21 APR 2017

# THE INDUSTRIAL TRIBUNALS

**CASE REF: 2270/16**

**CLAIMANT:** **Roberta Gray**

**RESPONDENT:** **Shankill Women's Centre**

## DECISION

The unanimous decision of the tribunal is that the claimant had been dismissed on the ground of redundancy. The respondent organisation had not fully complied with the three-step statutory procedure for dismissals and the dismissal had been automatically or technically unfair. However, the decision to select the claimant for redundancy had been substantively fair. The claimant would have been fairly dismissed even if the correct procedure had been followed. That dismissal would have been delayed for one month at most. Compensation which would have been due for that one month is more than offset by an enhanced redundancy payment and no compensation is payable.

**Constitution of Tribunal:**

**Vice President:** **Mr N Kelly**

**Members:** **Mr I Rosbotham**
**Mr A Huston**

**Appearances:**

**The claimant was represented by Mr J Bryson, of JWB Consultancy.**

**The respondent was represented by Mr M Towson, of Peninsula Business Services Ltd.**

**Background**

1. The respondent is company limited by guarantee which runs various projects in the Shankill area of Belfast. It receives funding from various sources including from Government Departments. At the relevant times, it ran, among other projects, an education support project and a childcare project.

2. The claimant had been employed by the respondent in the education support project from 2003 until 31 August 2016, when she was dismissed on grounds of redundancy.

3. The claimant lodged a tribunal claim on 2 November 2016 alleging unfair dismissal contrary to the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order'). She claimed that she had been unfairly selected for redundancy because she had taken a grievance against her employers on 4 April 2016 and further alleged that the dismissal had been procedurally and substantively unfair.

**Procedure**

4. This case had been case-managed. Directions had been given for the interlocutory process and for the exchange of witness statements, which had been intended to take the place of oral evidence-in-chief.

5. The claimant sought and was granted a Witness Attendance Order requiring the attendance of a former DUP Special Political Adviser ('SPAD'), Mr Andrew Gowan. The witness, represented by the Departmental Solicitor's Office, initially argued for that Witness Attendance Order to be set aside. That matter was heard at a Case Management Discussion on the day before the substantive hearing commenced. In the event, the Departmental Solicitor's Office agreed for the Witness Attendance Order to remain in place but to be modified to require the attendance, of Mr Gowan, for two hours only on the afternoon of the first day of the substantive hearing, ie Tuesday 29 March 2017.

6. There were various disputes about the interlocutory process and, in particular, about the furnishing of discovery. In cases where the witness statement procedure is used the practice is for witnesses to adopt their witness statement as their entire evidence-in-chief and then to move to cross-examination and then brief re-examination. In this case, additional oral evidence-in-chief was allowed to deal with matters raised by late discovery.

7. The respondent provided further additional documentation by way of discovery on the second day of the hearing. By that stage, the first two respondent witnesses had adopted their witness statements as their evidence-in-chief and had been cross-examined and re-examined. Those first two respondent witnesses were recalled for further cross-examination and re-examination in relation to that additional discovery.

8. As part of the additional discovery, the respondent produced facebook messages from the claimant's facebook account. The claimant's representative sought leave to raise what he argued was an important legal issue about privacy. That application was refused. This is a tribunal jurisdiction designed for the speedy resolution of employment disputes. The importance of the facebook entries appeared peripheral at best to the issue before the tribunal. In the final analysis, they formed no part of the tribunal decision. The delay which would have necessarily have resulted from an examination of the law in relation to privacy, with an almost inevitable postponement to enable arguments to be prepared, would not have been in accordance with the overriding objective.

9. The claimant's representative also argued in his final submission that the decision to progress the claimant's redundancy had been a breach of corporate law because the Board of the respondent had not been '*quorate*'. The claimant argued that this was a breach of the Articles of Association and referred to the recent decision of the English High Court in ***Pui-Kwan v Gilbert Leung Kam-Ho and Others [2015] EWHC 621 (CH)***.

There had been no evidence-in-chief or cross-examination about the Articles of Association. The Articles had not been provided to the tribunal in the bundle. There had been no evidence-in-chief or cross-examination in relation to whether or not the Board had been '*quorate*' at any point. The tribunal ruled that, irrespective of what were perceived to be the potential merits of this argument, it would not have been in accordance with the overriding objective to allow this matter to be pursued in the final submissions where no evidential basis for any such argument had been laid before the tribunal. In any event, the alleged illegality of the Board's meetings had nothing to do with the narrow statutory jurisdiction under the 1996 Order which fell to be exercised by this tribunal.

The tribunal therefore did not rule on this argument.

10. The tribunal heard evidence from the following witnesses on behalf of the respondent:-

(1) Ms Elizabeth Carlisle MBE, the manager of the respondent company;

(2) Ms Carol Lundy, the finance manager of the respondent company; and

(3) Ms Joan Mercer, the treasurer of the respondent company.

