THE INDUSTRIAL TRIBUNALS

CASE REF: 12857/18

CLAIMANT: **Paul Gordon**

RESPONDENT: **MSM Contracts Ltd**

DECISION

The decision of the tribunal is that the claimant was automatically unfairly dismissed by the respondent for failing to comply with steps 1 and 2 of the statutory dismissal procedure. The respondent also failed to provide the claimant with employment particulars. The tribunal awards the claimant £12,327.54.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress**

Members: **Mr Atcheson**
Mrs Stewart

Appearances:

The claimant was unrepresented and appeared in person

The respondent represented by Mr Gerry Ward of People Services Limited

SOURCES OF EVIDENCE

1. The tribunal received witness statements and supplementary witness statements from the claimant, Mr Spencer Savage, Mr Robert Mackey and Mr Peter Carson and heard oral evidence from them by way of cross-examination. The tribunal also admitted a witness statement by Mr Gerry Ward during the course of the hearing and heard oral evidence from him by way of cross-examination. The tribunal also received a bundle of documents together with a number of additional documents which were produced in the course of the hearing including competing schedules of loss. In addition, the tribunal also listened to an audio recording of a telephone conversation between the claimant and Mr Ward and was provided with a typed transcript of it.

THE CLAIM AND THE RESPONSE

2. The claimant's claim form succinctly set out his claim as follows:

"I believe that I was unfairly dismissed as my employer did not follow the three step procedure or give me the opportunity to remain in the firm. I also have never been given an employment contract."

3. In its response the respondent conceded that it had failed to comply with the statutory dismissal procedure but asserted that the claimant would have been dismissed in any event. The respondent also conceded that it had not provided the claimant with a statement of his terms of employment.

THE ISSUES

4. Although the admitted failure by the respondent to adhere to the statutory dismissal procedures featured prominently in the claim form and the record of the Case Management Discussion on 23 November 2018 it is clear that the claimant did not seek to confine his claim to the admitted breaches of the statutory procedure and as reflected in the CMD record he did not accept that the process around the redundancy dismissal was fair. The tribunal considers that the main issues that it has to address are as follows:

   (1) Was the claimant dismissed by the respondent by way of redundancy and was there a genuine redundancy situation?

   (2) Was the claimant unfairly selected for redundancy?

   (3) To what extent was the statutory dismissal procedure complied with?

   (4) Would the claimant have been dismissed in any event despite the respondent's non-compliance with the statutory dismissal procedure?

   (5) Did the respondent give adequate and proper consideration to suitable alternative employment?

   (6) Did the claimant seek to mitigate his loss of employment?

   (7) Is the claimant entitled to an award for non-provision of particulars of employment?

   (8) What compensation is the claimant entitled to?

THE FACTS

5. The claimant was employed by the respondent as an Assistant Site Manager. He had previously worked for the respondent as a bricklaying sub-contractor in 2003/04 on a residential housing contract and an apartment building in the greater Belfast area.

6. On 9 May 2017 the claimant was looking for work as a site supervisor and contacted Mr Mackey, the Managing Director of the respondent business, who invited him to attend in his office. On 11 May 2017 the claimant attended with Mr Mackey. Following a short interview Mr Mackey indicated that he wanted to start the claimant on a Hampton by Hilton Hotel site in Hope Street and that eventually he wanted to send him to one of the housing projects that was starting. They visited

the site together and Mr Mackey asked the claimant to call into the office the following Monday.

7. On 11 May 2017 the claimant attended the office and met with Mr Mackey and Mr Savage, the respondent's Contracts Manager. Mr Mackey gave the claimant drawings to look over and told him to report to the Hope Street site the following day.

8. On 16 May 2017 the claimant attended the Hope Street site and commenced employment with respondent as an Assistant Site Manager. The claimant was not provided with an initial statement of particulars of employment either than or at any stage in the future. There were four Assistant Site Managers or Supervisors employed on this particular site - Mr Ronnie McNeill, Mr Tom Vogan, the claimant and Mr Alan McNeill. Mr McNeill was a contacts manager from the Portadown office who had been temporarily drafted in to the Hope Street site to accelerate the work there.

9. The claimant worked 39 hours per week on average at £15.00 per hour with gross pay of £585.00 and take home pay of £544.00 per week. The claimant worked almost every Saturday but was allowed to take time off on Mondays for contact with his children.

10. There were no issues as to the claimant's performance of his duties. In his witness statement the claimant made reference to his reporting of problems with standards and progress to the Quantity Surveyor Mr Bobby Layton, Mr Savage and the Site Manager, Mr Steven Guy. The claimant was also given the responsibility of being left in charge of the site when Mr Guy was on holiday.

11. In his witness statement and oral evidence the claimant made reference to a meeting with Mr Mackey in his office on 15 August 2017. Mr Mackey had no recollection of this meeting. According to the claimant he told Mr Mackey that he was about to sign for a mortgage and asked him about his future with the firm. Mr Mackey told the claimant that he was happy with his progress but had an issue with another foreman's ability on the Armagh House job in Belfast and that if he could split the claimant in two he would send him there as he knew of his roofing experience but knew that he was needed on the Hope Street site. According to the claimant Mr Mackey went on to repeat that he saw the claimant's future as working on housing sites and that he would eventually go there. It is noteworthy that Mr Mackey did not deny meeting with the claimant or making the comments attributed to him. We consider the claimant to be a credible witness and have no reason to doubt his account of the meeting.

12. On 22 May 2017 the respondent's Office Manager, Dawn Allen provided the claimant with a letter which confirmed that the claimant was employed full time with the respondent as a Site Manager and that his current salary was £31,000 per annum.

13. On Thursday 14 June 2018 the claimant was on site at the hotel reception. Mr Savage was also on site and told the claimant that the job would come to an end next week and that he no longer had any work for him. Mr Savage said – "You're agency aren't you". The claimant understood that Mr Savage was giving him one day's notice as he wanted him to work the Friday as his last day. The claimant replied – "Spencer I'm not an agency worker". Mr Savage responded that he could

work the next week and he would give him a week's pay after that so his last working day would be 22 June 2018.

14. On 15 June 2018 the claimant spoke with Mr Savage again and he confirmed his decision.

15. On 15 June 2018 the claimant phoned Dawn Allen in the respondent's main office to request a formal reason for his dismissal.

16. On 20 June 2018 the claimant sent an email to Mr Mackey which read as follows:

> "Robert I've been informed last Friday from Spencer Savage that I am to be no longer working for the Company from this Friday 22/06/18.
>
> I've contacted Dawn Tuesday and ask[ed] her to contact yourself to supply me with something in writing stating this and also the reason why my employment is to end.
>
> Can you also send me the MSM company employee contract of employment as I only have the cover letter from when I first started.
>
> Finally is it not company practice to try and retain an employee rather than let them go as if they were an agency worker. As Spencer was initially going to let me go last Friday without any notice.
> If you remember Robert I stressed that I have dependents and that on the strength of my employment status that I took out a mortgage and purchased a house.
> So I would like some official record of my termination to make sure that I am not being unfairly dismissed."

