

# THE INDUSTRIAL TRIBUNALS

CASE REF: 2274/03

**CLAIMANT:** Peter Gray

**RESPONDENT:** Bombardier Shorts

## DECISION

The unanimous decision of the tribunal is that the claimant's claims of unfair dismissal and unfair selection for redundancy against the respondent are upheld and the claimant is awarded compensation of £52,600.00.

### Constitution of Tribunal:

**Chairman:** Mr Cross

**Panel Members:** Dr Eakin  
Mr Lysk

### Appearances:

The claimant was represented by Mr K Denvir, Barrister-at-Law, instructed by Campbell Stafford, Solicitors.

The respondent was not represented and did not appear at the tribunal.

### The Issues

- 1 The claimant, who had been employed as an aircraft fitter, was made redundant by the respondent on 9 May 2003. He claimed that his selection for redundancy was unfair as the system used to select him was flawed. The tribunal heard the evidence of the claimant, but no evidence from the respondent, as the respondent had been debarred from defending the proceedings and its response to the claimant's application to the tribunal had been struck out by Order of Mr D Buchanan dated 20 December 2006, which Order had been reviewed and affirmed on 19 February 2007.

### Findings of Fact

- 2 The claimant was born on 2 April 1955. He commenced employment with the respondent on 6 October 1997. He was made redundant on 9 May 2003. He

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### Findings of Fact

- 2 The claimant was born on 2 April 1955. He commenced employment with the respondent on 6 October 1997. He was made redundant on 9 May 2003. He

received an enhanced redundancy payment of £6,891.52. His average net pay was £1,400 per month. He also contributed a sum of £70.00 per month to a company pension scheme. His take home pay was £1,400.00 per month.

- 3 The system used to select the employees to be made redundant was a points system. The maximum points that an employee could score was 60, 30 for discipline and 30 for attendance. If an employee had a verbal warning within the previous 12 months he lost 5 points from the discipline score, if he had a written warning he lost 20 points. On the attendance side, if an employee had up to 1 absence in the last 12 months, he lost no points. If he had 2 absences he lost 3 points and so on. Cautions issued under the respondent's rule, known as "Absence Control Procedures", required that cautions for absence will be handled under the discipline category of the redundancy selection procedure.
- 4 On 6 January 2003 the claimant was called into an interview with one of his managers. He was told that this was a disciplinary meeting. He had however received no reasonable notice of this and was not given the opportunity to be accompanied by a trade union representative or colleague. The interview was one to one with a manager, Mr Connell, with whom the claimant was having a dispute over a work related matter, in that the claimant disagreed with Mr Connell as to the feasibility of carrying out a certain item of work. As a result of this dispute the claimant had been moved into a different work team doing different work. This incident had caused the claimant stress.
- 5 At that meeting the claimant was disciplined for being sick for 36 hours between 17 and 21 September 2001. This sickness absence was the result of a leg injury.
- 6 One of the illness absences that was also recorded against the claimant and was brought up at the meeting with Mr Connell, was 'flu in November 2002. This was an illness that might not in normal circumstances have kept the claimant out of work for so long as the 5 days recorded. However the claimant's father was in intensive care in hospital and the claimant, who wanted to visit him before he died, was told that he must be free of any 'flu symptoms before he visited his father.
- 7 The claimant was not sure why he was being disciplined. Mr Connell referred to the illness recorded in September 2001 which the claimant stated was work related (the claimant remembered this because of the attack on the Twin Towers in New York on the same day). In any event the claimant received a verbal warning. He appealed this warning but the appeal failed. The tribunal have no information on this appeal, as the claimant was vague in his recollection and there was no documentary evidence of it available.
- 8 Three days after the 6 January meeting referred to above an HR1 form, being a warning of pending redundancy, was issued to the claimant, as his points score had dropped from 30 to 25. The claimant stated that he appealed this as well but the tribunal has no evidence of the date of that hearing.
- 9 On 10 April the claimant received an "At Risk Assessment Score" form. This form showed that his Discipline score was down from 30 to 25. The claimant appealed this score. The appeal was heard on 30 April 2003, it was unsuccessful and the claimant was made redundant on 9 May 2003.

## The Law

- 10 Under Article 130 of The Employment Rights (Northern Ireland) Order 1996 it is for the respondent to show that the reason for the employee's dismissal is a reason that falls within one of the reasons listed in Paragraph (2) of the Article. One of the listed reasons is that "the employee was redundant."
- 11 The tribunal is aware that the cause of this dismissal is the respondent's decision that the claimant was redundant. The claimant has given evidence to the tribunal to this effect. The tribunal must then turn to examine the fairness of the redundancy selection process. In the case of *British Aerospace Limited v Green [1995] IRLR 433*, the English Court of Appeal stated that:-

"it is sufficient for the employer to show that he set up a good system [of selection for redundancy] and that it was fairly administered and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."

This tribunal has no evidence from the respondent, as to the system of selection, as the respondent is barred from defending these proceedings. The tribunal is left to do its best to uncover the actions and thoughts of the officials of the respondent in their treatment of the claimant. The tribunal, in reaching its decision as to whether or not the selection of the claimant, as a person to be made redundant, was fair, usually relies on the evidence of the respondent as to its selection procedure. In this case the tribunal only has the documents that have been supplied to it, which are inconclusive. The only sworn evidence available to the tribunal is that of the claimant, whose uncontested evidence was that the procedure adopted was far from fair.

## Decision of the tribunal

- 12 The tribunal has no evidence that there was a redundancy situation which led to the dismissal of the claimant. Even if the tribunal assumes that there was such a situation that required a selection amongst employees for redundancy, the tribunal does not know from what pool of employees the selection was to be made. The tribunal has read the documents supplied to it and gets a picture of a scoring system that is far from clear. The explanatory document called "Redundancy Selection Procedure Manual and Lead Hands March 2003", does state that if the employee has been cautioned for absence under the "Absence Control Procedure", then he will be deducted points under Discipline. However the disciplinary hearing with Mr Connell was flawed as the claimant was in dispute with him and the procedures were defective.
- 13 The Tribunal hold that the disciplinary meeting on 6 January 2003 was not fair to the claimant. He was not told in advance that this was a disciplinary meeting and he was not allowed to bring a friend or union official with him. He was merely told that he was getting a warning because of certain absences caused through illness and given no chance to explain the circumstances or his side of the situation. The claimant had some difficulty in bringing these occasions of absence to mind at the time. There was confusion in the claimant's mind over the respondent's Occupational Sickness Pay Scheme and the variations of that scheme and in

relation to The Control of Absences scheme. The tribunal also had difficulty in following the way that these schemes inter linked and were operated in the absence of the respondent at the tribunal hearing. The claimant felt that he had not done justice to his cause in the fluster of this surprise meeting. The tribunal can only come to the conclusion that the respondent wanted to dismiss this claimant and set up this deduction of points to achieve this end.

- 14 The tribunal hold that the disciplinary process was flawed for the reasons set out above and that consequently the redundancy selection was unfair. Furthermore the tribunal cannot assume that there was a redundancy situation involving the claimant's department, as the respondent has not discharged that burden of proof. For these reasons the tribunal hold that the claimant was unfairly dismissed and award to the claimant the compensation set out in the schedule hereto.
- 15 The tribunal examined a bundle of correspondence between the claimant and various potential employees. The claimant applied for numerous jobs in the engineering sector and in all sorts of other sectors including, security, the prison service, driving and retail to mention a few. He produced his Social Security, "Looking for Work" diary for the period from June 2003 to June 2005. This shows that the claimant applied for many jobs and searched the advertisements in the papers and on the web. The claimant finally secured a job in the autumn of 2005 which started on 27 February 2006. This was as a carer visiting and looking after elderly people in their own homes, with a business called Qualitycare Services, where he earns £1,020.00 per month (£235.00 per week). He has to use his own car and gets a petrol allowance of about £242 .00 per month. However his job entails a lot of driving from house to house of his clients and he spends all that allowance on fuel. The tribunal do not take into account this petrol allowance in calculating the loss of wages suffered by the claimant.
- 16 Since taking up this carer's job the claimant has continued to apply for better paid jobs in areas of employment that would be more within his old skills range. So far he has had no success. The tribunal award the claimant his loss of wages up to the time that he got his job as a carer. It also awards him his loss of the difference between his old wage with the respondent and his new wage. This loss is carried forward for one year from the date of this hearing.
- 17 As the compensation was likely to be over the statutory maximum, referred to in the Schedule, the claimant did not give any evidence on the loss of pension aspect of his loss, save to state that a sum of £70 per month was deducted from his wages to pay his contribution. Furthermore no evidence was led as to compensation for loss of statutory rights, for the same reason.
- 18 This is a relevant decision for the purposes of The Industrial Tribunals (Interest) Order (Northern Ireland) 1990.
- 19 The claimant was in receipt of Job Seeker's Allowance after his dismissal. The parties are referred to the Statement relating to the Recoupment of Job Seekers Allowance annexed to this decision.

## Schedule

### Compensation Award

Basic Award Nil, as the claimant received a redundancy payment from the respondent.

### Compensatory Award

Loss of earnings from 9 May 2003 to 27 February 2006  
147 weeks at £339.00 per week (this includes £70.00  
per month which was paid into his pension)

£49,833.00

Loss of wage from when claimant started new job from  
28 February 2006 to 26 February 2007 52 weeks  
at £339.00 - £235.00 = £104.00 x 52

£ 5,408.00

Loss of that difference in salary for a further year

£ 5,408.00

£60,649.00

Less enhanced redundancy payment received

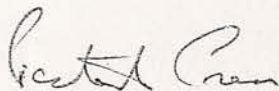
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The maximum sum that can be awarded under the provisions of the Employment Rights (Increase of Limits) Order (Northern Ireland) 2002 is £52,600.00.

Total award      £52,600.00

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



Chairman:

Date and place of hearing: 26 February 2007, Belfast

Date decision recorded in register and issued to parties: 19 APR 2007

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## ANNEX TO THE DECISION OF THE TRIBUNAL

### STATEMENT RELATING TO THE RECOUPMENT OF JOBSEEKER'S ALLOWANCE/INCOME SUPPORT

1. The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996.

	£
(a) Monetary award	52,600.00
(b) Prescribed element	47,093.00 *
(c) Period to which (b) relates:	9 May 2003 – 27 February 2006
(d) Excess of (a) over (b)	5,507.00

\*Note that in this statement the Prescribed element is reduced by 5.5% from £49,833.00, as the Monetary award is reduced by that percentage as a result of the maximum sum that the tribunal can award in this case is £52,600.00.

The claimant may not be entitled to the whole monetary award. Only (d) is payable forthwith; (b) is the amount awarded for loss of earnings during the period under (c) without any allowance for Jobseeker's Allowance or Income Support received by the claimant in respect of that period; (b) is not payable until the Department of Social Development has served a notice (called a recoupment notice) on the respondent to pay the whole or a part of (b) to the Department (which it may do in order to obtain repayment of Jobseeker's Allowance or Income Support paid to the claimant in respect of that period) or informs the respondent in writing that no such notice, which will not exceed (b), will be payable to the Department. The balance of (b), or the whole of it if notice is given that no recoupment notice will be served, is then payable to the claimant.

2. The Recoupment Notice must be served within the period of 21 days after the conclusion of the hearing or 9 days after the decision is sent to the parties (whichever is the later), or as soon as practicable thereafter, when the decision is given orally at the hearing. When the decision is reserved the notice must be sent within a period of 21 days after the date on which the decision is sent to the parties, or as soon as practicable thereafter.
3. The claimant will receive a copy of the recoupment notice and should inform the Department of Social Development in writing within 21 days if the amount claimed is disputed. The tribunal cannot decide that question and the respondent, after paying the amount under (d) and the balance (if any) under (b), will have no further liability

to the claimant, but the sum claimed in a recoupment notice is due from the respondent as a debt to the Department whatever may have been paid to the claimant and regardless of any dispute between the claimant and the Department.