11. On behalf of the claimant, the tribunal heard from the following witnesses:-

(1) Mr Andrew Gowan, former SPAD to a DUP Minister, who attended on foot of a Witness Attendance Order, as described above;

(2) the claimant;

(3) Ms Donna McIlroy, a former Board member of the respondent company;

(4) Ms Alison Blayney, the centre manager of Kilcooley Women's Centre where the claimant is currently employed; and

(5) Ms Tracy Harrison, a former employee whose witness statement was accepted as evidence and who was not cross-examined.

**Relevant law**

12. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides that:-

*"(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 reasons (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.*

*(2) A reason falls within this paragraph if it –*

...

*(c) is that the employee was redundant,*

...

*(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."*

13. The Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd [1992] ICR 156*** listed the principles which, in general, reasonable employers adopt when dismissing for redundancy employees who are represented by independent trade unions. Those principles can be adapted where the employee is not represented by a recognised trade union. They are as follows:-

*"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 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."*

14. Clearly if there is no union which is actively involved, these general principles have to be modified accordingly.

15. In ***Polkey v AE Dayton Services Ltd [1988] ICR 142*** the Court stated:-

> *"In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation ... it is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that in the exceptional circumstances of the particular case, procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."*

16. When considering the termination of any employment the employer must follow the three-step procedure set out in Schedule 1 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order'). Paraphrasing that schedule, the procedure for a redundancy dismissal is:-

> *"(i) The employer must set out in writing the circumstances which lead him to contemplate dismissing the employee as redundant, and must send a copy to the claimant and invite him to a meeting to discuss it.*
>
> *(ii) There must be a meeting. The employee must be told of the decision and of his right to appeal.*
>
> *(iii) If the employee wishes to appeal, there must be an appeal meeting and the employee must be told of the decision."*

17. ***Polkey*** (above) as interpreted by ***Kelly-Madden Manor Surgery [2007] IRLR 17*** makes it clear that where there is a breach of the three-step procedure the employer may not argue that the dismissal was fair. However the employer may argue for a percentage reduction in the compensation payable (up to 100%) to reflect the chance of a fair dismissal if the correct procedure had been followed.

18. When determining the fairness or unfairness of a dismissal a tribunal, may not substitute its own subjective judgment for that of the employer. It must judge the decision to dismiss against an objective standard of reasonableness. The common way of applying this objective standard of reasonableness is to ask whether or not the decision to dismiss was within the band of reasonable responses, ie whether the decision to dismiss had been an option which had been open to a reasonable employer.

**Relevant findings of fact**

19. The claimant had been the manager responsible for the education support project. She managed three staff. It was one of the major projects run by the respondent organisation and it required a significant budget; approximately £240,000.00 annually.

20. In recent times, funding for community organisations and community projects has become more difficult to obtain. The respondent organisation, like many other such organisations, experienced significant difficulty in maintaining funding at its previous level.

21. In the financial year 2015/2016 and in the financial year 2016/2017, the education support project received funding amounting to 65% of actual expenditure from the Department for Employment and Learning. That funding was advanced on the basis that the respondent organisation needed to secure and to certify '*match funding*' from another source to make up the balance of 35% of expenditure.

22. Match funding had been provided previously by the Department for Social Development. However this was no longer available in the financial years 2015/2016 and 2016/2017. In 2015/2016, the respondent got round this problem by what was described by the claimant as '*creative accounting*' or '*deception*'. The respondent organisation described the procedure less pejoratively as a '*paper exercise*'.

23. In that year, the respondent, given that that DSD was no longer in a position to provide match funding, had to provide match funding of 35% or approximately £83,000.00 to allow DEL to advance the main funding of 65% or approximately £154.000.00 to the respondent organisation for the education support project.

24. The respondent organisation made significant efforts to receive this funding from other sources. In the event it received £25,000.00 from Belfast City Council and approximately £22,000.00 from the Department of Foreign Affairs in Dublin. That left a shortfall of approximately £36,000.00 which had yet to be found. The respondent organisation signed a '*match funding certificate*' for DEL. That certificate stated that funding from the Women's Centres Childcare Fund ('WCCF') would be used in part for the purposes of providing match funding for the education support project. The WCCF funded and employed childcare staff who were fully engaged in running the crèche provided by the respondent. The respondent organisation never intended to, and never did, use that funding for the education support project. That WCCF funding remained in place to pay the salaries of the childcare manager who was responsible for managing the crèche and to pay the salaries of three of the childcare staff.

25. As indicated above, this was described variously as '*creative accounting*' or as a '*paper exercise*'. The respondent in reality used its own cash reserves to make up the £36,000.00 shortfall in the financial year 2015/2016. In so doing, it preserved the education support project for that tax year and preserved the claimant's job and the jobs of her colleagues throughout that financial year.

26. It is no part of this tribunal's function to comment on the accounting practices of community associations which are funded, at least in part, by Government Departments. It may, or may not, have been that the Government Departments who were involved in the scrutiny of the match funding certificate had been fully aware of the situation and fully aware of the intentions of the respondent organisation. It seems unlikely to this tribunal that any civil servant involved in the processing of that match funding certificate and the provision of the 65% funding would have actually believed that the respondent organisation would have diverted the WCCF funding, or would have intended to divert that funding, to support the education support project. That funding had been intended for childcare and was fully used for childcare. If any civil servants involved in this exercise had actually believed that the funding would have been diverted in accordance with the match funding certificate, they would have expected redundancies or, at the very least, significantly reduced hours in the childcare project and the crèche operated by the respondent organisation. None of that occurred in that year. They would also have raised queries during their frequent audits of funding expenditure. The tribunal heard no evidence of any such queries.