17. On the same day the claimant spoke with Mr Mackey outside the entrance to the hotel at 17.30 pm. Mr Mackey said that he had read the claimant's email and when asked why he had made the decision he replied that he didn't have any work on. The claimant told Mr Mackey that he knew of other sites running and also a new one at Stormont. The claimant also asked why he couldn't work as a bricklayer on a site in Comber and Mr Mackey replied that they had bricklayers there already. According to the claimant he expected Mr Mackey to offer him something even a labouring job but it was clear that he wasn't interested and when the claimant asked about getting something official Mr Mackey said – "I won't be giving you a reply to your email" and threatened to let him go there and then. According to the claimant Mr Mackey also told him that it was a case of last in first out. The claimant replied that he was not the last one and that Adam Nicholl had only started a few months ago. Mr Mackey said that Mr Nicholl was an engineer. The claimant pointed out that he was a trainee and not qualified and his only previous experience was at Wrightbus as a general worker. In his supplemental statement Mr Mackey denied that the claimant referred to working on other sites or in other capacities and said that he emphasised the declining market to the claimant. Mr Mackey also denied saying that it was a case of last in first out.

18. The claimant worked through his notice period and his last day at work was 22 June 2018.

19. As indicated above there were three other Assistant Site Managers or Supervisors employed on the Hope Street site. According to Mr Carson, the respondent's Operations Manager, Mr Ronnie McNeill retired; Mr Vogan left the company voluntarily and Mr Alan McNeill returned to his post at Portadown. Mr Mackey gave evidence that there was a sharp decline in work in and around the time of the claimant's dismissal due to three hotel projects coming to an end and other residential housing projects either not being ready to proceed or with bricklaying work being undertaken on a sub-contracting basis.

20. On 26 July 2018 the claimant wrote to Mr Mackey in the following terms:

> "Robert I have written to you already asking for the reasons of my dismissal in writing. You told me that you will not do this even though you are legally obliged to.
>
> I also wish to appeal my dismissal. Please advise me as to your appeal procedure.
>
> I have not received a contract of employment, something to which I am legally entitled, and therefore do not know your appeal procedure.
>
> Please let me hear from you by return. Should I not hear from you within fourteen days [it] would be my intention to bring an application for unfair dismissal to you."

21. The claimant's request for an appeal did not contain the grounds of his appeal. This is unsurprising as he had not been provided with a proper decision letter as required by Step 1 of the statutory dismissal procedure.

22. On 27 July 2018 Ms Allen emailed Mr Ward about the matter and attached a copy of the claimant's letter of 26 July 2018. Mr Mackey was copied into the email. After commenting briefly on the contents of the letter Ms Allen stated as follows:

> "He has been paid all his overtime and holiday pay at the end of his notice which was one week as he was weekly paid. (he had asked us to hold all overtime as he did not want to be hit with a big payment to the CSA, this had been kept since pre-Christmas)."

23. On 8 August 2018 Ms Allen wrote to the claimant and invited him to attend an appeal meeting on Wednesday 29 August 2018 which would be chaired by Mr Carson. The letter went on to state that the purpose of the meeting would be for Mr Carson to explain the reason for the termination of the claimant's employment and for the claimant to provide full details of his reasons for appeal in order that Mr Carson could consider all relevant facts. Ms Allen also advised that the claimant was entitled to be accompanied at the meeting by a work colleague or accredited trade union official.

24. On 10 August 2018 the claimant emailed Ms Allen saying that he had received legal advice that he should be made aware of any allegations or the reasons for his termination in advance of the appeal meeting so that he could prepare for something that may be stated that he was unaware of rather than attending a one sided meeting.

25. Ms Allen replied on 13 August 2018 stating – "this is to confirm that your employment was terminated on 22nd June 2018 by reason of redundancy". The claimant was also sent a statement of his main terms and conditions of employment. We pause to note that the claimant's contract made no provision in respect of redundancy dismissals. In addition, we note that the contract was neither time-bound nor project-bound.

26. The claimant sent a further email to Ms Allen on 22 August 2018 in which he asked if he could bring a friend to the meeting as he was not in a union and asked who else would be attending. Ms Allen replied on 24 August 2018 and advised the claimant that he could bring a family member or a Citizens Advice Worker and that Mr Ward, the respondent's HR Consultant would be in attendance alongside Mr Carson. On 28 August 2018 the claimant emailed Ms Allen and advised that he would be attending unaccompanied.

27. The appeal meeting took place as arranged on 29 August 2018. Mr Ward was responsible for taking a note of the meeting. A typed record of the meeting was included in the bundle and copies of Mr Ward's handwritten notes were provided during the course of the hearing at the tribunal's request. The claimant had some issues with the notes and believed that Mr Ward said more than was recorded. Having considered the contents of the notes (both typed and handwritten) and the claimant's observations we are satisfied that the notes provide an accurate though not verbatim account of what was said at the meeting. The claimant was not however offered the chance to agree the notes after the meeting as he should have been as a matter of good practice.

28. Mr Carson opened the appeal meeting by stating its purpose which was the claimant's opportunity to tell him why he believed his dismissal to be unfair. The claimant recounted what had occurred including referring to the absence of proper procedures, Mr Mackey saying that he would not be replying to his email and not being offered anything to remain. The claimant stated that he was multi-skilled and that when he met Mr Mackey before taking on his mortgage he was "all-glowing". The claimant stated that since leaving he had a short term bit of work, had registered as self-employed and had been looking for other work. Mr Ward then asked the claimant if he had registered with agencies and the claimant replied that he had been calling into sites and phoning up. Mr Ward pressed the claimant as to whether he had actually registered with any agencies and the claimant responded that he had not, that he had registered as self-employed and was not going to work in Tesco. It is not clear what relevance this had to the appeal hearing. It seems to us that Mr Ward was using this part of the appeal meeting to probe the claimant about matters which would be likely to be relevant to the value of a claim of unfair dismissal and had nothing to do with the appeal. Some discussion of the Armagh House job then ensued in which the claimant referenced his conversation with Mr Mackey on 15 August 2017 (which Mr Mackey was unable to recall). Mr Carson put it to the claimant that he knew that the job was coming to an end. The claimant responded – "Did I have to go and ask" and mentioned that other people had told him that he was going to Comber or houses at Stormont or Chichester Street and that he didn't think that he would have to go begging and was taken by surprise. The claimant then told Mr Carson what Mr Savage had said to him and Mr Carson replied that he wasn't aware of this conversation and that maybe Mr Savage did think that the claimant was an agency worker. Mr Carson asked the claimant if he had anything to add. The claimant replied – "Nothing really. There is other work – Stormont site, Chichester House. Was anybody else made redundant?"

