Appeal No. UKEAT/0089/18/RN

# EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 September 2018

**Before**

**HIS HONOUR JUDGE MARTYN BARKLEM**

**MR M SMITH OBE JP**

**MISS S M WILSON CBE**

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MS L GEORGE — APPELLANT

LONDON BOROUGH OF BRENT — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Applicant | MR SIMON CHEETHAM<br>(One of Her Majesty's Counsel)<br>Bar Pro Bono Scheme |
| For the Respondent | MR EDWARD KEMP<br>(of Counsel)<br>Instructed by:<br>London Borough of Brent<br>Legal Services<br>The Civic Centre<br>Engineers Way<br>Wembley<br>Middlesex<br>HA9 0FJ |

**SUMMARY**

**UNFAIR DISMISSAL**

**REDUNDANCY – Trial Period**

Despite having had the matter remitted from the Employment Tribunal on two previous occasions, an Employment Tribunal failed to follow the guidance given, and failed to identify the correct issue which it had to determine given a conceded failure by the Respondent to offer the Claimant a trial period in relation to an offer of a new position following redundancy. That issue was the fairness of the dismissal.

The Employment Tribunal failed to have regard to undisputed evidence as to the benefit to the Claimant of such a trial period, and confused the issue before them with the outcome of any trial period, which was an entirely separate issue.

The matter was remitted to a fresh Employment Tribunal.

**HIS HONOUR JUDGE MARTYN BARKLEM**

1. This is a rather unusual appeal, resulting as it does from a Decision of the same constitution of an Employment Tribunal which first heard the case in December 2012 and to which it has been remitted on two occasions: first by Judgment of HHJ Richardson made in May 2014, then (following a second hearing of a remitted matter) by the Judgment of HHJ Hand QC, following his Judgment in January 2016. I shall refer to the parties as they were before the Employment Tribunal.

2. In each case the issue which was remitted was concerned with the Respondent's failure to offer a trial period to the Claimant of a new position which she was offered following her position as Library Manager having been made redundant.

3. The matter was permitted to come to a Full Hearing, at which I have the benefit of sitting with lay members, by an Order of HHJ Stacey following a Rule 3(10) Hearing. At that hearing the Claimant was represented under the auspices of the Bar Pro Bono Unit by Mr Simon Cheetham QC, who continues to represent her today. Mr Edward Kemp represents the Respondent, as he has done at each of the three hearings before the Employment Tribunal and the two previous hearings before the Employment Appeal Tribunal. We are grateful to both counsel for their helpful skeleton arguments augmented in oral submissions today, which have enabled us to give this ex tempore judgment.

4. On the last occasion that the matter came before this Tribunal, HHJ Hand QC summarised the background to the case succinctly. and rather than repeat that exercise afresh, I now quote from his Judgment:

**"2. The hearing on 13 November 2014 had been remitted to the Employment Tribunal by a division of this Tribunal presided over by HHJ David Richardson, after hearing an appeal on 27 May 2014 against a previous decision of an Employment Tribunal with the same constitution. The terms of the rescission were accurately reproduced by the Employment Tribunal at paragraph 2 of the Judgment and Reasons (see pages 1 and 2 of the appeal bundle). The issues to be considered were, firstly, whether the Appellant was entitled to a trial period and, secondly, whether the dismissal had been fair or unfair in terms of section 98(4) of the Employment Rights Act 1996 ("ERA"). The evidence was to be restricted to:**

> **"… the issue of entitlement to the trial period, the value of the trial period to the claimant, the reasons why no trial period was offered and, applying the *Polkey* [*v A E Dayton Services Ltd* [1987] IRLR 503] principles, what chance if any there was that if the respondent had acted fairly there would still have been a dismissal and of course questions as to compensation."**

**3. At the hearing on 13 November 2014 the Respondent conceded that the Appellant had a contractual entitlement to a four-week trial period pursuant to paragraph 6.1 of the Respondent's managing change policy and procedure (see paragraphs 7 and 14 of the Written Reasons). At the hearing today the Appellant has also referred me to paragraphs 9.1 and 9.2 of the same procedure. Therefore, as the Employment Tribunal recognised, at paragraph 7 of the Reasons, the hearing was to be:**

