THE INDUSTRIAL TRIBUNALS

CASE REF: 3093/17

CLAIMANT: **Anthony Millar**

RESPONDENT: **Foyle Food Group Limited**

DECISION

The unanimous decision of the tribunal is that the respondent has failed to discharge the onus placed upon it by Article 130(1) of the 1996 Order to show that the claimant had been dismissed for a potentially fair reason; namely redundancy. The dismissal of the claimant was therefore an unfair dismissal for the purposes of the 1996 Order. Compensation of £8392.00 is awarded to the claimant. The attention of the parties is drawn to the recoupment notice attached to this decision

Constitution of Tribunal:

Vice-President: **Mr N Kelly**

Members: **Ms F Cummins**
Mr A Barron

Appearances:

The claimant was represented by Mr Oísin Friel, Barrister-at-Law, instructed by McCay Solicitors.

The respondent was represented by Mr Barry Mulqueen, Barrister-at-Law, instructed by O'Hares Solicitors.

Background

1. The respondent is a large meat production company which has plants in Campsie, Omagh, Donegal and in Gloucester in England.

2. The claimant had been employed by the respondent at an earlier stage. However he was made redundant in 2010 and subsequently worked elsewhere. He was re-employed by the respondent on 27 December 2013 and worked until he was dismissed allegedly on the ground of redundancy on 3 March 2017. He had been employed throughout the latter period as one of the two boning hall managers in Campsie.

3. The claimant lodged an IT1 claim on 2 June 2017. He claimed;

   (i) Unfair dismissal.

   (ii) Disability discrimination.

   (iii) Failure to provide the statutory right to be accompanied.

4. The claim of disability discrimination and the claim in relation to a right to be accompanied were withdrawn. Only the claim of alleged unfair dismissal proceeded to hearing.

5. The claim had been case managed and the witness statement procedure had been directed by the tribunal. Sequential exchange of witness statements had been directed in this matter which had started off as a discrimination claim. The claimant therefore provided his witness statement first and the respondent then provided its witness statements.

6. The claimant gave evidence on his own behalf and called no other witnesses.

7. The respondent called three witnesses;

   (i) Mr Ambrose McAleer, the General Manager in the Campsie plant, who, together with Ms Kara Marshall, had conducted the redundancy selection exercise.

   (ii) Ms Kara Marshall, who at all relevant times, had been the HR Manager at Campsie.

   (iii) Mr Nigel McIlwaine, who at all relevant times, had been the Group HR and Finance Director and who had heard the claimant's appeal against redundancy selection.

8. The evidence was heard on 29 and 31 January 2018. The parties made oral submissions on 1 February 2018. The panel met on 23 February 2018 to review the evidence and the submissions and to make a decision. This document is that decision.

Relevant law

Unfair dismissal/Selection for Redundancy

9. Article 130(1) of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"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"*

Article 130(2) of the 1996 Order provides:-

> *"A reason falls within this paragraph if it –*
>
> *...*
>
> *(c) is that the employee was redundant;*
>
> *... ."*

10. In ***Polkey v AD Dayton Services Ltd [1988] ICR 142***, Lord Bridge stated:-

> *"In a 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."*

11. In ***Langston v Cranfield University [1998] IRLR 172*** the EAT stated:-

> *"Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."*

12. 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."

13. Under the 1996 Order, as amended by the Employment (Northern Ireland) Order 2003, a dismissal will be automatically unfair if a three step statutory procedure is not followed by the employer. That, in summary, is writing to the employee with the grounds of potential dismissal, holding a meeting with the employee, reaching a decision, and holding an appeal.

Selection pool

14. In **Capita Hartshead Ltd v Byard [2012] IRLR 814**, the EAT considered a case where the allegation of unfair dismissal in relation to redundancy centred on whether or not the employer had chosen the correct pool for redundancy selection. The EAT analysed the existing case law and stated;

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that;

*(a) "it is not the function of the Employment 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" (per Browne-Wilkinson J in **Williams v Compair Maxam Limited [1982] IRLR 83**);*

*(b) "the Courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in **Hendy Banks City Print Limited v Fair Brother and Others (UKEAT/0691/04/TM)**;*

*(c) "there is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the 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" (per Mummery J in **Taymec v Ryan EAT/663/94)**;*

(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".

Redundancy selection criteria

15. It is well established that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way that the employer did – **Earl of Bradford, v Jowett [1978] IRLR 16**.

"Bumping"

16. (The Court of Appeal (GB) in the case of **Samels v The University of Creative Arts [2012] EWCA Civ 1152**, considered the case of an employee who challenged his redundancy on the basis of the choice of the selection pool and an argument that the employer should have made another type of employee redundant instead of him employing the practice known as "bumping".