Mr Carson replied that there were others, some voluntary – five in total and that it was not something that the company was happy about. The claimant asked if people could have been put elsewhere and Mr Carson replied that that was not possible due to no other work. The claimant asked whether agency staff were taken on and Mr Carson responded that that was not the case. Mr Carson then asked the claimant how he would like the matter resolved. The claimant said that he was not naïve and that he was told that he was not getting his job back. Mr Carson said that he had read the emails and that things could have been done better. The claimant told Mr Carson that he needed to sort it out. Mr Carson asked what it would take to sort it out and the claimant replied – "Financial compensation. I don't have work." Mr Carson asked him how much and the claimant replied that he hadn't looked into it. He said that he was told about all the work when he took out a mortgage. The claimant went on to state that he was a sub-contract bricklayer; was never out of work; had lots of experience and that there were not too many bricklayer foremen about. There was then a short recess. When the meeting reconvened Mr Carson said that he had spoken to Mr Savage about the agency worker mistake and that Mr Savage had told him that he genuinely thought that the claimant was agency, was sorry for his mistake and apologised wholeheartedly. Mr Carson also confirmed that the work on site had come to an end; that the respondent had no other work for the claimant; that five people went and none were replaced. Mr Carson then told the claimant that he could offer him work as a bricklaying sub-contractor. The claimant asked if there were any bricklaying employee jobs and Mr Carson replied that all bricklayer opportunities were sub-contract; that there were sub-contractor positions at Dundonald and that all the claimant had to do was to contact the Quantity Surveyor and give him a price. The claimant replied that he wouldn't be comfortable with that and asked about the Comber site. Mr Carson replied that the last phase at Comber had not started but that the Dundonald work was there. In his evidence to the tribunal Mr Carson specifically addressed the claimant's suggestion that there was work available on the Chichester House site. Mr Carson stated that there was a full complement of workers on that site and that the respondent had already started to run down the headcount with some agency workers having left the site during August before the hearing of the claimant's appeal. Mr Carson produced records of employees and agency staff in support of his evidence. The overall tenor of Mr Carson's evidence was that the claimant offered very little by way of challenge to the respondent's decision. While the claimant clearly accepted, rightly or wrongly, that he did not expect to get his job back he did in our view participate fully in the appeal hearing and the evidence set out above is that the claimant did make positive suggestions as to where alternative work might be available albeit that Mr Carson did not agree that there was available work at the locations identified by the claimant.

29. A further recess took place at this juncture instigated by Mr Ward who asked Mr Carson to leave the meeting. What was said between Mr Ward and the claimant was not part of the record of the meeting which simply alludes to Mr Ward and the claimant having a short discussion on opportunities to resolve the situation following which Mr Ward advised the claimant that Mr Carson would be writing to him with the outcome of the appeal. The claimant in his witness statement and evidence to the tribunal expressed disquiet about the conduct of this part of the meeting. In particular the claimant alleged that Mr Ward told him that they would tell the Child Support Agency ("CSA") that he thought the claimant's wage was different to what he had earned. According to the claimant he was shocked at this comment and told Mr Ward that he didn't have any problems with the CMS [CSA] and asked whether Mr Mackey had told him that. Mr Ward replied

that he had seen an email and the claimant responded that he hadn't discussed that in any email. Mr Ward then asked the claimant to come up with a figure for compensation and that he would put it to Mr Mackey. The claimant responded that he hadn't thought of a figure and would need to think about it. Mr Ward asked the claimant to ring him with a figure in mind and gave him his business card. In his witness statement the claimant commented that he felt that he had been threatened as they hoped to get him to drop his claim. He also felt that they took advantage of him being on his own.

30. In view of the serious nature of these allegations the tribunal considered that Mr Ward ought to be given an opportunity to give evidence and on the invitation of the tribunal Mr Ward provided a witness statement and was cross-examined on it. In his evidence to the tribunal Mr Ward stated that Ms Allen advised him in an email dated 27 July 2018 that during the course of his employment the claimant had told her to hold all overtime as he did not want to be hit with a big payment to the CSA. Mr Ward's evidence was that he had never discussed the CSA matter with Mr Mackey and Mr Mackey hadn't instructed or requested him to raise it with the claimant. In his one to one meeting with the claimant Mr Ward told the claimant that he felt that there had been a genuine redundancy but that they both knew that the respondent had not handled it well. According to Mr Ward he went on to say that the respondent had been a good company to work for and that the claimant should keep open his options of working for them again. Mr Ward went on to say that the respondent had been good to him and had facilitated withholding overtime payments at his request to minimize payments to the CSA and he questioned the legality of that. Mr Ward denied telling the claimant that the respondent could or would inform the CSA and the claimant did not ask if Mr Mackey had told Mr Ward about the CSA. There was no dispute about the discussion that followed regarding financial settlement.

31. This was not the end of the matter however. On Monday 3 September 2018 the claimant phoned Mr Ward. Mr Ward was not aware that this phone call was being covertly recorded by the claimant. A transcript of the call was included in the bundle and the tribunal also had the benefit of listening to the recording. Whatever Mr Ward's intention was the claimant clearly felt threatened by the reference at the previous meeting to the CSA and raised it directly with Mr Ward who denied that it was intended to sound like a threat. They then went on to discuss a possible financial settlement at length and the claimant provided a minimum settlement figure which Mr Ward said he would put to Mr Mackey. The claimant invited the tribunal to regard these further exchanges about the CSA as sinister or threatening but having read the transcript and listened to the audio recording we are not prepared to read anything untoward in them. It is clear that the references to the CSA during the telephone call were instigated or prompted by the claimant rather than Mr Ward. The claimant maintained that he was in full compliance with all CSA and HMRC requirements.

32. On 14 September 2018 Mr Carson wrote to the claimant and gave his decision on the appeal. As this is the key document in the respondent's case it is set out in full and it reads as follows:

> "I refer to the appeal meeting that you attended on Wednesday, 29 August 2018.

At the meeting I asked you why you believed that you were unfairly selected for redundancy when your employment was terminated on Friday, 22nd June 2018. You stated that you understood that the Company had work on other sites that you could have undertaken. You also stated that Mr Spencer Savage was under the misapprehension that you were an agency worker.

You also advised that you were under the impression that you had a long-term future with the Company and had made financial commitments on that basis, including taking out a mortgage.

You advised that you had undertaken some work since your employment with us had ended but that that work was short-term. You told me that you had registered as self-employed. You also told me that you had NOT registered with any employment agencies.

I advised that the Company did not have any positions for a bricklayer foreman on its other sites. I told you that there were opportunities for sub-contract bricklayers at Dundonald. You told me that you were not interested in employment in a sub-contracting capacity.

I have spoken to Mr Savage who has confirmed his initial misunderstanding about your employment status, but I am convinced that, that mistake did not play any part in the decision to select you for redundancy.

I advised you that the termination process could have been handled differently but I am also convinced that even if the process had been different your employment would still have been terminated by reason of redundancy and that would have been a reasonable outcome in the circumstances.

In the circumstances I am unable to overturn the original decision to terminate your employment by reason of redundancy.

I wish you success in your future and hope that you gain employment soon."

33. The claimant obtained some employment following his dismissal and in between periods of work he was in receipt of Jobseekers Allowance. We will examine this aspect further when we come to consider what award should be made.

34. The Castlehill project commenced in July 2018 but as Mr Carson pointed out there would not have been bricklaying work there immediately as there were a number of months of clearing, piling, reduced level dig and foundations to complete first and his suggestion to the claimant was that if he spoke to the Quantity Surveyor he could be offered the chance to price the job as a sub-contractor when this trade was due to start on site.