> **"7. … concentrated on the fairness of the dismissal and specifically issues surrounding the trial period."**

**4. Having regard to the terms of the remission, it is entirely understandable that the Employment Tribunal did not repeat all of the background facts it had found at the previous hearing. I must, however, sketch in some of these for the purposes of this appeal. The Appellant had been employed as a Library Manager by the Respondent since 5 June 2003. She was one of six such managers, and, like each of her colleagues, she managed two of the Respondent's then 12 libraries. In common with many public institutions the Respondent suffered significant cuts in its funding in 2011 and was obliged to close six of its libraries. It also felt itself obliged to restructure its library management by reducing the number of Library Managers from six to two. These two would be in charge of three libraries each. Consequently, like her fellow managers, the Appellant was obliged to compete with her five colleagues for one of the two new Library Manager posts. Unhappily, she was unsuccessful, and she became subject to the Respondent's redundancy procedures.**

**5. These provided a redeployment procedure involving a job search for suitable alternative employment. The Appellant underwent this procedure. As a result she was offered a job as a Customer Service Officer ("CSO") by a letter dated 2 December 2011. As the Employment Tribunal had found in the previous hearing (see paragraph 11 of its previous Judgment and Reasons at page 26 of the appeal bundle), it was proposed that the Appellant would be located primarily at Kilburn. The new post was to take effect on 9 January 2012. It was at a lower grade but was to be ring-fenced so that her rate of pay would be maintained for a period of 12 months. As the Employment Tribunal found at paragraphs 12 and 13 of the Reasons, the terms and conditions of employment attached to the new post included a mobility clause. This had been the position with her existing post, and she had been moved in 2009 from the library at Kilburn to the Town Hall library.**

**6. On 4 November 2011, before she was in receipt of the offer letter, the Appellant had a meeting with Ms Agarwal, the Library Services Manager, who told her that on the advice of the HR Department the Appellant would not be offered a four-week trial period in the CSO post. This was subsequently confirmed at a further meeting on 17 November 2011 and also in writing by an email of that date. At the previous hearing before the Employment Tribunal in 2012 it had been asserted that a trial period would only apply when the new post was in a different service, and this appears again at paragraph 14 of the Judgment and Reasons where there is a reference back to paragraph 30 of the previous Judgment and Reasons.**

**7. As I have already said, during the hearing on 13 November 2014 the Respondent conceded that the refusal of a trial period was erroneous and in breach of contract. The Employment Tribunal, having described these matters at paragraphs 14 and 15 of the Reasons, do not say anything more about the Respondent's point of view in relation to the trial period. Thereafter, the Employment Tribunal concentrates on the Appellant's conduct. Having been invited by the email referred to above to contact HR if she had any queries about what she had been told about the trial period, the Employment Tribunal then find at paragraph 16 of the Reasons that the Appellant never raised the issue of a trial period either with HR or her trade union**

**and, one might presume, with anybody else, nor did she ever raise any difficulties or issues that she had with her understanding of the effect that any trial period or refusal of it might have on her entitlement to a redundancy payment."**

5. HHJ Hand QC was troubled by the erroneous application by the Employment Tribunal of the case of **Software 2000 Ltd v Andrews & Others** [2007] ICR 825, which was concerned with statutory provisions which were no longer in force. I need not set out his reasoning in this Judgment; I will simply quote the closing paragraphs of his Judgment remitting the case to the Employment Tribunal for second time:

**"33. In my judgment, the balance is tipped firmly in favour of the same Employment Tribunal now reconsidering on my direction whether the breach of contract that has been admitted as a circumstance made this dismissal fair or unfair, an analysis to be undertaken only by reference to and within the terms of section 98(4), although, I will direct that, if so advised, the parties can call evidence on the issue of why no trial period was offered to the Appellant, and the Appellant may call evidence as to why it would have been important to her for a trial period to be offered. Subject to that, no further evidence can be called.**