17. The Court stated at paragraph 30;

> *"Finally I must deal with Mr Samels' submission on "bumping". Mr Samels made a submission based on bumping that an employer should have looked at the question of whether or not the more valuable employee was the equipment technician or the store person, and if it felt the more valuable employee was the equipment technician, it should have bumped the store person and not declared that the equipment technician was at risk and make him redundant. Mr Samels informs us that he did take this point below, but the key is that it is not compulsory for an employer to consider whether he should bump an employee. As Mr Williams made clear, if an employer takes the route of bumping another employee, it can be very detrimental to employee relations. It is in essence a voluntary procedure. In those circumstances it seems it was not one adopted by this employer. Accordingly Mr Samels' new point adds nothing and I need say no more about it".*

Remedy

18. In *Harvey on Industrial Relations and Employment Law, Volume 1, Division D1, at Paragraphs 2535 – 2540*, two questions are indicated for the tribunal when assessing future loss. Firstly, the tribunal must consider what would have happened but for the unfair dismissal. It has to determine whether the employee would have continued in employment indefinitely or only for a limited period. Secondly, the tribunal must calculate the actual loss for the period which is considered appropriate.

19. The fixing of a relevant period for calculating future loss is not an exercise which can be done with mathematical precision on empirical evidence. To use the term adopted in *Harvey, Volume 1, D1, Paragraph 2567*, it is a highly speculative exercise. In ***Wardle v Credit Agricole Corporate and Investment Bank [2011] IRLR 604,*** the Court of Appeal (GB) concluded that an employment tribunal had been wrong to award compensation by considering loss over the claimant's entire remaining career, subject to a reduction to reflect the chance of the claimant leaving the respondent's employment in any event. The Court stated:-

"I agree with Mr Jeans that it will be a rare case where it is appropriate for a court to assess compensation over a career lifetime, but that is not because the exercise is in principle too speculative. If an employee suffers career loss, it is incumbent on the tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.

However, in my view the usual approach, assessing the loss up to the point where the employee would be likely to obtain an equivalent job, does fairly assess the loss in cases - and they are likely to be the vast majority - where it is at least possible to conclude that the employee will in time find such a job. In this case the tribunal has in effect approached the case on the assumption that it must award damages until the point when it can be sure that the claimant would find an equivalent job.

In my judgment, that is the wrong approach. In the normal case if a tribunal assesses that the employee is likely to get an equivalent job by a specific date, that will encompass the possibility that he might be lucky and secure the job earlier, in which case he will receive more in compensation than his actual loss, or he might be unlucky and find the job later than predicted, in which case he will receive less than his actual loss. The tribunal's best estimate ought in principle to provide the appropriate compensation. The various outcomes are factored into the conclusion. In practice the speculative nature of the exercise means that the tribunal's prediction will rarely be accurate. But it is the best solution which the law, seeking finality at the point where the court awards compensation, can provide."

20. The claimant in his statement of loss for the purposes of the hearing has adopted the common practice of first claiming loss of net earnings to the date of hearing. That is the common practice in cases of this type and is based on the decision of the National Industrial Relations Court (NIRC) in ***Norton Tool Company Ltd v Tewson [1973] 1 All ER 183***.

21. The textbook in this area, *'Employment Tribunal Remedies' by Korn & Sethi 4th Edition* states at *Paragraph 6.38* that in this particular case, *'the NIRC said that compensation should be assessed under four headings'*. It continues that the first of those headings should be:-

"Immediate loss of earnings – that is, the loss of earnings between the date of dismissal and the date of hearing."

22. However the NIRC does not appear to have said that in terms in the ***Norton Tool*** decision. The NIRC when considering the correct manner for assessing compensation in relation to the loss of employment did not say that the first element in such compensation should be the loss of wages up to the date of the hearing;

whether that hearing is by an employment tribunal or by some other judicial body. The date of any such hearing is subject to considerable variation and is impacted upon by a range of matters such as the availability of parties, the availability of counsel, the availability of witnesses and the availability of listing time. In real terms there can on occasion be significant delays in concluding cases and equally cases can move exceptionally quickly on occasion. In the tribunal's view, it is highly unlikely that the NIRC, or anyone else, had ever intended that a significant element of compensation should be determined by such a random event as the date of the hearing. The statutory basis for assessing compensation is to assess actual loss. It is not appropriate to assess a significant portion of actual loss by fixing that proportion to the listing dates given in any particular case.

23. In the ***Norton Tool*** decision, the NIRC had separated the component parts of appropriate compensation into four headings:-

(a) immediate loss of wages;

(b) manner of dismissal;

(c) future loss of wages;

(d) loss of protection in respect of unfair dismissal or dismissal by reason of redundancy.

In relation to the first category, ie '*immediate loss of wages*', the NIRC was not, as appears to be suggested in the textbooks and in the claimant's Schedule of Loss, stating that compensation should be awarded automatically or semi-automatically in relation to loss of earnings up to the date of hearing which determines remedy. It was in that context looking at the requirement then contained within the Contracts of Employment Act 1973 in relation to notice pay on the termination of employment. It was focusing therefore on the amount of notice pay that an unfairly dismissed employee would have received if he had been dismissed in the proper manner.

The NIRC stated:-

"*(a) Immediate loss of wages*

The Contracts of Employment Act 1963, as amended by the Industrial Relations Act 1971, entitles a worker with more than 10 years' continuous employment to not less than six weeks' notice to terminate his employment. Good industrial practice requires the employer to either give this notice or pay six weeks' wages in lieu. Mr Tewson was given neither. In an action for damages for 'wrongful' as opposed to 'unfair' dismissal he could have claimed this six weeks' wages but would have had to give credit for anything which he earned or could have earned during the notice period. In the event he would have had to give credit for what he earned in the last two weeks, thus reducing the claim to about four weeks' wages. But if he had been paid the wages in lieu of notice at the time of his dismissal, he would not have had to make any repayment upon obtaining further employment during the notice period. In the context of compensation for unfair dismissal we think that it is appropriate and

in accordance with the intentions of Parliament that we should treat an employee as having suffered a loss insofar as he receives less than he would have received in accordance with good industrial practice. Accordingly no deduction has been made from his earnings during the notice period."

24. The ***Norton Tool*** decision concerned a claimant who had found alternative and comparable employment four weeks after dismissal. It is not possible to discern from this decision any general proposition that an unfairly dismissed person should automatically, or presumptively, receive compensation for loss of wages up to the date of the remedy hearing, whenever that hearing might occur.

25. Therefore the issue in the present case and indeed in all such cases appears to be the speculative exercise of assessing when the claimant could be expected to obtain alternative equivalent employment and therefore fixing an appropriate point for future loss which should run from the date of dismissal and which should not depend in any way on the date on which the tribunal determined remedy.

As the Court of Appeal (GB) said in ***Wardle*** (see above), the tribunal should assess the loss up to the point at which the claimant would be likely to get another job, while recognising that this is a very speculative and unscientific exercise.

26. As far as the compensatory award is concerned, the tribunal must focus on any financial loss which was consequent on the dismissal and which was attributable to the actions of the former employer.

27. The decision in **Polkey v A E Dayton Services Ltd [1988] ICR 142** allows a tribunal to impose a percentage reduction in future loss to reflect the chance of a redundancy dismissal occurring in any event.

Relevant findings of fact

28. The claimant suffered from anxiety/depression which had not been work-related. He had been absent on three occasions, totalling in excess of 60 days, in 2016-2017.

29. The claimant's line manager at the time had been the Production Manager, Mr McKeegan. During the claimant's third absence Mr McKeegan had expressed concern at those absences and the effect it was having on the respondent's business. That had been made plain in the claimant's witness statement which had been served first on the respondent. The respondent did not call Mr McKeegan to give evidence to rebut this assertion. The witnesses that it did call did not rebut this assertion in their witness statements.

30. Before 2010, there had been two boning halls in the Campsie plant. One had dealt with beef and one had dealt with lamb. The boning hall which had dealt with lamb closed in 2010. Production staff who had been engaged in that boning hall, including the claimant who had been employed at that stage by the respondent, were either transferred to the Donegal plant or were made redundant. The claimant had voluntarily transferred to the Donegal plant but after a few weeks had instead selected voluntary redundancy.

31. From 2010 until to 2017, the two boning hall managers were retained in position even though there was at that stage only one boning hall in Campsie. In all the other plants, which each had one boning hall, the respondent had employed only one boning hall manager.

32. In that same period, 2010 up to 2017, the respondent had employed four Supervisors in the boning hall. They had been Supervisors of the general operatives and they had reported directly to the two Managers.

33. In the latter the part of that period, the operatives had been divided into five teams; designated A, B, C, D and E. The teams had each worked for four days each week. The boning hall operated from 7.00 am to 5.30 pm, Monday to Friday. To ensure that the entire length of that period was covered each day, the four Supervisors had different starting times and different finishing times within that period. They each had worked on each of the five days for 40 hours per week.

34. The five teams of general operatives had worked for four days out of five, between 7.00 am and 5.30 pm. The four Supervisors had worked for shorter and differing hours on each of the five days. Each team of general operatives had been divided into different skill categories. The most skilled were the boners and the least skilled were the packers.