27. In any event, the reserves, having been used to support the education support project in 2015/2016 and having been used therefore to support the claimant's job throughout that financial year, were significantly depleted. It seems clear to this tribunal that the solution provided in 2015/2016 had been at best a short term solution and could not have been expected, by any one involved, to have continued indefinitely into the future.

28. The same funding difficulty arose in the next financial year, ie in 2016/2017. Funding was available from DEL for 65% of the expenditure on the education support project provided that match funding could be secured to make up the difference of 35% or approximately £84 – 85,000.00.

29. The respondent organisation was successful in again securing £25,000.00 of match funding from the Belfast City Council. While the Department of Foreign Affairs in Dublin had paid approximately £22,000.00 Sterling in the previous tax year and a similar payment was hoped for in 2016/2017, a commitment from Dublin to make that payment had not been secured. That left a significant shortfall, of at least £35,000.00, which was required by the respondent organisation to provide enough match funding to secure the commitment from DEL.

30. The education support project had run into various practical difficulties with DEL in any event during 2015/2016. The respondent organisation and the claimant agree that DEL had placed various restrictions on the operation of the project including in relation to the qualifications required of tutors and the NVQ level of courses which could be provided. As a result, in the preceding financial year, ie in 2015/2016, the education support project had struggled and had resulted in only a 72.5% expenditure of the projected financial budget. That under-expenditure simply resulted in the corresponding reduction of the DEL grant which was related to

actual rather to projected expenditure. However it had provided some relief for the respondent organisation in the financial year 2015/2016 in respect of the remaining 35% of match funding and for the expenditure supported from the reserves.

31. The respondent organisation was also concerned about forthcoming and additional liabilities for 2016/2017 which included the implementation of the living wage and the implementation of pension costs.

32. In February 2016, all staff, including the claimant and indeed the manager, Ms Carlisle, were put on protective notice of redundancy. Given that all employees of the respondent organisation, and indeed all employees in this particular sector, would have been aware that their employment was dependent on the continuation of funding, that could not have come as a surprise to anyone.

33. The respondent organisation made various efforts to secure alternative funding to make up the shortfall in match funding which remained for 2016/2017 even after taking into account the £25,000.00 secured from the Belfast City Council and even after taking into account the hoped for payment from Dublin.

34. It applied for education support funding from:-

    (1) the Ulster Bank Skills and Opportunities Fund;

    (2) the Community Foundation (Northern Ireland) (Ulster Peoples College Fund);

    (3) the Flax Trust;

    (4) the Garfield Weston Foundation; and

    (5) John Moore's Foundation

    All those applications for education support funding were unsuccessful.

35. At the same time it had applied for funding for 2016/2017 from the National Lottery for the youth project. That project was separate from the education support project and involved separate employees. That application for funding was unsuccessful and on 31 March 2016, six youth staff were made redundant by the respondent organisation. In contrast, the claimant remained in employment even though funding had not been fully secured for the education support project.

36. In fact, it seems clear that the respondent organisation continued to make significant efforts to continue the employment of the education support staff. The hours of those education support staff were reduced over the period from April to August 2016 from 35 hours per week to 30 hours per week in an effort to reduce costs in the first part of the financial year 2016/2017 pending the continued applications for alternative sources of funding. Unfortunately those efforts to secure alternative funding proved unsuccessful.

37. There were several meetings between the claimant and the management of the respondent organisation to discuss the ongoing situation with the education support project and the ongoing efforts to secure alternative funding. The claimant appears

to have been actively involved in the efforts to secure funding and could not have been unaware of the efforts which were being made by the respondent organisation to preserve her job and indeed to preserve the jobs of her fellow employees. She could also not have been unaware of the fact that youth workers had already been made redundant on 31 March 2016.

38. On or around 4 April 2016, DEL apparently stated to the respondent organisation that it was '*content*' that the full WCCF funding should be used to match fund the proposed grant from DEL for the education support project for the financial year 2016/2017. It is difficult to understand what had been meant by this statement. If it were taken as a simple proposition that the WCCF funding should have been taken off the childcare project and diverted to the education support project, then that would have involved re-allocating childcare funding to adult education. That would appear somewhat surprising. If that were the correct interpretation, it would also have necessarily resulted in redundancies of the childcare manager, who was responsible for operating the crèche, and three of the childcare workers whose salaries were all paid for by the WCCF funding.

    In the course of argument before the tribunal, this was referred to as '*Option 1*'. As that argument progressed, the claimant ultimately stated that she did not argue that this was an option that could or should have been taken by the respondent organisation. That option would have involved actual '*creative*' accounting, in that childcare funds would have been devoted to something essentially different, ie adult education. It would also have involved four redundancies.