**34. So, this matter will be remitted to the Employment Tribunal with the same constitution as that which made the decision subject to the appeal to reconsider whether or not this was a fair or unfair dismissal in terms of section 98(4) and in particular whether the breach of contract of refusing to offer a trial period, as a circumstance relating only to section 98(4) was a significant circumstance so far as the determination of whether the dismissal was fair or unfair when looked at from the point of view of the employer's reason for not offering a trial period and the employee's position in relation to the offering of the trial period, the parties being at liberty to call further evidence confined only to the question of the failure to offer a trial period.**

**35. The Employment Tribunal considered that the failure to offer a trial period was not only a breach of contract but also a breach of statutory right (see paragraph 27.1 of the Written Reasons). Whether the concept of there being a breach of statutory right - and if so, what that statutory right might be - adds anything to the breach of contract matter is, to my mind, open to question, but when considering the trial period the Employment Tribunal on the remission should consider not only the trial period from the point of view of a contractual right but from the point of view of any statutory right, insofar as that makes any difference."**

6. The amended grounds of appeal, as approved by HHJ Stacey, provide as follows:

**"1. The employment tribunal erred in law in that it misdirected itself in failing to follow the direction given by the Employment Appeal Tribunal (8 January 2016; HHJ Hand QC) that, in determining the fairness of the Appellant's dismissal and then applying the law to the facts of the case, the tribunal should focus upon the Respondent's reason(s) for not offering a trial period and not just the Appellant's conduct.**

**2. The employment tribunal further misdirected itself by failing to consider the purpose, relevance and importance of a trial period in the circumstances of the Appellant's dismissal by reason of redundancy."**

7. In granting leave, HHJ Stacey made these comments:

> **"There are reasonable grounds to suppose that the ET erred in law, again in its consideration of the Claimant's unfair dismissal claim and s.98 ERA 1996 and failed to follow the direction and guidance of both HHJ Hand QC and HHJ Richardson given previously in this case.**
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> **Firstly, by considering the Claimant's conduct and behaviour, rather than that of the Respondent's action, the Tribunal became distracted by its opinion of the quality of the Claimant's evidence. The issue in the case was the now admitted failure of the Respondent to offer the Claimant a trial period in the position of CSO when the Claimant's library manager post was made redundant, which the Respondent now accepts was in breach of its contractual and statutory duties.**
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> **Secondly, in failing properly or at all to consider the implications and consequences (or as articulated in the amended notice of appeal purpose, relevance and importance) of the Respondent's failure to offer the Claimant a trial period - such as the effect it would have had on the Claimant's redundancy entitlement, and how it would or could affect the fairness of the dismissal pursuant to s.98(4) ERA 1996.**
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> **Thirdly, it is arguable that the ET has confused or conflated the issues of liability and remedy in its focus on whether the Claimant would have refused the trial period, had one been offered, or refused to accept the post at the end of the trial period."**

8. Having set out the final paragraphs of HHJ Hand's Judgment (as set out above) and before turning to the facts, the Employment Tribunal made a number of conclusions adverse to the Claimant at paragraph 11 of its Reasons. It is a paragraph we find rather concerning, both as to its position in the judgment and its tone:

> **"11. The tribunal found the claimant's evidence to be frequently evasive, inconsistent and generally unsatisfactory. As an example, the claimant asserts that a trial period would have allowed her to have training to get to grips with coping with the CSO job. The claimant was reminded that at a previous hearing it was established that she had, in fact, covered for an absent CSO for a two month period (which she had complained about in her letter of appeal) [doc 526] and had trained CSOs whom she line managed as a Library Manager. In response the claimant now advances a "straw man" argument, namely that she never had the formal title of CSO because no title would need time. It has never been alleged that the claimant ever held the position of CSO. Wherever there was disputed evidence, we have preferred that of the respondent to that of the claimant."**

9. At paragraphs 12 and 13 of the Reasons the Employment Tribunal set out the Respondent's position as to what was by now a clearly admitted breach in failing to offer a trial period:

> **"12. There is now no dispute that the claimant had a contractual right to a four week trial period in the new job of CSO and that it was not offered to her. We accept the evidence of Ms Agarwal that the reason for that was that she and Ms McKenzie (Head of Libraries at that time), acted in good faith upon erroneous HR advice that as the CSO post was two grades below that of the claimant's substantive past [sic], and it was in the same service area and hence not covered by the applicable policies.**
>
> **13. Ms Agarwal knew that the claimant was suitable to do the CSO job and indeed had done so from October until late December 2011 to cover the sickness absence of one of the CSOs reporting to her. The CSO job was, in fact, "very similar to her existing role". She was familiar with the Kilburn library where she had previously worked. She knew that her salary**

> **would be protected for one year. In summary, Ms Agarwal's evidence is that "there was therefore nothing new in the CSO role the claimant was offered that might have been highlighted during a four week trial period, in respect of which management would have to judge her suitability." [R1/para 6]"**

10. At paragraph 15 the Employment Tribunal pointed out that the Claimant did not, thereafter, raise the question of a trial period. Mr Cheetham says that this is an unfair comment, bearing in mind that up to and including the first EAT hearing the Respondent maintained that there was no entitlement to a trial period, the concession that this was in error having been made only at the start of the second hearing.

11. As permitted by HHJ Hand QC, the Claimant had advanced evidence as to why a trial period would have been useful to her. The Employment Tribunal summarised the evidence and their conclusions at paragraphs 18 to 25:

> **"18. The claimant also asserts that a trial period would have allowed her to "try out the relationship" with her new line managers, one of whom had, in the past, been junior to her and about whom she had at some point made a complaint. We note that all of the applicants for the two Library Manager posts were on the same grade when the restructuring took place and that at a previous hearing when questioned about the likelihood of being able to be managed by two individuals who she had complained had been appointed through an unfair and biased process, she argued very strongly that as professionals any past differences would be set aside.**
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> **19. In her evidence, the claimant asserts that "the trial period was of particular importance and I can categorically state that had the respondent granted me a trial period; I would have retained my employment" [C1/para 12]**
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> **20. There is, however, a marked disconnect between what the claimant now states to be the importance of the trial period ("On a scale of 0-to-10, 0 being the least and 10 being the highest scale, I would rate the value of a trial period in this instance to me to be 10") [C1/para 6] and what is reflected in contemporaneous documents (see para 25 below) and in particular the claimant's letter of appeal as well as her conduct at the time.**
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> **21. After the meeting on 14 November 2011 (see para 14 above) the claimant did not pursue the question of her entitlement to a trial period with management. She now asserts for the first time that she did raise it with an OH advisor. The notes of the Individual Stress Risk Assessment Plan (dated 18 November 2011) do reflect that "Ms George has decided to make decisions regarding the role offered but she needs some further clarifications" [doc 546]. The Individual Risk Assessment Log of the same date records that:**
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> > **"Due to the restructuring and her demotion, she feels she has no control of what is happening in the restructuring process. Needs more clarity from Management in making final decisions regarding accepting the offered role." [doc 549]**
>
> **There is no direct mention of a trial period.**
>
> **22. That report went on to recommend a further meeting with management. There is no evidence before the tribunal as to whether this report was seen by any member of the management team. Certainly no formal follow up meeting took place although Ms Agarwal**

**did speak with the claimant on a number of occasions after that assessment but it appears the issue of a trial period was never raised again.**

**23. On 7 December 2011, the claimant requested in an email to Ms Agarwal entitled "Staff location from January" [doc 551] that she be based at "Town Hall Library due to my health challenges as I would find moving very unsettling".**

**24. Ms Agarwal spoke to the claimant after receiving that email to explain the allocation of jobs and to undertake to see if there were any alternatives but before she could do so, the claimant declined the job offer (see para 16 above). On 16 December 2011 the claimant was given notice of termination [docs 553-554].**

**25. In her lengthy and detailed letter of appeal against the dismissal [docs 525-527] the claimant set out her grounds of appeal:-**

**25.1. the wording of the redundancy letter was unfair and discriminatory as it referred to the fact that she had declined the offer of alternative employment which could affect any benefits to which she might have been entitled post-employment;**

