee for redundancy, to consult him and/or his trade union and to seek alternative employment for him.
>
> (8) We would normally expect the industrial tribunal to refer to these three issues on the facts of the particular case in explaining his reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy.
>
> In setting out these propositions we are not seeking to replace the statutory test under s.98(4) but to ensure its practical application in redundancy cases".

(11) Article 157(1) of the Employment Rights (NI) Order 1996 ("the 1996 Order") provides that the amount of the compensatory award shall be:-

> "Such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

(12) The compensatory award should not be increased out of sympathy for the claimant or to express disapproval of the respondent (***Lifeguard Assurance Ltd v Zadrozny (1997) IRLR 56***).

(13) In ***Norton Tool Company Ltd v Tewson [1973] 1 ALL ER 183***, the NIRC

said that compensation should be assessed under four main headings:-

(a) Immediate loss of earnings, ie loss of earnings between the date of dismissal and the date of the hearing.

(b) Future loss of earnings, ie anticipated loss of earnings in the period following the hearing.

(c) Loss arising from the manner of the dismissal.

(d) Loss of statutory rights, ie compensation for being unable to claim unfair dismissal for a period of at least one year.

In ***Tidman v Aveling Marshall Ltd [1977] IRLR 218***, the EAT held that it was the duty of each tribunal to raise and enquire into each of the four heads of compensation established by ***Norton Tool*** plus a fifth head of compensation – loss of pension rights. It should be noted that enquiring into a particular head of compensation does **not** mean that compensation has necessarily to be awarded under that head.

5. In Division D1 of Harvey on Industrial Relations and Employment Law ("Harvey"), the following paragraphs are considered relevant:-

[1669]

The House of Lords in the *Polkey* case (discussed above, para [998]) expressly adverted to the relevant procedures required in a redundancy dismissal in the following terms:

> "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.'

[1685]

A crucial preliminary problem in relation to redundancy selection where the requirements of a business for employees to carry out work of a particular kind have ceased or diminished is to choose the group of employees from which the selection must be made. The system for choosing this pool must be fair and if there is a customary arrangement or procedure then that should be followed unless there is a good reason for not doing so. The pool should include all those employees carrying out work of that particular kind but may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees. Ultimately the pool from which the selection will be made is for the employer to determine, and, in the absence of a customary arrangement or procedure, it will be difficult for an employee to challenge where the employer can show that he has acted reasonably.

[1686.01]

As in any area of unfair dismissal law, there is a balance to be struck here between on the one hand the tribunal's powers of adjudication and on the other hand the level of discretion to be given to an employer making economic decisions and the rule that a tribunal must not substitute its own view. Arguably, it may be particularly difficult to attain that balance in relation to pool selection.

[1686.02]

It is true that the employer has considerable latitude in redundancy selection cases and that a tribunal must not overstep the mark and impose what it would have decided. However, the EAT here pointed to the next sentence in Mummery J's judgment which said 'It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem'. That was interpreted as meaning that (a) the tribunal does have the power and right to consider the *genuineness* requirement and (b) ruling against the employer's choice of pool may be difficult *but not impossible*. On the facts here, the tribunal had not overstepped the mark and had come to a defensible decision on the facts. Having reviewed the case law, Silber J at para 31 gave this summary of the true position:

> ''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 Limited [1982] IRLR 83)***;
>
> (b) "…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 Limited v Fairbrother and Others (UKEAT/0691/04/TM)***;
>
> (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 v Ryan EAT/663/94***);
>
> (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.''

[1687]

It is now well established that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see eg ***Earl of Bradford v Jowett (No 2)*** ***[1978] IRLR 16*****,** ***[1978] ICR 431***; and ***NC Watling v Richardson*** ***[1978] IRLR 255*****,** ***[1978] ICR 1049***). Last in, first out ('LIFO') used as a dominant (or even sole) criterion for many years but during the period of major changes in industrial relations in the 1980s suffered a very noticeable decline, partly as a result of the contemporary decline in influence of the trade unions, for whom it had always been the 'least unfair' form of selection. Under the new dispensation, it became clear that (especially in hard economic times) an employer must be entitled to take into account criteria in addition to length of service, eg efficiency and the need to retain a balanced workforce. Provided these are proper criteria the tribunal cannot seek to substitute its own selection method by giving greater prominence to long service (***BL Cars Ltd v Lewis*** ***[1983] IRLR 58***). However, the introduction of these wider criteria meant more of a role for judgment of the employee and his performance by the employer, which opened up a greater possibility of a challenge of unfairness by the employee(s) selected; the one major advantage of LIFO for the employer had been that the eventual dismissals were almost certain to have been fair.