39. The claimant argued that Ms Carlisle had reached the ultimate decision to declare the claimant and her colleagues redundant without keeping the Board fully informed. There is no evidence to support that argument. Ms Carlisle, as manager, clearly had significant authority in the running of the respondent organisation and in determining redundancies. In any event, it seems clear from the Board minutes that the Board had been kept adequately informed of the efforts to secure funding for the education support project and that it had been kept adequately informed of the risk of redundancy.

40. A Board meeting was held on 17 May 2016, some six weeks after the commencement of the 2016/2017 financial year. The claimant was still in employment. The only item on the agenda for that Board was the future of the education support project and the funding for that project. It was clear during that meeting that the respondent organisation still required significant match funding for the education support project and that hours had already been cut to minimise financial outlay. Nevertheless the reserves were being depleted. It was decided at that meeting to cut the education support project in half for the foreseeable future.

41. On 18 May 2016, two of the Board members held a meeting with the education support team including the claimant to outline the conversation that had taken place during the Board meeting and to provide information about the Board's conclusions. It was explained that hours were being reduced to give the respondent a chance to look at other funding streams to fill the deficit in match funding and to postpone the possible chance of redundancies. The education support team, including the claimant, had questions about the calculation of wages on the reduction on hours and the effect of the reduction in hours on their redundancy entitlement.

42. The claimant and the education support team were advised on 19 – 20 May 2016 of the respondent's attempt to find further funding and of the difficulties that the respondent was experiencing.

43. On 22 May 2016, the treasurer of the respondent organisation provided details of the claimant's redundancy entitlement to the claimant as requested and provided further details.

44. There was a first redundancy meeting between Ms Carlisle and the claimant and two other employees of the education support team. The notes of that meeting are undated but it must have occurred in early June 2016. The claimant was advised that this was the first of three meetings in the redundancy process. The difficulty with match funding was discussed and the employees, including the claimant, were updated of the current position.

45. Discussions continued about possible solutions to this problem. The claimant was copied into much of the correspondence and appears to have been fully aware of the efforts being made by the respondent organisation to find alternative sources of funding.

46. A further Board meeting was held on 28 June 2016. Some limited funding had been obtained from the International Fund for Ireland. Ms Carlisle sought clarification on whether or not to trigger redundancy because money received from the International Fund for Ireland covered only programme costs and not salaries. The claimant in the hearing sought to argue that the respondent organisation and, in particular, Ms Carlisle had been at fault in not specifically seeking IFI funding for salaries. Ms Carlisle was clear, and the tribunal accepts her evidence, that she had been advised that it would have been better to keep the application for funding as small as possible from the IFI to maximise any chances of success. In any event, the tribunal does not accept that the respondent organisation or Ms Carlisle, in particular, deliberately or carelessly sought funding from IFI in relation to programme costs only and not in relation to salaries. It was clear that significant efforts had been made to secure funding in respect of salary costs from several different sources at the same time. It would have made no sense whatsoever for Ms Carlisle to have had, for some reason, other than advice she received from IFI, sought programme costs only from the IFI.

47. Ms Carlisle advised the Board that the education support staff were currently working only 20 hours per week to allow the project to continue for a longer period of time with the hope that match funding could be found. Ms Mercer, the treasurer, advised that Peninsula had advised the respondent organisation that redundancy proceedings need to start as soon as possible as this would be a 12 week process.

48. After some discussion the Board determined that redundancies should be triggered on 28 June 2016. The claimant suggested that the education support team should be allowed to work in the Summer Scheme but stated that she had been advised that they required to have a Level 2 qualification to do so. Ms Carlisle indicated that it was not that they had to be trained to an NVQ 2 level but they had to be trained to a particular level. The tribunal concludes that the claimant's suggestion had been considered and had been discounted for a valid reason.

49. A business case dated 30 June 2016 was prepared by Ms Carlisle for the proposed redundancies. She stated that the reason for the redundancies was lack of funding because the funding had been withdrawn from its original source (DSD). She stated that she had considered alternatives and that three people, including the claimant, were facing redundancy.

50. A further Board meeting was held on 26 July 2016. The record of the meeting noted that there had been two visits from MLAs on that date. The first had been Mr Givan MLA, the new Minister for the Department for Communities and the second had been Mr Hamilton the new Minister for the Department for the Economy.

51. A particular option which in the course of the argument before the tribunal was referred to as '*Option 2*' was discussed at that meeting. That option involved taking the WCCF funded staff, the childcare manager and the childcare workers (of whom there were now two) into the education support project to set against the amount of match funding required. It is clear that there had been a discussion about the difficulties of implementing such a drastic step which would have resulted in moving the childcare manager and the childcare workers onto new contracts with the possibility that they would not be available to work with other crèche users, but would have to confine their attention to the children of adult learners on the education support project. It also raised the possibility of having to hire an additional child centre manager to deal with the other children and the other childcare staff. Even if the suggestion had been accepted and if the practical difficulties had been overcome, this still would have been a shortfall of approximately £20,000.00. There was also a discussion about the difficulties that the respondent organisation was then experiencing with the education support project. Following discussion, the Board decided to proceed with the redundancies for the education support project.

52. Ms Carlisle wrote to the claimant on 1 July 2016 stating that the respondent anticipated redundancies in the near future because of a lack of funding. The letter warned the claimant that it was likely her position was at risk and commenced a consultation period of approximately eight weeks to 31 August 2016.