**25.2. management did not take steps to investigate the reasons for her rejection of the CSO position which included the question of where she would be based;**

**25.3. management did not treat her with dignity as illustrated by the fact that she was given no notice of a handover/induction meeting;**

**25.4. another CSO held a meeting with one of the claimant's members of staff about a matter the claimant had been dealing with;**

**25.5. management leaked information about the claimant;**

**25.6 the claimant had to cover the duties of her CSO as well as her own.**

**In this detailed letter the claimant went on to raise complaints about the process for selecting the two Library Managers. There is no mention in the letter of what the claimant now states was the single most important reason for her refusal of the CSO post, namely the refusal of a trial period. The claimant's evidence is that when she wrote that letter she was in a "state of confusion". We do not accept that she was so confused as to omit any reference at all to what she now claims was the most important factor for rejecting the new job."**

12. The Employment Tribunal then went on to summarise the law. At paragraph 29 they made reference to **Elliot v Richard Stump Ltd** [1987] ICR 579 pointing out, in a rather acid way which tends to suggest an impatience with the Claimant, that:

**"29. … it was not held, contrary to the claimant's assertion, that failure to offer a trial period results in an automatically unfair dismissal. Rather it is one factor, albeit it an important one, in the overall consideration of the fairness or unfairness of a redundancy dismissal."**

13. At paragraphs 30 to 32 the Employment Tribunal applied the facts as they had found them to the law as they had stated it:

**"30. Applying the law to the facts as found above, we conclude that notwithstanding the respondent's refusal on the mistaken advice of its HR department to offer the claimant a trial period in the job of CSO, the subsequent dismissal following the claimant's rejection of that offer was not unfair for the following reasons. The claimant:**

**30.1. was familiar with the more limited duties of the CSO position having trained new CSOs and having covered for one of her CSOs who was on long-term absence;**

**30.2. knew where she would be based (Kilburn) and had worked there in the past;**

**30.3. knew that her salary as Library Manager would be preserved for one year;**

**30.4. knew the managers to whom she would report and gave evidence that they were all professionals who could work together;**

**30.5. knew, or should have known, that she would receive a redundancy payment even if she refused the offer of the CSO position.**

**31. We do not accept the claimant's assertion that the trial period was of crucial importance. The claimant is tenacious in pursuit of her rights and we are not convinced that the refusal on one occasion of what she, correctly, believed was her contractual right to a trial period would be sufficient to deflect her from continuing to assert that right. Instead, we find that the claimant was well aware of those facts set out above (para 30) and for that reason can now assert categorically that had she had a trial period she would have retained her employment. In other words, the results of a trial period were a foregone conclusion for the claimant. She was not disadvantaged by the respondent's failure to offer it.**

**32. Whilst we accept that in many, if not most, circumstances the failure to offer a trial period would be a very significant (although not determinative per se) factor leading to a finding of unfair dismissal, we do not find it to be so in this case for the reasons set out above and accordingly we find that the claimant's dismissal was not unfair."**

14. As Mr Cheetham points out, it is notable that the Tribunal completely fails to make any mention of the fact that it was the Respondent which had acted in breach of contract in failing to provide a trial period. Although purporting to make reference to the importance of such a failure, in its reference to **Elliot** the Employment Tribunal gave no reasons to how that failure was to be accounted for in carrying out the balanced exercise which they had been tasked with undertaking. Rather, in our judgment, they focused entirely on what they regarded as what the outcome would have been had the Respondent acted lawfully. The words in paragraph 31 "*we are not convinced that the refusal on one occasion of what she, correctly, believed was her contractual right to a trial period would be sufficient to deflect her from continuing to assert that right*" are inexplicable in the context of the task which this Employment Tribunal had to undertake. It is as though the Employment Tribunal found the Claimant to have been at fault for what was conceded to have been the Respondent's failure.