35. It is apparent that there is a dispute about what was discussed between the claimant and Mr Mackey when they met on 20 June 2018. It is not necessary for the tribunal to resolve this dispute as irrespective of whether the claimant raised the issue of Mr Nicholl's retention, Mr Nicholl's situation needs to be considered in order to determine whether or not he should have been considered for redundancy at the same time as the claimant. At the material time Mr Nicholl was a trainee engineer with a foundation degree who was attending the Ulster University as an undergraduate. He was not an Assistant Site Manager or Supervisor. Following

completion of the Hope Street site Mr Nicholl worked on the respondent's Castlehill site and operated a robotic total station. The claimant gave evidence that he could operate laser level equipment but we are satisfied that this is very different to what Mr Nicholl was engaged upon and was not within the claimant's skills set.

RELEVANT LAW

Substantive Unfair Dismissal

36. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") 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 reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(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."*

37. A redundancy is defined in Article 174 of the 1996 Order as follows:

> *174(1) For the purposes of this Order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
>
> *(a) the fact that his employer has ceased or intends to cease –*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*

(ii) *to carry on that business in the place where the employee was so employed, or*

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind,

or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

38. The Employment Appeal Tribunal in **Williams v Compair Maxam Ltd [1982] 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."

39. These guidelines were expressly approved in **Robinson v Carrickfergus Borough Council [1983] IRLR 122**, a decision of the Northern Ireland Court of Appeal.

40. In **Langston v Cranfield University [1998] IRLR 172**, the Employment Appeal Tribunal held that, so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being an issue in every redundancy unfair dismissal case.

41. In the decision of the Employment Appeal Tribunal in the case of **Halpin v Sandpiper Books Ltd [2012] UKEAT/0171/11**, it was confirmed that the correct approach to dealing with redundancies is set out in **Williams v Compair Maxam Ltd [1982] IRLR 83 EAT**. It also confirmed that decisions as to pools and criteria are matters for management and rarely will it be for an employment tribunal to interfere with any such decisions.

42. In **Taymech v Ryan [UKEAT/0663/94]**, Mummery J, as he then was, said on the issue of the basis of the pool for selection:-

> *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how a 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."*

43. In **Capita Hartshead Ltd v Byard [UKEAT/0445/12]** it was held:-

> *"(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."*

44. A tribunal is not entitled to substitute its view for that of an employer, who has genuinely applied his mind to the said issue (see further **Family Mosaic Housing Association v Badman [UKEAT/10042/13])**.

45. In **Fulcrum Pharma (Europe) Ltd v Bonassera [UKEAT/0198/10]** there was no criticism of the management decision to have a pool of two, rather the employer's failure related to the failure to consult on the size of the pool. Similarly, in **Halpin v Sandpiper Books Ltd** since the claimant was the only employee based in China, the respondent's decision to make the post redundant was correctly based 'on a pool of one'.

46. 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."

47. In **Mugford v Midland Bank [1997] IRLR 208**, the EAT stated:-

> *"It will be a question of fact and degree for the 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."*

48. In **Rowell v Hubbard Group Services Ltd [1995] IRLR 195** Judge Levy QC in the context of the requirements of fair consultation emphasised that consultation with an employee in the context of dismissal for redundancy must be fair and genuine. Judge Levy QC also cited with approval a passage in Glidewell LJ's judgment in **R v British Coal Corporation and Secretary of State For Trade and Industry ex parte Price and others,[1994] IRLR 72** as follows:

> "24 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.'
>
> 25 Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

Procedural Fairness

49. Article 130A of the 1996 Order is concerned with the procedural fairness of dismissals. Employees are regarded as unfairly dismissed if the statutory dismissal procedure was not complied with and the failure to comply was attributable to the employer. By Article 130A (1) of the 1996 Order where the statutory dismissal procedure is applicable in any case and the employer is responsible for non-completion of that procedure, the dismissal is automatically unfair.

50. When considering the termination of any employment the employer must follow the three-step procedure set out in Schedule 1 of 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 employee and invite the employee 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."*

51. Article 17 of the Employment (Northern Ireland) Order 2003 ('the 2003 Order') provides for adjustment of awards made by industrial tribunals where the claim relates to any of the jurisdictions listed in Schedule 2 of that Order. Unfair dismissals are included in that Schedule. Where a tribunal finds that a failure to complete the statutory procedure is attributable to failure by the employer, it may increase any award it makes to the employee by between 10% to 50% if the tribunal considers it just and equitable in all the circumstances to do so unless there are exceptional circumstances which would make an increase of that percentage unjust or inequitable. This only applies to the compensatory award.

52. The case of **Polkey v Dayton Services Ltd 1987 3 All ER 974 HL** makes it clear that, if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if following the procedures correctly would have made no difference to the outcome.

53. The Employment Appeal Tribunal in **Alexander v Bridgen [2006] IRLR 422** summarised the interplay between the statutory procedures and fair or unfair dismissal as follows:

> (1) if the statutory procedures were followed and there was a breach of other procedures but the individual would have been sacked anyway, that is the chance of dismissal was more than 50%, the dismissal is fair;
>
> (2) if the statutory procedures were followed but there was a breach of other procedures and if the chance of dismissal was below 50% the dismissal is unfair, but a ***Polkey*** deduction can be made;
>
> (3) if no statutory procedures were followed there is automatic unfair dismissal and four weeks pay is the minimum which must be paid and can be increased by 10 to 50% unless the award of four weeks pay would result in injustice to the employer.

54. In **Software 2000 Ltd v Andrews & Ors [2007] UKEAT 0533_06_2601** Mr Justice Elias set out the following principles in relation to compensation at paragraph 54:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred

when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

Statement of Particulars of Employment

55. Articles 33(1) and 36(1) of the 1996 Order require an employer to provide an initial written statement of particulars of employment covering specified matters and a written statement of any subsequent changes to those particulars. Article 27 of the Employment (Northern Ireland) Order 2003 ("the 2003 Order") makes provision for a minimum award in respect of an employer's failure to provide such a statement as follows:

"27(1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.

(2) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change),

the tribunal shall, subject to paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order,

the tribunal shall, subject to paragraph (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In paragraphs (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable."

Minimum Basic Award

56. Article 154 of the 1996 Order makes provision for a minimum basic award in in certain cases as follows:

"154 (1A) Where –

(a) an employee is regarded as unfairly dismissed by virtue of Article 130A(1) (whether or not his dismissal is unfair or regarded as unfair for any other reason),

(b) an award of compensation falls to be made under Article 146(4), and

(c) the amount of the award under Article 152(1)(a), before any reduction under Article 156(3A) or (4), is less than the amount of four weeks' pay,

the industrial tribunal shall, subject to paragraph (1B), increase the award under Article 152(1)(a) to the amount of four weeks' pay.

(1B) An industrial tribunal shall not be required by paragraph (1A) to increase the amount of an award if it considers that the increase would result in injustice to the employer."

Compensatory Award

57. Article 157(1) of 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".

58. 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**). 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.

59. 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.

SUBMISSIONS

60. Both parties provided helpful oral and written submissions. The written submissions are appended to this decision.

Claimant's Submissions

61. In relation to the evidence the claimant submitted that he could have been offered a bricklayer employee position in the Castlehill housing project which commenced some weeks after his dismissal. The claimant submitted that he was justified in declining the bricklaying sub-contractor role that was put forward at the appeal meeting because he had lost trust in the respondent and Mr Mackey in particular and would have incurred costs in employing bricklayers. The claimant criticised the reference to the Child Support Agency at the appeal meeting and the absence of minutes of his one to one discussion with Mr Ward. The claimant also submitted that had the three step procedure been followed his financial circumstances as well as his skills and experience would have been taken into account. The claimant further submitted that Mr Mackey was the real decision maker in terms of selecting him for redundancy and that he was not aware of the claimant's full experience and that he had taken on large projects for the respondent in the past. The claimant also submitted that favouritism had counted for more than experience.

Respondent's Submissions

62. The respondent conceded at an early stage of the proceedings that it had failed to follow steps 1 and 2 of the statutory dismissal procedure. Against this background Mr Ward sought to persuade the tribunal that these failings would have made no difference to the decision to dismiss the respondent due to the downturn in business in the early to mid-part of 2018 which had resulted in the respondent no longer having a requirement for a number of assistant site managers or supervisors. In the normal course of events employees would have been moved from site to site according to business needs but there was no further requirement for a site supervisor at the time of the claimant's dismissal. Mr Ward submitted that the claimant had failed to raise the matters that he relied on before the tribunal at the

appeal meeting with Mr Carson and offered very little to review. Mr Ward ultimately retreated from his written submission that the claimant had failed to mitigate his loss but maintained that the claimant's refusal to countenance working for the respondent as a sub-contractor bricklayer was evidence of a failure to mitigate loss as this role attracted the same rate of pay as his employment with the respondent. Mr Ward was also rather dismissive of the impact of the failure to comply with the statutory dismissal procedure which he suggested might have added a week to the claimant's employment. In relation to **Polkey** Mr Ward submitted that following the procedures correctly would have made no difference to the outcome and accordingly the compensatory award should be reduced by 100%.

CONCLUSIONS

63. We return to the questions posed at the outset of this decision.

(1) Was the claimant dismissed by the respondent by way of redundancy and was there a genuine redundancy situation?

There is no dispute that the claimant was dismissed by reason of redundancy a potentially fair reason for dismissal. We are entirely satisfied that there was a genuine redundancy situation due to the completion of work on three hotel sites around the same time and that the claimant was dismissed on the basis of redundancy.

(2) Was the claimant unfairly selected for redundancy by the respondent and thus unfairly dismissed?

There was a notable absence of any structured decision making by the respondent in relation to the redundancy situation that arose. It was dealt with in a very haphazard and piecemeal way by the respondent. It bears the character of an off the cuff decision without any consideration of the size or nature of the redundancy pool or the criteria that would determine who should be in it. There appears to have been a degree of self de-selection by other potential members of the pool. While the respondent gave a credible explanation as to what had become of the other assistant site managers there was no evidence of any coherent redundancy plan. In these circumstances it is difficult to perceive any selection as such. Rather it was clearly the case that an ad hoc decision was made by Mr Savage to dismiss the claimant. Mr Savage was not even aware that the claimant was a full-time employee and was under the impression that he was agency staff. While this was rectified in terms of the appropriate period of notice being given by Mr Savage once he was appraised of the claimant's employment status the die was very much cast at this stage with no attempt by the respondent to either consult properly or take steps to arrange a proper process which would have involved as a minimum the establishment of a pool for redundancy and consideration of appropriate criteria. While this might give the impression of using a sledgehammer to crack a nut it no more than a proper process demands and may result in a small pool with limited but relevant criteria. As indicated in the course of our decision if there had been a pool we are not satisfied that Mr Nicholl should have been in it

(3) To what extent was the statutory dismissal procedure complied with?

(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 employee and invite the employee to a meeting to discuss it.

The respondent did not set out in writing the circumstances which lead it to contemplate dismissing the claimant as redundant and send a copy to the claimant. The claimant was not invited to a meeting.

(ii) There must be a meeting. The employee must be told of the decision and of his right to appeal.

As indicated at (i) above there was no meeting and as a consequence there was no decision at this stage to tell the claimant about and at no time was the claimant informed of his right to appeal any decision.

(iii) If the employee wishes to appeal, there must be an appeal meeting and the employee must be told of the decision."

Notwithstanding the failure by the respondent to inform the claimant of his right to appeal he appealed anyway. The claimant received a proper invitation to the appeal meeting which he attended. The respondent subsequently advised the claimant of its decision on the appeal.

(4) Would the claimant have been dismissed in any event despite the respondent's non-compliance with the statutory dismissal procedure?

While there is force in the respondent's submission that the decision to make the claimant redundant would have been the same even if the statutory dismissal procedure had been fully complied with it must be remembered that the purpose of the procedure is to ensure that the employer complies with the minimum requirements of fairness. It is not a mere box ticking exercise. The absence of a fair procedure will be likely to have an adverse impact on the validity of the decision making process. In the present case the claimant was dismissed by the respondent with no regard to a fair process. Steps 1 and 2 were missed out completely and the respondent only arranged an appeal when prompted to do so by the claimant. As a result of the respondent's failings the claimant was deprived of the opportunity to consider a written decision by his employer and to put forward reasons at a step 2 meeting as to why he should not be dismissed. Not only did this deprive the claimant of his Step 1 and 2 rights it placed him at a significant disadvantage when it came to the appeal as there was no properly articulated decision to appeal against just a short letter from Ms Allen on 13 August 2018 which stated that his employment was terminated on 22 June 2018 by reason of redundancy. The appeal hearing itself was in certain respects as fair as it could be in the circumstances. Mr Carson quite properly gave the claimant the opportunity to say why he should not have been made redundant and the claimant made a number of points to Mr Carson. However, the process was already damaged and was further undermined by straying into personal issues about child maintainace payments and attempts to reach a negotiated settlement. We also have concerns about the one to one meeting between Mr Ward and the claimant. Interposing a discussion of this nature in the midst of an appeal meeting strikes us as highly irregular in itself irrespective of what transpired which again went into negotiation mode and addressed child maintenance issues. Having carefully considered the evidence

we are satisfied that the decision would probably but not certainly have been the same. The degree of probability is impossible to measure with scientific precision and is largely a matter of judgement which we assess as a 70% probability bearing in mind the undoubted downturn in work when the hotel projects were completed.

(5) Did the respondent give adequate and proper consideration to suitable alternative employment?

In the absence of either a proper and structured redundancy process and the invocation of Steps 1 and 2 of the statutory procedure it is difficult for the respondent on whom the onus falls to demonstrate satisfactorily that appropriate consideration was given to finding suitable alternative employment. Clearly, the claimant was dismissed without any thought being given to this by Mr Savage. Furthermore, there is no evidence that Mr Savage gave any consideration to this once he learnt that the claimant was not an agency worker. Nor is there any evidence that Mr Mackey did so. It was only at the appeal stage and presumably with benefit of Mr Ward's advice that such matters were addressed. We are satisfied that Mr Carson considered the issue of suitable alternative employment. In the event the cupboard was bare and the only option that Mr Carson came up with was a sub-contracting role which was proffered in good faith to the claimant. As was accepted by Mr Ward this role did not by definition constitute employment and thus could not be regarded as suitable alternative employment. Thus we are satisfied that very belatedly, some two months after his dismissal, the respondent considered suitable alternative employment. Had the respondent, as it should, have given active consideration to suitable alternative employment when it first contemplated making the claimant redundant it might have found something even at a lower level such as labouring that could have been offered to the claimant in the meantime until the residential projects kicked in.