53. The letter dated 1 July 2016 invited the claimant to a meeting on 5 July 2016 to further discuss the situation. The claimant was told that she was being made redundant. It does not appear that she was advised, at any stage, of her right to appeal. The claimant accepted her redundancy and went to volunteer for Kilcooley Women's Centre where she volunteered for employment for one month before take up paid employment.

54. The respondent determined that the redundancy payment should be calculated by reference to full-time earnings rather than the part-time earnings which the claimant had received for several months. This had resulted in a significant additional benefit to the claimant of some £2,499.50.

55. There was a one-to-one redundancy meeting with the claimant on 1 August 2016. The claimant was advised of a post that would be advertised in the coming weeks and was advised that if she applied for it and was successful, her redundancy payment would not be made because she would not be redundant. The claimant confirmed that she was not interested in applying for the post. She asked to leave

on 4 August 2016 as she had been offered another job and they wanted her to start immediately.

56. The new job was in the Kilcooley Women's Centre. In the event there was a delay pending clearance but she took up paid employment approximately one month later.

57. It would appear and the claimant accepts that at that point she was disappointed at the redundancy but that she had accepted the reasons for that redundancy.

58. On 12 August 2016, Mr Givan MLA, the Minister for Communities wrote to Diane Dodds MEP to state, among other things:-

> *"The Department's officials identified the way of funding this shortfall and made contact with Betty Carlisle at the SWN to discuss the next steps. SWN indicated that whilst they very much appreciate the interest that I have taken in the issue and the Department's willingness to find a solution, that they no longer require this funding in 2016/17."*

59. On 13 September 2016, the claimant attended a meeting at which Mr Andrew Gowan, the DUP's SPAD was present. The redundancies in the respondent organisation in the education support project were discussed. Mr Gowan referred to Mr Givan MLA's letter to Diane Dodds MEP and stated that a solution had been found but had not been accepted by the respondent organisation. When he was called to give evidence on a Witness Attendance Order, he stated candidly that he did not know anything about what the solution might have been, or whether it had been a workable solution or merely a suggestion. His knowledge had been restricted to what the letter from Mc Given MLA had said.

60. The claimant had lodged a grievance on about a fellow employee. That grievance had been unsuccessful. In her claim form and in the course of the tribunal she stated that the decision to make her redundant had been because she had lodged that grievance. She could produce no evidence to support that statement. It was just a '*feeling*' on her part. If that '*feeling*' were correct, that would involve a decision on the part of Ms Carlisle and others in the management of the respondent organisation to not just shut down the education support project but also a decision to make the claimant and two other workers redundant. While one of those two other workers who had been declared redundant had obtained another job, the other worker, although she had short service and therefore did not qualify for a statutory redundancy payment, lost her job. The claimant was therefore putting forward a proposition that the management of the respondent organisation, had decided to make not just her but another person redundant and to close down a significant project simply because she had lodged a grievance. That does not seem at all likely.

**Decision**

61. The unanimous decision of this tribunal is that the decision to make the claimant redundant had absolutely nothing to do with the fact that she had lodged a grievance. By the time she lodged a grievance in April 2016 she and every other member of staff had already been placed on protective notice. The funding difficulty was obvious. It is, in any event, difficult to believe that managers in the respondent

organisation, in an effort to '*get back*' at the claimant because she had lodged an unsuccessful grievance had been prepared to not just close down a significant project but to dismiss not just her but another two workers, one of whom had no job to go to. Such an argument is also inconsistent with the clear and repeated efforts on the part of the respondent organisation to seek alternative funding from other sources to keep the education support project going. It had kept the project going and had secured her employment throughout the whole of the 2015/2016 financial year and for a significant part of the 2016/2017 financial year. It is also inconsistent with the clear efforts (which the claimant herself criticised as 'creative accounting') taken during the preceding financial year to preserve the education support project through the use of the respondent organisation's reserves. It is also inconsistent with the repeated efforts on the part of the respondent organisation to extend the life of the education support project by reducing the hours of the education support staff.

62. It seems clear that the reason for this redundancy was no more than a general reduction in funding coupled with ongoing difficulties in the delivery of the education support project.

63. The first issue for the tribunal to determine is the reason for the dismissal of the claimant. The tribunal is satisfied that the reason for this dismissal was redundancy a potentially fair reason for the purposes of the 1996 Order.

64. It is clear that the claimant had been consulted repeatedly in relation to efforts to secure funding and to avoid her redundancy. It is clear that alternatives had been considered and that the options open to the respondent had been extremely limited.

65. While the solution described as '*Option 2*' might have been taken up by the respondent, it would have involved significant efforts on the part of the respondent to re-arrange new contracts, which may not have been agreed by the relevant staff. It would also have involved seeking the approval of DEL, which may not have been given. It would still have left the respondent organisation with a significant shortfall. The claimant argued that shortfall could have been covered by a reduction of five hours work per week for all the staff. There would have resulted in a significant reduction in services. Again it might not have been agreed by other staff.

66. The respondent organisation saw clear and significant bureaucratic difficulties with all of this. It also, at its heart, involved the use of childcare funding to support adult education.

67. It cannot, in the tribunal's view, be argued that a decision not to indulge in yet further '*creative accounting*' and a decision to proceed instead to the logical conclusion of declaring redundant posts which were no longer sufficiently funded, was a decision no reasonable employer could have taken. It clearly had been a decision that a reasonable employer could have taken within the band of reasonable responses open to it.

68. The redundancy exercise appears to have been conducted in a relatively amateurish manner. The tribunal was not assisted in this case by the confused and disorganised nature of the documentation which was presented to it. Much of this documentation was out of chronological order and some documents appeared in the bundle more than once.

69. In particular, there appears to have been no letter or e-mail from the respondent to the claimant setting out the decision of the respondent to dismiss the claimant on the ground of redundancy following the letter of 1 July 2016 and the subsequent meetings. The respondent appeared to argue at one point that the claimant had resigned rather than being dismissed. She had left, by agreement, on 4 August 2016 to work (as a volunteer) at Kilcooley Women's Centre. However she had been paid up to 31 August 2016 and her redundancy payment was calculated up to that date. The respondent accepted in the response form that the claimant had been dismissed. Since a redundancy payment had been made, the tribunal accepts that she had been dismissed on 31 August 2016.

70. Although this was not raised in the course of the hearing, and the confused and quite possibly incomplete nature of the bundle made this difficult to check, it seems clear that the claimant, while she may have been told (verbally) of the decision to dismiss her, had never been told, either verbally or in writing, of her right to appeal that decision. That would have been a necessary step in the statutory dismissal procedure set out in Schedule 1 to the 2003 Order. Whilst the analogous provision has been repealed in Great Britain, it remains in place in Northern Ireland. The decision to dismiss the claimant was therefore automatically, or technically, unfair.

71. It might be argued that the claimant would not have exercised the right to appeal, in any event, in the circumstances of this case. However, that seems unlikely. She wrote on 3 October 2026 to the respondent raising a number of matters, including the redundancy selection. Bizarrely, that had been treated as a grievance rather than an appeal against dismissal and not upheld.

**Remedy**

72. The claimant was entitled to a basic award for unfair dismissal under the 1996 Order of £5,769.40. That would have been based on the gross pay payable over the 12 weeks prior to 31 August 2016. That would have amounted to:-

£4,285.89/12 = £357.15 gross weekly pay

73. The claimant was aged 52 and had been employed for 12 complete years. The basic award/statutory redundancy calculation is:-

17.5 x £357.15 = £6,250.25

74. The claimant received £8,750.00 which had been calculated differently. The claimant had therefore been overpaid by £2,499.50.

75. The claimant seeks, by way of a compensation award, loss of wages for approximately one month when she took up paid employment and continuing loss thereafter and travelling expenses.

76. Under the 2003 Order the tribunal shall uplift the compensatory award by 10% and may uplift it by up to 50% where the statutory procedure has not been completed by the employer. In this case, the failure to specifically advise the claimant of her right to appeal is at best a technical matter. She may not have appealed and, in any event, had wanted to leave early to start work for Kilcooley Women's Centre. If she

had lodged any appeal it would not have been successful. Her '*grievance*' about her redundancy had failed. She was also aware, in any event, of her general right to appeal and had exercised that right in relation to grievances.

The tribunal therefore uplifts the compensatory award by 10%.

77. The tribunal concludes that the compensatory award falls to be reduced by 100% because the claimant would have been dismissed in any event on ground of redundancy even if she had been specifically advised of her right to appeal.

78. The dismissal may have been delayed for a brief period to allow for such an appeal. That is the maximum extent of any loss, which the tribunal fixes at four weeks loss of net pay. The tribunal has decided that it would be just to deduct from that compensatory award the enhanced redundancy payment of £2,499.50. The result is that no compensatory award is payable:-

| | |
|---|---|
| Compensatory award | £1,235.71 |
| Uplift of 10% | £ 123.57 |
| Loss of statutory rights | £ 300.00 |
| Travelling expenses | £ 300.00 |
| **Total** | **£1,959.28** |
| Less enhanced redundancy payment | £2,499.50 |
| **Balance owing** | **£ 0.00** |

79. No compensation is therefore payable. This dismissal was technically unfair because of a failure to comply in full with the statutory procedures. However the decision was substantively fair : it had been a decision which a reasonable employer had been entitled to take.

80. The tribunal's unanimous decision is therefore that the claim of unfair dismissal should be upheld on a technical ground but that no compensation is awarded.

**Vice President**

**Date and place of hearing:** **28 – 29 March 2017, at Belfast**

**Date decision recorded in register and issued to parties:** 20 APR 2017

# THE INDUSTRIAL TRIBUNALS

**Office of the Industrial Tribunals**
**and the Fair Employment Tribunal**
**Killymeal House**
**2 Cromac Quay,**
**Ormeau Road, BELFAST**
**BT7 2JD**

**Telephone: (028) 90327666**
**Fax: (028) 90250100**

## DECISION OF INDUSTRIAL TRIBUNAL

## EXPLANATORY NOTES

The decision of an industrial tribunal in proceedings to which you were a party is attached. These notes are intended to assist parties in understanding the implications of the decision but they are not in any sense, a complete or authoritative statement of the law. You should read them carefully, in particular the time limits set out in paragraphs 6, 10, 11, 14 and 15 below for seeking a review of the decision and/or appealing against it on a point of law.