15. The paragraph goes on: "*we find that the claimant was well aware of those facts set above (para 30) and for that reason can now*" - we think that they may mean "not" but nothing turns on it - "*assert categorically that had she had a trial period she would have retained her employment. In other words, the results of a trial period were a foregone conclusion for the claimant. She was not disadvantaged by the respondent's failure to offer it*." Again, we find this inexplicable. There are many potential advantages of a trial period, such as seeing whether in practice a person is able to work in a post in which he or she is not merely covering a role from a higher substantive position, but seeing whether having been downgraded or moved to a different location he or she could still make a go of it at no risk.

16. Given the Respondent's concession that the failure to offer a trial period was unlawful, the written evidence of Ms Agarwal (which we have at page 97 of our bundle) must be of limited relevance. The reason for the failure was said, and accepted, to be erroneous advice given in good faith. That being the case, the assertion at paragraph 7 of that statement that "*The offer of the CSO role without a trial period struck me then, as it does now, as fair and reasonable*" is perplexing. We ask rhetorically, how something accepted to be unlawful can also be fair and unreasonable?

17. At paragraph 9 of the same statement, the witness records the Claimant having said in a witness statement prepared for the first hearing that she (the Claimant) had told her that she wanted the four-week trial period to "*get to grips with the lower position in the same service area*". In her own witness statement at paragraph 9 (page 96 of our bundle) in the statement prepared for the hearing now under appeal, the Claimant had said "*The trial period was important because I was going to be managed by a new manager, one of whom I had employed*

*as a junior staff and I had made a complaint about in the past; so it was important for both myself & the new manger to try out the relationship in this new role*".

18. It is striking that the Employment Tribunal failed to make any findings into relation to what seems to be undisputed evidence, namely that the Claimant wanted a trial period in order to see how she would cope in the new role and being managed by someone who had previously worked under her. Rather, the findings at paragraph 30 seem to have been based on the Respondent's evidence rather than that of the Claimant, which has been completely ignored. Mr Kemp points to the Employment Tribunal's comments at paragraph 12 as to why it preferred the evidence of the Respondent to that of the Claimant when there was evidence in dispute, but there was no dispute as to the value of the trial period from the Claimant's perspective, and that point was simply not addressed.

19. Mr Cheetham referred us to paragraph 38 of HHJ Richardson's Judgment in the first EAT Decision, when he said:

> **"38. … The question for the Tribunal was whether it was reasonable to dismiss the Claimant, having regard to equity and the substantial merits of the case. It is one thing to hold that it is fair and reasonable to dismiss an employee who asked for but was not entitled to a trial period in the job; but it is another thing to say that it was fair and reasonable to dismiss an employee who asked for, was entitled to, and was refused a trial period in the new job. The new job was likely to be at a different location. Whether to accept or reject a job in a new location might well be affected by a trial period at the job."**

20. Mr Cheetham also referred us to **Elliot**. In that case, a manager facing redundancy was offered an alternative position doing similar work but reporting to someone formally at his level and with reduced benefits. He requested a four-week trial period, but this was refused. At page 583 Scott J, sitting with lay members in the Employment Appeal Tribunal, first recorded the findings of the Industrial Tribunal before giving their conclusion:

> **"… In the formal reasons, the matter is put in paragraphs 9 and 10 in this way:**

> **"9. There is, however, one further point to be considered. When the applicant was offered the alternative employment, he raised the question of a trial period, and the [employers] told him that this would be inappropriate and there would not be one. In fact, the [employers] had no right to refuse him a trial period. The right to a trial period arises statutorily under the Act, under section 84(3). If [the applicant] had accepted the offer of alternative employment, he would in fact have been working on a trial period for the first four weeks, and if he then found that he did not like the job he could still have refused it, and provided that refusal was reasonable, he would still have been entitled to his redundancy payment. So the [employers] were presumably in mistake of law when they indicated that there would be no trial period in this case. The could not take it away from him. Equally, [the applicant] was in mistake of law in that he believed that the [employers'] refusal of a trial period was effective. Therefore there was a mutual mistake about the trial period.**
>
> **10. The question which remains is whether or not that gives any basis for saying that in purporting to refuse a trial period, which they could not withdraw, the [employers] were in any way acting unreasonably under section 57(3). Again we are unanimous in concluding that we cannot say that a company which simply makes a mistake of law over an employee's rights, which he must also be presumed to know, can be said to be acting unreasonably within the terms of section 57(3), so as to render the dismissal on grounds of redundancy unfair."**