[1702.01]

It appears, however, that the courts will not be willing to carry out a detailed re-examination of the way in which the employer applied the selection criteria. In ***Eaton Ltd v King*** ***[1995] IRLR 75*** the Scottish EAT (Lord Coulsfield presiding) stated that it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This approach was expressly endorsed by both Waite and Millett LJJ, in the Court of Appeal decision in ***British Aerospace plc v Green [1995] IRLR 437*** where there was a definite reason for such a hands-off approach because the case concerned the selection for redundancy of 530 employees out of a workforce of approximately 7,000—not a task a tribunal would want to repeat. Waite LJ summed up the position as follows:

> ''Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely a swift, informal

> disposition of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him."

[1702.02]

Similar sentiments were expressed by Pill LJ in ***Bascetta v Santander [2010] EWCA Civ 351*:**

> "The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in ***Eaton Ltd v King*** … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based."

[1707]

All these decisions were reviewed by the EAT in ***Mugford v Midland Bank [1997] IRLR 208***, who summarised the state of the law as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the [employment] tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

[1721]

In order to act fairly in a redundancy situation, an employer is obliged to look for alternative work and satisfy itself- that it is not available before dismissing for redundancy.

SUBMISSIONS

6. The claimant made submissions reflecting on how the furlough arrangements changed again 7 to 14 days after 30 October 2020 and reiterated that in his

submission, The Gill Corporation had not complied with the three step procedure and that his dismissal was unfair. Mr Morrison reiterated that The Gill Corporation had taken legal advice and had access to the Government Website. In consequence they had not pursued the redundancies on the *"last in first out"* principle but had adopted a points system. Mr Morrison also pointed out that if the claimant had not been made redundant and was working he would still have been in furlough a short time after 30 October 2020 and there would have been a difference to income expectation over that period.

CONCLUSIONS

7. The tribunal, having carefully considered the evidence together with any submissions from both parties, and having applied the principles of law to the facts as found, concludes as follows:-

(i) The reason for the dismissal was redundancy.

(ii) It is clear to the tribunal that the statutory dismissal procedure is applicable and that the respondent failed to follow the three step approach set out in the Employment (Northern Ireland) Order 2003. The claimant was not provided with written notice that he was being invited to a meeting to consider the termination of his employment on ground of redundancy. Such a meeting should have been held to engage in a meaningful consultation with the claimant and to consider any proposals to avoid redundancy. In the event of there being no way forward to retain the claimant, The Gill Corporation should have confirmed the redundancy in writing at that stage with the claimant being provided with confirmation of entitlement to redundancy pay and any other payments due. These entitlements were set out in the correspondence dated 27 October 2020 when a decision had already been taken to make the claimant redundant in advance of any meaningful consultation at The Gill Corporation's initiative. The claimant's appeal should have been properly considered by an individual within the Gill Corporation who had no prior involvement in the process. This was not done.

(iii) The failure to follow the statutory procedures is the responsibility of The Gill Corporation. The tribunal is satisfied on the evidence before it, that the claimant has been automatically unfairly dismissed.

(iv) By reason of the automatic unfair dismissal the tribunal is also satisfied that there should be an uplift in any compensation in accordance with Article 17 of the 2003 Order. The tribunal takes the view that the appropriate uplift should be 30% as the respondent did have an exchange of correspondence with the claimant, however flawed the procedure reflected therein may have been. The tribunal does not consider that there are any exceptional circumstances that would render an increase of 30% unjust or inequitable.

(v) The decision in **Polkey** cannot render an automatically unfair dismissal fair but it can give rise to a reduction in the amount of compensation up to 100% in appropriate circumstances. Article 130A of The Employment Rights (Northern Ireland) Order 1996 provides, subject to adherence to the statutory procedures, that failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of

Article 130(4) (a) as by itself making the employer's action unreasonable if the employer shows that he would have decided to dismiss the employee if he had followed the procedure. This was not shown in the circumstances of this case. The Gill Corporation did not have a pre-existing procedure to follow and proceeded on an ad hoc basis to address the redundancy issue using a multifactor matrix pursuant to legal advice.

(vi) The tribunal is therefore satisfied that the claimant's dismissal was unfair both under Article 130A of the 1996 Order and on ordinary unfair dismissal principles.

REMEDY

8. (1) The claimant is not entitled to a basic award as a redundancy payment has already been made.

(2) Compensatory Award.

30 October 2020 to 3 January 2021 308.96 x 9 = £2,780.64 + (30% uplift £834.20) total = £3,614.84

Loss of statutory rights £500. Total compensation = £4,114.84

The prescribed period is 30 October 2020 to 3 January 2021.

The prescribed amount is £605.43.

(3) The tribunal is not satisfied on the evidence there is a sufficient basis for any further amounts to be awarded.

9. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations (Northern Ireland) 1996 as amended applies in this case. It provides that part of the award (*"the prescribed element")* is retained by the respondent for a period to allow the Social Security Agency to recoup expenditure on relevant benefits.

10. The attached recoupment notice forms part of this judgment.

11. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 11&12 April 2022, Belfast.

This judgment was entered in the register and issued to the parties on: