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Judgment: approved by the Court for handing down | *Delivered:* **16/04/2010**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

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IN THE MATTER OF A CASE STATED BY AN INDUSTRIAL TRIBUNAL

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FOR THE OPINION OF THE COURT OF APPEAL FOR NORTHERN IRELAND

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UNDER ARTICLE 22 OF THE INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996

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BETWEEN:

STEVEN McCORMICK

Claimant/Respondent;

-and-

SHORT BROTHERS PLC

Respondent/Appellant.

_____

Sir John Sheil

[1] This is an appeal by way of case stated from a decision of an Industrial Tribunal made on 18 June 2009 whereby it found that the dismissal from the employment of the claimant, the respondent in this appeal, by reason of redundancy was unfair in view of the manner in which his employer, the appellant in this appeal, selected him for redundancy. The question, as formulated by the Tribunal, for the Court of Appeal is as follows:

> "In light of the all the primary facts found by the Tribunal, was the Tribunal's ultimate determination (that the claimant was unfairly dismissed) a determination that any Industrial Tribunal, properly directed, was entitled to make?"

[2] As appears from the factual findings made by the Tribunal, the claimant had been in the employment of the employer from 1976 until December 2002. He was employed as a quality inspector. In total, some 2,000 employees were made redundant at various stages after September 2001. The claimant was made redundant on 6 December 2002. He was selected for redundancy following the application of a selection process which became known as the "720 System". That system provides for the scoring, under a number of criteria, of each individual within each unit of selection. In addition (but not relevant in this case), provision is made in the selection system for penalty points in respect of current cautions/warnings/discipline. When the selection process had been applied to the claimant and to other people within his redundancy pool, the claimant was found to have scored less well than others, and was put at risk of redundancy. He exercised his right of appeal against the assessment scores of his manager (Mr Bailey). As a consequence, one of his scores (housekeeping) was varied upwards, but the final total was insufficient to save him from redundancy as his total fell below the 720 mark. His employment was subsequently terminated on the ground of redundancy.

[3] The "720 System" selection process was created out of a formal agreement between the employer and the Federation of Shipbuilding and Engineering Unions in 1988. Five criteria had to be assessed under the procedure:-

(a) Productivity,
(b) Quality of workmanship,
(c) Attitude,
(d) Ability to work unsupervised,
(e) Housekeeping.

There were 23 people within the claimant's peer group. A comparison of the claimant's scores within the scores of his peers was as follows:-

(a) In relation to productivity, he got the same score as 21 of his peers;
(b) In relation to quality of workmanship, he got the same score as all of his peers;
(c) In relation to attitude, he got the same score as three of his peers, which was a higher score than two of them and a lower score than 18 of them;
(d) In relation to ability to work unsupervised, he got the same score as 12 of his peers and a lower score in relation to 11 of them;
(e) In relation to housekeeping he got a higher score than any of his peers.

[4] In relation to "attitude" the claimant, as noted above, got a lower score than 18 of his peers in his 23 person peer group; Mr Bailey, his manager, noted on the redundancy assessment sheet "usually above average but can lapse occasionally". This was because of a difference of opinion between the claimant and Mr Bailie in relation to the claimant's use of drawings to check if parts were matched with the correct paperwork. The claimant's understanding was that such checking was appropriate and that such checking had previously been standard practice throughout his employment. Mr Bailey never instructed him to change that practice but he did ask or encourage him to change it but the claimant was not prepared voluntarily to do so because he considered that his current practice was a better practice. The claimant's unwillingness to change his practice had no significant effect on his productivity. The practice which the claimant followed and the practice which Mr Bailey was urging upon him (as the substitute practice) were both practices which were not incompatible with the contemporaneous formal written procedures under which quality inspection was carried out within the factory. The Tribunal found that the only basis for the marking down of the claimant in relation to "attitude" was this difference of opinion between himself and Mr Bailey. The Tribunal also found that this was the only basis for Mr Bailey's decision to give the claimant a lower score than 11 of his peers in relation to "ability to work unsupervised".

[5] The Tribunal found Mr Bailey to be an honest and conscientious assessor, who did his best to be fair. In assessing "productivity" and "quality of workmanship", Mr Bailey took a very broad-brush approach, the claimant getting the same score as 21 of his peers in respect of the former and the same score as all of his peers in respect of the latter. As already stated above, in relation to "housekeeping" he got a higher score than any of his peers. The Tribunal held that Mr Bailey's broad-brush approach in relation to the two criteria of "productivity" and "quality of workmanship" was a perfectly reasonable option to take but that that made the assessment of the other three criteria all the more important. Furthermore, in assessing whether or not the assessment in respect of the other two criteria of "attitude" and "ability to work unsupervised" took the dismissal outside the range of reasonable responses, the Tribunal held that it was entitled to consider that issue against the background of the broad-brush approach which was adopted in respect of "productivity" and "quality of workmanship". The Tribunal concluded as follows:

> "We consider that the marking down of the claimant on Attitude was perverse and irrational. Because the marking down of the claimant in respect of Attitude cost him his job, we consider that the perversity and irrationality of the marking down in respect of Attitude takes the dismissal outside the range of reasonable responses. In other words, in the

> circumstances of this case, no reasonable employer would have dismissed the claimant. We have also concluded that the marking down of the claimant in respect of 'Ability to work unsupervised' was irrational and perverse. It was based on precisely the same refusal (on the part of the claimant) to modify working practices which has already been referred to above."

[6] Article 130(4) of the Employment Rights (Northern Ireland) Order 1996 provides as follows:-

> "Where the employer has shown the reason, or principal reason for the dismissal, and that it is a potentially fair reason, the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
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> (a) depends whether in the circumstances … the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
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> (b) shall be determined in accordance with equity and the substantial merits of the case."

In Williams and Others v Compair Maxam Limited [1982] ICR 156 Browne-Wilkinson J at 161 stated, with reference to the then equivalent provision in England and Wales, Section 57(3) of the Employment Protection (Consolidation) Act 1978:

> "For the purposes of the present case there are only two relevant principles of law arising from the sub-section. First that it is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants, on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably

> in treating redundancy 'as a sufficient reason for dismissing *the* employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.
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> In law, therefore, the question we have to decide is whether a reasonable tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted."

In British Aerospace Plc v Green and Others [1995] ICR 1006 Waite LJ stated at 1016:

> "The use of a marking system of the kind that was adopted in this case has become a well recognised aid to any fair process of redundancy selection. By itself, of course, it does not render any selection automatically fair; every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinised officiously. The whole tenor of the authorities to which I have already referred is to show, in both England and Scotland, the courts and tribunals (with substantial contribution from the lay membership of the latter) moving towards a clear recognition that if a graded assessment system is to achieve its purpose it must not be subjected to an over-minute analysis."

[7] In the present case there was no suggestion of bad faith on the part of Mr Bailey or any victimisation of the claimant.

[8] Mr Lockhart QC, who appeared on behalf of the respondent in this appeal, submitted that the decision of the industrial tribunal was wrong in finding that the marking down of the claimant on the criteria of "attitude"

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

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

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

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

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

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

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

[11] Accordingly this court answers the question posed for consideration of this court at paragraph 19 of the case stated: NO.