**In our conclusion, in those two paragraphs the industrial tribunal misdirected themselves in law. The question for the industrial tribunal was whether or not the dismissal was unfair. The dismissal was on the ground of redundancy, but the circumstances surrounding the redundancy and the manner in which its consequences were dealt with by the employers had to be taken into account for the purpose of considering whether under section 57(3) the dismissal was unfair.**

**One of the critical matters in that regard was the offer of alternative employment. There was plainly a job of sorts available for the applicant if he chose to accept it. That job was offered to him by the employers; if that job was offered to him on reasonable terms, then in our view, his refusal of it and consequent dismissal on the ground of redundancy could not be said to be unfair. But, if that employment was offered to him on terms which were not reasonable then that would prima facie, in our view, justify the conclusion that the dismissal was unfair. The industrial tribunal, therefore, had or ought to have had in mind that the question for decision by them was whether the offer of employment put before the applicant was an offer on reasonable terms or on terms which, viewed in the round, were unreasonable. If an unreasonable term is included in an offer of employment, or if unreasonably some particular term is omitted from the terms on which employment is offered, it is, in our view, no answer to the question of whether the offer was or was not a reasonable one to notice that some statutory provision or principle of law would render nugatory the term in question. It is perfectly true that, as the industrial tribunal observed, everybody is presumed to know the law, but the purpose for which they are presumed to know this must be borne in mind. They are presumed to know it at least for the purposes of the criminal law. Citizens cannot assert ignorance of the law as a defence to a criminal charge. But it would be a matter of astonishment if ordinary members of the public knew complex provisions of the Act of 1978 and it is not really very sensible to suppose that the contents, consequences and implications of, for instance, section 84(3) are known by all or even most employees up and down the country. The question of whether the terms of employment offered to the applicant were reasonable ought, in our view, to have been considered by the industrial tribunal without regard to the question of whether if those terms had been incorporated into a contract, each and every one of them would have been effective according to its tenor.**

**The point can be tested by considering what the position would have been had the offer of employment been accompanied by a provision to the effect that the employers would be entitled to dismiss the applicant from his employment on, say, three days notice and no more. Such a provision would not be effective; three days notice would be less than the minimum period of notice that the law requires. Nonetheless, if an employer insisted that such a term, ineffective in law as it might be, was to be accepted by an employee as a term of his employment, it would, in our view, be no answer to the apparently unreasonable nature of that insistence to notice that the law would negate the term if incorporated into a contract of employment. So here, the reasonableness or unreasonableness of the omission from the terms of employment that were being offered of a trial period ought to have been considered without regard to the effect of section 84(3) of the Act of 1978. As I have said, the industrial tribunal did not do that, and in that respect we think misdirected themselves in law.**

> **That leaves the question of what this appeal tribunal should do with the case. There are two alternatives. One alternative would be to send the case back to the industrial tribunal which heard the matter for that tribunal to direct its mind to the proper question, namely, whether the terms of alternative employment placed before the applicant and the omission from those terms of a trial period were reasonable or unreasonable. The other alternative, which both Mr Hughes for the applicant and Mr Threlfell for the employers have told us is open for us to adopt, is ourselves to come to a conclusion on that issue. Since both the lay members of this tribunal have a very clear view as to what the answer to that question ought to be, and it is their expertise in the industrial relations field which is particularly valuable in tribunals such as this, we have concluded that it would be convenient and right that we should decide the matter ourselves. Both the lay members of the appeal tribunal, for reasons which have persuaded me as well, are of the view that the terms put before the applicant were not reasonable. The refusal by the employers to allow him a trial period was, in our view, an unreasonable attitude for the employers to adopt; that is so for two reasons. First, the refusal was inherently likely to confuse the employee as to whether, if he accepted the employment and then after a short period decided to leave, he would prejudice his redundancy payment rights. True it is, that the absence of a trial period would not in law deprive him of his redundancy payment rights. But it does not follow that the insistence on a trial period being omitted would not confuse an employee and might not for that reason cause him to reject an offer of employment which he would otherwise have been minded to accept. Secondly, the applicant was being offered employment under a manager junior to himself. He had been himself for many years a cutting manager in the factory which was to be closed. It was a step down, so far as status was concerned. Whether from his point of view or indeed from the employers' point of view the alternative employment was going to work depended on the personal relationship between the Crossgate Drive cutting manager and the applicant. In refusing a trial period in those circumstances the employers were, in our view, acting unreasonably and insensitively towards the applicant.**
>
> **For those reasons, we conclude that it was unreasonable to refuse the trial period, that that refusal had the effect that the package offer of alternative employment made by the employers to the applicant was not a reasonable one taken in the round and, in consequence of that, his dismissal was unfair. Accordingly, we remit the case to the industrial tribunal on that footing for the determination of compensation."**