### Industrial Tribunal Awards and Orders

1. Where an industrial tribunal –

   (a) finds that an employee was unfairly dismissed by his employer and orders that employee to be reinstated or re-engaged by that employer, the employee should notify the Secretary of the Industrial Tribunals and the Fair Employment Tribunal immediately if the employer fails to comply with the reinstatement/re-engagement order within the time allowed to him to do so; and

   (b) finds that a complaint of unlawful discrimination is well founded and makes a recommendation that the person/body discriminating take action within a specified period in relation thereto, the person in whose favour the tribunal found should notify the Secretary of the Tribunals immediately if the recommendation made by the tribunal is not complied with within the specified time.

2. A sum of money awarded by an industrial tribunal is payable, without further notice by the party against whom the award is made, direct to the party entitled to receive it except when Jobseeker's Allowance, Income related Employment and Support Allowance and/or Income Support has been paid during a period of unemployment. In such cases the whole or part of these benefits may be recovered by the Department for Communities from the award before it is paid. In that event, the appropriate notice is attached to the decision. The respondent may be obliged by law to make some

deductions from gross wages or salary in respect of income tax and/or national insurance. If in doubt you should consult the appropriate authorities.

3. The Industrial Tribunals (Interest) Order (Northern Ireland) 1990 provides that interest is payable on all or part of an industrial tribunal award which remains unpaid 42 days after the decision of the tribunal is sent to the parties. (For further details see "Interest on Tribunal Awards: Guidance Note").

4. If a party against whom an award is made by an industrial tribunal does not comply with that award, then the award can be enforced by lodging an application with **Enforcement of Judgements Office (EJO).**

   You should complete a Form 1 (Application to enforce a judgement for the recovery of money only) **in duplicate** and forward both to EJO together with **two copies** of the tribunal's decision and appropriate fee. Members of the EJO are trained to provide support and advice about the enforcement process and their forms.

   Any request for enforcement by EJO will require the written decision of the industrial tribunal and any recoupment notice that may have been served by the Department for Communities on the party seeking to enforce in respect of Jobseeker's Allowance, Income related Employment and Support Allowance or Income Support received. The production of a document certified by the Secretary of the Industrial Tribunals and the Fair Employment Tribunal to be a true copy of the decision of the industrial tribunal shall, unless the contrary is proved, be sufficient evidence of the document and of the facts stated in it for any proceedings in any court. Application for such a copy – obtainable free of charge – should be made to The Secretary of the Industrial Tribunals and the Fair Employment Tribunal at the address shown above.

   Form 1 can be found @ www.courtsni.gov.uk or contact:-

   **Enforcement of Judgments Office**
   **Laganside House**
   **23-27 Oxford Street**
   **Belfast**
   **BT1 3LA**

   **Phone: 030 0200 7812**

5. In certain circumstances the Department for the Economy is entitled to make payments out of the Northern Ireland National Insurance Fund if an award of an industrial tribunal has not been paid. If you have difficulty obtaining a redundancy payment or certain other payments due to you, or if your employer is insolvent, you should contact the Redundancy Payments Branch of the Department for the Economy, Room 203, Adelaide House, Adelaide Street, Belfast BT2 6FD (Freephone 0800 585811) for advice.

**Review of Decision of Industrial Tribunal**

6. If asked to do so, an industrial tribunal may review its decision in the following circumstances:-

   (a) the decision was wrongly made as a result of an administrative error;

   (b) a party did not receive notice of the proceedings leading to the decision;

   (c) the decision was made in the absence of a party;

   (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or

   (e) the interests of justice require such a review.

   If the industrial tribunal does review the decision it may confirm, vary or revoke the original decision. Any application for a review should be made by letter to the Secretary of the Industrial Tribunals and the Fair Employment Tribunal at the address shown above within a period of **14** days of the date the decision was sent to the parties, which date is shown on the last page of the decision as the date of issue to the parties. The letter should set out the grounds of the application and, if under paragraph (d) above, should be accompanied by a statement of the new evidence and the reason why such evidence was not produced at the hearing before the industrial tribunal.

7. The Employment Judge of the industrial tribunal may refuse an application for review if, in his/her opinion, it has no reasonable prospect of success. The industrial tribunal will have to be satisfied that one or more of the grounds specified above in paragraph 6 exist before a decision can be reviewed. There is no right to have the decision reviewed because someone thinks it is the wrong decision.

8. If the sum payable is varied after a review of the industrial tribunal's decision, then interest will accrue after 42 days from the date of issue of the original decision which was the subject of review, but on the varied amount and not on the amount that the industrial tribunal first awarded. (See paragraph 3 above and "Interest on Tribunal Awards: Guidance Note").

9. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 allow an Employment Judge to extend the time in which a review application can be made. An application to extend the time should be made to the Secretary of the Industrial Tribunals and the Fair Employment Tribunal at the above address setting out the grounds relied upon.