(6) Did the claimant seek to mitigate his loss of employment?

As indicated above ultimately it was not disputed that the claimant sought to mitigate his loss. The only issue was whether the claimant should have pursued the offer of a sub-contracting bricklayer role. If the respondent's evidence is accepted the monies earned in this role would have equated to the claimant's pay as an employee of the respondent. The claimant did not accept this as accurate and pointed out that there would be costs involved in employing bricklayers and having had previous experience of this role he would not wish to take it on again. The respondent was not in a position to challenge the claimant's contentions in this regard and in these circumstances we are not persuaded that any failure to mitigate loss has been established. In addition, it is clear that there was no bricklaying work of any sort on the Castlehill site until September 2018 at the earliest. At the request of the tribunal both parties revisited the issue of loss after the conclusion of the evidential phase of the hearing and a more detailed Schedule of Loss was provided by the claimant which was ultimately agreed between the parties with only some minor adjustments by Mr Ward. It is not necessary to rehearse all of its contents here but we have set out below the parts dealing with compensatory loss and mitigation.

23 June 2018 to 12 August 2018 - Jobseekers Allowance.

13 August 2018 to 22 August 2018 – Barwood Developments, Lisburn. The claimant was paid £640.00 for 9 days work.

23 August 2018 to 2 December 2018 - Jobseekers Allowance.

3 December 2018 to 20 December 2018 – Working for bricklayers Oliver Donnelly and Chris Gray on Porter Homes Sites in Lisburn for which he was paid £1,168.00.

21 December 2018 to 2 January 2019 - Jobseekers Allowance.

3 January 2019 to 1 February 2019 – Working for Intertoll, Belfast. The claimant was paid £1,418.78 for 4 weeks work.

5 February 2019 to 15 February 2019 – Bricklaying work for Francie Glass sub-contractor on Lisburn site. The claimant was paid £784.00 for two weeks' work.

The claimant therefore earned a total of £4,910.78 from four short periods of work between his dismissal and the tribunal hearing and claimed Jobseeker's Allowance when he was out of work. The claimant calculated his loss from the end of his notice period up until the tribunal hearing at £12,108.22. The claimant included £1,888.72 received in respect of Jobseeker's Allowance in his calculations. As recoupment applies the claimant's loss for the purposes of calculating his loss is therefore £13,996.94. We would expect the claimant to be capable of securing full-time work in the near future. However, it is clear that the claimant has actively pursued work opportunities since the termination of his employment and it seems likely that he will continue to do so in the immediate future.

(7) In addition, it is common case that the respondent failed to provide the claimant with a written statement of main terms of employment. The consequences of this failure are addressed below.

(8) What compensation is the claimant entitled to?

(i) In terms of the compensatory award there was, as noted above, no dispute on the claimant's calculation as to his loss of earnings from the date of his dismissal to the date of hearing. We are satisfied that the claimant did all that he reasonably could to mitigate his loss during this period of approximately eight months' duration. The claimant is clearly employable and we are confident that he is capable of securing paid employment on an ongoing basis. The remuneration is likely to be lower than an assistant site manager unless the claimant decides to pursue sub-contracting work of the type offered. We consider that an award of 6 months or 26 weeks' pay differential is appropriate in respect of future loss. The compensatory award is subject to a 70% Polkey reduction for the reasons set out above.

(ii) It is also necessary to consider uplift. If the statutory procedures are not complied with, the tribunal must increase the award of compensation that it makes by 10%, (Article 17 of the 2003 Order). The tribunal also has power, under Article 17 to increase the award by

a further percentage, up to 50%, if the tribunal considers it just and equitable so to do. The respondent is a large construction company based at Portadown and the offices on Boucher Road, Belfast as well. Its building work embraces a wide range of large projects of a commercial and residential nature. In the period leading up to the claimant's dismissal it was engaged on three separate hotel sites. It engages both full-time and agency employees whose numbers vary in accordance with the volume of work. The respondent has no human resources department and outsourced such matters to external consultants. The evidence that we have heard suggests that this occurs when problems arise rather than engaging services to proactively deal with redundancies. Given the size of the business and its lengthy pedigree we find it surprising that it should fail to adhere to the most basic and minimum standards required by the statutory dismissal procedure and that it should stumble into problems of the type that arose in this case. No explanation was given for the failure to follow the statutory dismissal procedure. The decision to dismiss the claimant without any proper process strikes us as an act of carelessness or neglect rather than a wilful attempt to avoid going through a proper process. In these circumstances we consider that an uplift of 20% would be just and equitable.

(iii) As the respondent has failed to implement the statutory dismissal procedure and the dismissal is thereby automatically unfair, the tribunal must award the claimant a sum to bring his basic award up to 4 weeks' salary, if the claimant's basic award would have been below 4 weeks' salary unless that increase would 'result in injustice to the employer - Article 154(1A) of the 1996 Order. There is no evidence in the present case that would cause the tribunal to believe that such an award would be unjust to the respondent.

(iv) The claimant's claim of unfair dismissal falls within jurisdictions to which Article 27 of the 2003 Order applies. In accordance with Article 27(3) of the 2003 Order where the employer has failed to provide an employee with a written statement of main terms of employment the tribunal must increase the award by the minimum amount and, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead unless there are exceptional circumstances. The claimant was not provided with a written statement of main terms of employment either at the start of his employment or when he requested it following his dismissal. No reason was proffered for this failure and there appears to have been a complete disregard by the respondent of its obligations to employees in this respect. In light of these facts we consider that it is just and equitable in all the circumstances to increase the award by the higher amount. No evidence was placed before the tribunal to suggest that there were exceptional circumstances of any description.

AWARD

64. The claimant's gross weekly pay was £585.00 and his net weekly pay was £544.00. A week's pay is capped at £530.00 per week. The claimant was aged over 41 and had one completed year of service on dismissal. On the basis of service alone the

claimant's basic award would have been £795.00 which is the equivalent of 1.5 week's pay. However, the claimant is entitled to a minimum of 4 weeks in respect of the basic award due to the respondent's failure to follow the statutory procedure.

Basic Award –

4 weeks' minimum award = £2,120.00

Compensatory Award

Loss from date of dismissal to date of hearing (34 weeks) = £13,996.94

Future Loss

Based on the claimant's ability to find short term work we consider that it is appropriate to allow 26 weeks' future loss of income based on the drop in the claimant's income between the date of dismissal and the date of hearing [£13,996.94 divided by 34 multiplied by 26]

= £10,703.54

Pension

The claimant's contract of employment made provision for an Occupational Pension Scheme to which the employer contribution was 4% and the minimum employee contribution was 5%. The respondent made pension contributions from 25 May 2017 to 19 July 2018 totalling £1,464.00 (approximately £23.40 per week on average). In keeping with a future loss of 26 weeks' pay differential we consider that the claimant should be awarded the benefit of employer contributions for 26 weeks plus employer contributions from 19 July 2018 to the date of hearing a period of 31 weeks.

(26 weeks + 31 weeks) x £23.40 = £1,333.80

Failure to provide written statement of main terms of employment

4 weeks' gross pay (£530.00 x 4) = £2,120.00

Loss of Employment Rights

= £200.00

Sub-total = £28,354.28

Less Polkey reduction of 70% - £19,848.00

= £8,506.28

Failure to follow statutory procedure

20% uplift = £1,701.26

Total Compensatory Award = £10,207.54

Add Basic Award £2,120.00

TOTAL AWARD £12,327.54

65. The claimant was in receipt of Jobseeker's Allowance for a number of periods following his dismissal. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996 therefore apply in this case. Rule 4(3) requires that the tribunal set out:-

    (a) the monetary award;

    (b) the amount of the prescribed element, if any;

    (c) the dates of the period to which the prescribed element is attributable; and

    (d) the amount if any by which the monetary award exceeds the prescribed element.

66. For the purposes of the unfair dismissal proceedings the monetary award is £12,327.54. The prescribed element is the amount of compensation for loss of earnings up to the date of the hearing. The relevant dates are 22 June 2018 to 18 February 2019. The tribunal finds that the amount of the prescribed element is £4,199.08. The monetary award therefore exceeds the prescribed element by £8,128.46.

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

Employment Judge:

Date and place of hearing: 18-20 February 2019, Belfast.

Date decision recorded in register and issued to parties:

Closing Submission

In Employment tribunal case reference 12857/18IT. Date 20/02/2019

From claimant Mr Paul John Gordon .

Respondent MSM contracts Ltd .

1/ My submission is that I was Employed by MSM contracts after meeting MR Robert Mackey in may 2017 , I was Employed as a site supervisor and worked at hope street Hampton by Hilton site .

2/. As has been said by MSM that my work there was without fault and my sickness record was unblemished. I had experience in many trades and therefore supervised many trades on this construction site .During my employment I met Robert Mackey and was assured a secure future with MSM and felt secure enough to sign for a mortgage.

3/ On taking up this post I requested a contact as I new I would be applying for a mortgage, but instead was given a cover letter stating my earnings. I did not receive an employment contract until long after my dismissal.

4/. When I was told of my dismissal on 14/06/18. I was initially going to be given one days notice then changed to one weeks notice. Again I requested my contract and on meeting Robert Mackey again on 20/06/18 On site I asked of other work on other MSM sites but was turned down flat . I was told it was a case of last in first out , which I disputed.

I requested a reference from Mr Spencer Savage but I was told that I would have to ask Robert Mackey himself. But because of Robert Mackeys negative response to me on the 20/06/18 that I knew a reference would not be supplied.

5/ No proper procedure was followed in my dismissal and MSM disregarded my employment rights . Only when I sought legal advice and sent a recorded delivered letter did I get a response from MSM and an appeal meeting was set for 29/08/18

6/ Before my appeal meeting and some weeks after my dismissal. MSM began working on the Stormont housing project which given my experience I believe a role could have been made for me . As this project had been discussed in the hope street site office many times with the person who eventually was the contract manager on that site(Mr Allen Mcneil) and it was he who informed me that it was a four year project .

7/ At the appeal meeting it was suggested I could take a sub contractor bricklayer position on the stormont site .

I declined as I had lost trust in MSM and also because of my experience working in that role in the past and at some stage even with MSM in 2003/. 2004 .

Therefore I knew what was involved in Starting fresh and employing people again and I would have had to make a substantial financial investment in employers liability insurance also I would have been at a disadvantage because I was not tax exempt.

Because of these reasons and because of my lack of trust I'm Robert Mackey I felt it would be foolish to go into a financial agreement with MSM were all the risk would be on my head.

Instead I asked for a bricklayer employee position as it would be a less risk involved position and also as I knew that MSM had direct joiners working for them as I had met them on hope street when they came to fit doors for a few weeks.

When I turned the sub contractor offer down MR Carson left the room and Mr Ward took the opportunity to bring up my CMS status and my wages which he questioned the legality of this ,as he has mentioned in paragraph 10 of his Statement.

Mr Robert Mackey in his verbal evidence yesterday admitted he had knowledge and was copied into the email sent to Mr Ward regarding this matter.

Mr Ward admitted he took the minutes of the appeal meeting yet he chose not to take minutes of this conversation.

I felt I was right not to trust MSM after this meeting. As my CMS status was none of Mr Wards business, if he was told about this matter then he should have kept it to himself. He has now had six months since that meeting to come up with an answer as to why he felt it relevant in my appeal meeting .

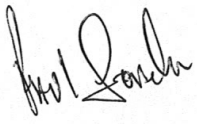
8/ It is unfortunate that the situation has led to myself having to take my former employer to this tribunal as I was happy working for MSM and I was taken by surprise by my dismissal.

If not for me having savings I may have jeopardised paying my mortgage while dealing with ongoing legal cost at family court. These financial circumstances along with skills and experience are issues that should be taken into account if meetings in the three step procedure had been followed.

It is unrealistic to select a person when the person making the selection (namely Robert Mackey) admits he isn't aware of my full experience or even that I had taken on large MSM projects in the past .

That selection procedure would never be fair in a firm like MSM were favouritism counts for more than experience.

9 To Date there is still no clear admission as to how or who made the decision for my dismissal.



INDUSTRIAL TRIBUNALS

In the matter of

Paul Gordon -v- MSM Contracts Ltd
Case No 12857/18

Respondent's Representative Submission

The case

1. It is common case that the claimant was employed by the respondent from 15 May 2017 to 22 Jun 2018 as an assistant site manager at the Hampton by Hilton Hotel, Hope Street, Belfast.

2. Employment ended on 22 Jun 2018 and the respondent admits that they failed to follow Step 1 and Step 2 of the statutory disputes resolution procedure.

3. The evidence of the respondent's witnesses was that MSM Contracts faced a down turn in business in the early to mid part of 2018 with three major hotel contracts ending and no replacement contracts.

4. The respondent no longer had a requirement for a number of assistant site managers, or supervisors. Spencer Savage, contracts manager, told the tribunal that the four supervisors on the Hope Street site were Ronnie McNeill, Tom Vogan, the claimant and Alan McNeill. In his evidence Peter Carson, operations manager, confirmed that Ronnie McNeill had retired, Tom Vogan had left the company voluntarily and that Alan McNeill was a contracts manager from the Portadown office temporarily drafted into the Hope Street site to accelerate the work.

5. There was no further work for the claimant. Spencer Savage met the claimant on site on Wed 13 Jun 2018, told him that he would be no longer required and gave him one week's notice of termination, up to Fri 22 Jun 2018. They shook hands and Mr Spencer wished him well for the future.

6. The claimant sent an email to Robert Mackey on Wed 20 Jun 2018 asking for reasons for termination and seeking a copy of his contract of employment. Mr Mackey met the claimant the same day, Wed 20 Jun 2018 at 5:30pm. In his evidence Mr Mackey refuted the claimant's evidence that the claimant spoke of other sites or working in another capacity.

7. On Fri 26 Jul 2018 the claimant sent a letter as an email attachment to Mr Mackey asking for reasons for dismissal, a contract of employment and asking for an appeal against dismissal.

8. A letter stating that the claimant's employment had been terminated by reason of redundancy and a statement of main terms and conditions of employment were sent to the claimant.

9. Robert Mackey arranged for Peter Carson, the operations manager, to hear the appeal which was arranged for Wed 29 Aug 2018. Mr Mackey gave Mr Carson complete authority in relation to the outcome of the appeal.