21. We accept Mr Kemp's submissions that **Elliot** is a case which, to an extent, turned on specific facts. However, it is a case which the Employment Tribunal plainly thought of relevance. Given the striking similarity, taken in the round, of the positions in which the present Claimant and Mr Elliot respectively found themselves it is simply not sufficient to say, as the Employment Tribunal did in its closing paragraph, that whilst the failure to offer a trial period would be a very significant factor leading to finding of unfair dismissal, "*we do not find it to be so in this case for the reasons set out above*" without explaining what those reasons were and what the different factors were in relation to the admitted failure to offer a trial period.

22. Although grateful for, and mindful of, Mr Kemp's powerful submissions in support of the Tribunal's Decision, we find ourselves in agreement with the remarks made by HHJ Stacey at the Rule 3(10) Hearing and are unanimous in finding that this Tribunal erred in law in failing

to address itself to the issues set out in the guidance of HHJ Richardson and HHJ Hand QC and we uphold the appeal on both grounds.

23. Mr Cheetham did not press his written submission that this is a case in which the Tribunal can substitute its own view for that of the Employment Tribunal, pursuant to **Jafri v Lincoln College** [2014] EWCA Civ 449. Regrettably we agree, given the issue is not entirely cut and dried and the Tribunal has not made findings of fact on key issues. That said, the lay members have asked me to stress that this is only narrowly the case and they find it difficult to envisage how the dismissal could be found to be reasonable in the circumstances outlined. I agree, whilst recognising that it is ultimately a matter for the Employment Tribunal.

24. If the Respondents make no further concessions, this matter must be remitted for a fourth hearing, albeit limited to this narrow issue. We are told that the Employment Judge who has presided over the last three hearings has now retired from the part-time judiciary. Mr Kemp submits that, as the issue is only one of many which were initially before the Tribunal, it is proportionate to remit it to the same constitution, assuming that the Employment Judge can and will come out of retirement.

25. Unfortunately, we take the view that there is significant risk that the negative view taken of the Claimant from the outset of the last hearing, with an apparent unwillingness to address the key question before it, renders the risk of an appearance of bias or prejudgment inevitable. Having regard to the guidance in **Sinclair Roche & Temperly v Heard** [2004] IRLR 763 we consider that this is a matter which must be remitted to a fresh Tribunal. We resist the temptation to add further to the legal guidance already given by two Judges of this Tribunal.

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26. Should the fresh Tribunal find the dismissal to be unfair, it will then have to look at what the outcome would have been had the trial period, which ought to have been offered, had taken place. As the Employment Tribunal mistakenly conflated those issues in its Judgment, we direct that the Employment Tribunal rehearing the matter should not be bound by findings of fact made by the last Employment Tribunal in this regard in any of its prior Reasons, nor as to the *obiter* findings, to use its own expression, as to **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 and failure to mitigate in paragraph 27.7 of the second Judgment (sent to the parties on 15 December 2014).

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27. Whilst a matter for the Regional Employment Judge, having regard to the time which has elapsed since this case was first brought, we would urge consideration to the remitted hearing being expedited, if at all possible.

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