**Direct Appeal against Decision of the Industrial Tribunal to the Court of Appeal**

10. A party, known as the appellant, who is dissatisfied on a point of law with a decision of an industrial tribunal must serve a notice of appeal on all parties to the case and the industrial tribunal within **6** weeks of receiving a copy of the industrial tribunal's decision. The notice of appeal must state the questions of law upon which the appeal is brought.

11. The appellant must also, within **7** days after serving the notice of appeal (referred to at paragraph 10 above) on all the parties to the case and the industrial tribunal, enter the appeal for hearing by lodging in the Central Office, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF:

    (a) 2 copies of the notice of appeal;

    (b) a certified copy of the industrial tribunal's decision (obtainable free of charge from the Secretary to the Industrial Tribunals and the Fair Employment Tribunal);

    (c) any other documents which may be relevant to the appeal.

12. After the appellant has lodged the documents (referred to at paragraph 11 above) the Court of Appeal will list the appeal for hearing not earlier than the expiration of **21** days from the date of lodgement unless an earlier date is fixed by the Court of Appeal at the request of and with the written consent of both the appellant and the other parties to the appeal.

**Appeal by way of Case Stated to the Court of Appeal against Decision of the Industrial Tribunal**

13. If a party, known as the appellant, who is dissatisfied on a point of law with a decision of an industrial tribunal wishes the industrial tribunal to state a case for the opinion of the Court of Appeal on a point of law rather than following the direct appeal procedure (set out at paragraphs 10-12 above) the appellant must apply directly to the Court of Appeal for **LEAVE** for the tribunal to do so.

14. The application for **LEAVE** (referred to at paragraph 13 above) must:

    (a) state the grounds for the appeal to be brought by way of case stated rather than the direct appeal procedure (set out at paragraphs 10-12 above); and

    (b) be lodged together with a certified copy of the industrial tribunal's decision (obtainable free of charge, from the Secretary to the Industrial Tribunals and the Fair Employment Tribunal) in the Central Office, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF within **14** days of the date of the industrial tribunal's decision.

15. An industrial tribunal does not have power to extend the limits set out at paragraphs 10, 11 and 14 above. Those time limits can only be extended by the Court of Appeal. Any application to extend those time limits has to be made directly to the Court of Appeal. The time limits for appeals (as set out at paragraphs 10, 11 and 14 above) are **not** extended because an application has also been made to the industrial tribunal to review its decision.

16. If the sum payable is varied as a result of an appeal to the Court of Appeal (or on subsequent appeal) then interest will accrue in the same way from the calculation day, known as relevant decision day, in respect of the original decision which was the subject of the appeal, but on the varied amount and not the amount the tribunal first awarded. (See "Interest on Tribunal Awards: Guidance Note").

17. If you are considering appealing a decision of an industrial tribunal either directly to the Court of Appeal or by way of case stated with the **LEAVE** of the Court of Appeal, you should take advice on what constitutes a 'point of law'.

18. Where oral reasons have been provided by a tribunal or the Employment Judge at the hearing written reasons shall only be provided in relation to decisions:-

    (a) if requested by one of the parties orally 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 the Employment Judge where he considers it just and equitable to do so.

    (b) In relation to any decision or order requested by the Court of Appeal at any time.

## INTEREST ON TRIBUNAL AWARDS: GUIDANCE NOTE

1. This guidance note should be read in conjunction with the enclosed Notes on Tribunal Decisions.

2. The Industrial Tribunals (Interest) Order (NI) 1990 provides for interest to be paid on industrial tribunal awards of compensation if they remain wholly or partly unpaid after 42 days.

3. The 42 days run from the date, known as the relevant decision day, which the tribunal decision is recorded as having been issued to the parties. The date from which interest starts to accrue is called the calculation day. The dates of both the relevant decision day and the calculation day which apply in your case are recorded on the Notice attached to the decision.

4. Simple interest will accrue on a daily basis on any sum outstanding on the calculation day. Interest does not however accrue on deductions such as tax and/or national insurance contributions which have to be paid over to the appropriate authorities. Neither does interest accrue on any sums which the Department for Communities has claimed in a recoupment notice. (See paragraph 2 of the Explanatory Notes on Tribunal Decisions). If part of the sum is paid within 42 days then interest will accrue only on the amount which remains unpaid.

5. The rate of interest will be the rate in force on amounts awarded by decree in the County Court on the decision day. This is known as the "stipulated rate of interest" and the rate which applies to your case can be found on the Notice attached to the decision document.

6. If the sum payable is varied either on appeal to the Court of Appeal (or on subsequent appeal) (see paragraphs 10-12 of the Notes on Tribunal Decisions), or after a review of the tribunal's decision (see paragraphs 7-9 of the Notes on Tribunal Decisions) then interest will accrue in the same way from the calculation day in respect of the original decision which was the subject of the appeal or review, but on the varied amount and not on the amount that the tribunal first awarded.

7. Industrial tribunal awards are enforced through Enforcement of Judgements Office (see paragraph 4 of the Notes on Tribunal Decisions). The interest element of any such award is enforced in the same way.