10. At the appeal hearing Mr Carson was accompanied by Gerry Ward, employment consultant. At the appeal Mr Gordon was invited to put forward his reasons as to why he believed that his dismissal for redundancy may have been unfair.

11. After the appeal meeting Mr Ward engaged unsuccessfully with Mr Gordon in an attempt to settle the unresolved matters.

12. Mr Carson wrote to the claimant on Fri 14 Sep 2018. In his letter Mr Carson stated "I advised you that the termination process could have been handled differently but I am convinced that even if that process had been different your employment would still have been terminated by reason of redundancy and that would have been a reasonable outcome in the circumstances".

Matters arising

13. The claimant's statement of main terms of employment (or contract) provides for an ongoing relationship and is not time-bound or project-bound.

14. All the respondent's witnesses agreed that in the normal course of events employees are moved from site to site according to the needs of the business, but all their witnesses confirmed that there was no further requirement at that time for a site supervisor.

15. Mr Gordon alleges that he met with Mr Mackey on Tue 15 Aug 2017, three months after the commencement of his employment, a meeting that Mr Mackey does not recall. Mr Mackey denies saying the things that the claimant alleges that he said. The claimant says that he made a mortgage application decision based on that meeting. Mr Mackey confirmed that a letter had been provided to Mr Gordon to support his mortgage application, but that alleged meeting was a full 10 months before the claimant's employment was terminated.

16. The claimant questioned Mr Mackey on the retention in the business of Mr Adam Nicholl, trainee engineer. The claimant based his questioning on a comment that he claims Mr Mackey made regarding his redundancy that it was 'last in, first out'. Mr Mackey denies ever making that statement.

17. However Mr Nicholl is not a fair comparator for the claimant. Mr Mackey told the tribunal that Mr Nicholl is a trainee engineer with a foundation degree attending Ulster University as an undergraduate.

18. Mr Mackey said that Mr Nicholl is working on the Castlehill site operating a robotic total station. In response to a question from the Employment Judge "is that the sort of work Mr Gordon could do?", Mr Mackey answered "no".

19. The claimant told the tribunal that he had laser level equipment, Mr Mackey asserted that they were two different things.

20. It is acknowledged that Steps 1 & 2 of the disputes resolution procedure were not followed but step 3 was completed. That was an opportunity for the claimant to raise all issues relating to his selection for redundancy. He failed to raise the issues that he has taken to the tribunal. It is the respondent's case that the claimant gave Peter Carson very little to review.

21. Following the appeal hearing the respondent's representative attempted to find resolution to the matter. He spoke to the claimant on a one-to-one basis. The conversation was relaxed and friendly throughout. Mr Ward's evidence was that he believed that the claimant could have the best of two outcomes - a financial settlement to compensate for the dismissal, but also the opportunity to secure future work with the respondent. At no time during that meeting did the claimant seem alarmed or threatened by the discussion around the arrangements made to withhold pay in respect of the CSA.

22. Indeed, the telephone conversation covertly recorded by the claimant on Mon 3 Sep 2018 failed to show any signs that the claimant felt threatened or intimidated in any way.

Mitigation

23. It it the respondent's contention that the claimant has failed to mitigate his loss. It is the responsibility of the claimant to demonstrate that he has done all that he could do to mitigate loss. The claimant has failed to provide any evidence that he looked for further work. He could not produce any application forms, interview requests or rejection letters. He could not produce any email acknowledgements or email 'read receipts' to say that he had been in touch with agencies or prospective employers.

24. In response to Mr Ward's question at the appeal hearing "have you registered with agencies?", the claimant replied that he had been calling into sites and had been phoning up. But when pressed by Mr Ward "have you actually registered with any of them?", he replied "no".

25. The claimant now tells the tribunal that he was lying when he said "no". The respondent contends that he had not registered with any agencies and thus failed to mitigate his loss.

26. The claimant accepts that he said at the appeal hearing "I am not going to work in Tesco". Whilst it is accepted practice that a claimant can initially 'hold out' to pursue

their given career, that is not indefinite and certainly not as long as the claimant was unemployed for.

27. The respondent further contends that by refusing the respondent's offer of work as a sub-contract bricklayer - a position that the claimant told the tribunal that he had operated in before - that outright refusal is further evidence of him failing to mitigate his loss. The position of sub-contract bricklayer was at the same rate of pay as the claimant had previously been earning.

Loss

28. This is not a case of unfair dismissal similar to a conduct or capability dismissal. In any assessment of loss the tribunal should be mindful that had the correct procedure been followed then the dismissal would have happened in any case. Going through a consultation period and complying with the full three step procedure might have added a week on to the period of the claimant's employment.

Polkey

29. The tribunal will be aware of the case of ***Polkey -v- A E Dayton Services Ltd [1987] IRLR 503***.

30. The ***Polkey*** principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

31. Where the process is procedurally defective then the dismissal is unfair but ***Polkey*** makes it clear that the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if following the procedures correctly would have made no difference to the outcome.

32. Accordingly the respondent submits that the tribunal should reduce any compensation award by 100%, in that it is clear that by following the procedure correctly there would have been no difference to the outcome.

Automatically Unfair Dismissal Uplift

33. This respondent has not operated in a malicious or vindictive way. It was faced by a reduced workload and a need to reduce headcount accordingly. It handled Stages 1 & 2 incorrectly and was not helped by the claimant's lack of input at appeal. Any uplift applied to any award should be of the minimum.

Conclusion

- The respondent submits that the claimant was dismissed by reason of redundancy and was paid one week's notice, withheld overtime and all outstanding holiday pay.
- The respondent accepts that it failed to follow Steps 1 & 2 of the statutory disputes resolution procedure.
- The third step - the appeal - was carried out. The claimant offered the appeal meeting with little to go on to overturn the original decision. The claimant had already decided to go to tribunal and had not participated in the appeal meeting in good faith.
- Peter Carson gave evidence that the claimant's job was redundant and that was confirmed by the Certificate of Practical Completion issued by Todd Architects on 22 Jun 2018.
- No other work was available on other sites at that time and this was confirmed by the headcount figures provided.
- It is common case that Peter Carson offered Paul Gordon a job opportunity where he would earn similar monies to what he had been earning. He failed to mitigate his loss.
- The claimant demonstrated no attempts at mitigation of loss by failing to look for alternative work or register with agencies. He produced no documentation in support of any attempts at mitigation.
- Robert Mackey provided unchallenged financial evidence that there was a reduction in business and a consequential reduction in headcount throughout the business evidenced by records of hourly staff, salaried staff and agency workers.
- There was a genuine downturn in the respondent's business, the claimant's position was redundant and the respondent acted in good faith

- It is conceded that the respondent failed to follow part of the statutory disputes resolution procedure and hence the dismissal was automatically unfair under ***Article 130A(1) of the Employment Rights (Northern Ireland) Order 1990***.
- The respondent contends that if it had followed the statutory disputes resolution procedure that dismissal of the claimant would have occurred in any event fairly on the grounds of redundancy.
- The respondent is asking the tribunal, under ***Polkey***, to reduce any compensation by 100% in that it is clear that by following the procedure there would have been no difference to the outcome.