35. The way in which the Supervisors were organised created practical difficulties for the respondent. In particular if there had been a problem during a shift, it had proved difficult to identify who had been the Supervisor responsible at the relevant time.

36. The difficulty was discussed over a period of some months until a decision was made at the end of 2016 to move to five Supervisors. No notes, records or other documentation had been kept in relation to this discussion which appears to have been a largely oral discussion between Mr McAleer and Ms Marshall. It had not gone higher within the respondent organisation because it had been an operational issue restricted to Campsie.

37. The decision had been that each of the five Supervisors would be assigned to one of the five teams of general operatives and would work on the same rota as that particular team, ie, work for four days out of five days on a regular basis.

38. Mr McAleer and Ms Marshall decided to delay the implementation of this proposal until after the Christmas and New Year holidays.

39. The claimant at this stage had been off sick on his third period of absence and was not kept informed of the proposal and in fact was told nothing about the proposal. Given that he had been one of the two Managers in the boning hall, this looks odd – it was never suggested by any of the respondent witnesses that they had kept him out of the loop to avoid stress – they simply said that as a Manager, the recruitment of the fifth Supervisor would not be of interest to him. He would not have been interested in applying for that job.

40. It is simply not credible that the respondent, in recruiting a fifth supervisor, implemented significant changes in the working arrangements and in the staffing of the boning hall and that the respondent did not involve the claimant, or keep him

informed, simply because it felt that he would not have been interested in applying for the post. The claimant had been one of the two managers of the boning hall and would have been directly interested in the changes even if he had not been interested in applying for the post of supervisor.

41. The advertisement for the fifth Supervisor's post was placed on two internal notice boards on 9 January 2017. It was advertised for only four days. Again, at that stage, the claimant had still been off on sick leave and would have had no reason to enter the premises and would have had no reason, and no opportunity, to see the advertisement on either of the two notice boards. There had been no attempt to email him a copy of the advertisement or to seek his comments. There had been no attempt to keep him informed.

42. The advertisement had been placed on the two notice boards for only four days before the competition closed. There appears to have been no good reason for that level of haste. A supervisor's post might have been of interest to staff outside the boning hall and perhaps even in other plants. The haste is consistent with a desire on the part of the respondent to complete the process before the claimant could return from sick leave.

43. Two general operatives within the boning hall applied for the post of fifth Supervisor. One withdrew from the competition, and the other, Dale Culbert, was appointed. He had been interviewed on 13 January 2017 and he started in post on 16 January 2017. The claimant remained on sick leave.

44. The claimant had first been referred for an Occupational Health report on 4 March 2016. Standard questions had been asked in that referral. They had concerned his fitness to return to work, the question of reasonable adjustments and the question of medication, etc. In reply, Dr Tohill reported that the claimant had not then been currently fit for work and that he probably would have been fit for work in 2-3 weeks' time, with a phased return.

45. The claimant was referred for a second time to Occupational Health on 15 December 2016. Again, standard questions had been asked. On 19 December 2016, Dr Tohill advised that the claimant was unfit for work. He stated that a return to work "may take anything from six weeks to three months for things to improve and then a period of stability would be required prior to a return to work".

46. Dr Tohill at that stage had therefore anticipated a lengthy absence which may well have exceeded three months. That would have been a matter of considerable concern to the respondent.

47. The claimant was referred to Occupational Health for the third time on 26 January 2017. At that stage the claimant had been off work for almost two months from 29 November 2016.

48. That referral form had been prepared by Ms Marshall, the HR Manager. It had contained two unusual questions for Mr Tohill among the standard questions. Those questions were;

Question 5 – does Anthony have the ability/mental capability to participate in a restructuring process for the management of the boning hall?

Question 6 – what effects could a restructuring process have on Anthony's mental state?

49. The appointment of the fifth Supervisor had at that stage been completed. Mr Culbert had been in post for over a week. The new rotas for the Supervisors had been in place for over a week.

50. The respondent's position and that of Ms Marshall was that the reference to restructuring had been a reference to the restructuring of the Supervisors and the appointment of the fifth Supervisor. The claimant in cross-examination stated he accepted that to be the meaning of the reference to restructuring. However, the tribunal concludes that the claimant had simply been agreeing that this had been said by Ms Marshall in cross-examination. He seemed to misunderstand several questions in this way.

51. The changes to the Supervisor days and hours of work had been completed at that stage. It had been over and done with. Any initial teething problems would have been resolved by 26 January 2017 and certainly by the date of any anticipated return by the claimant. The tribunal concludes that the term "restructuring process" referred to the restructuring of the two Manager posts which actually would have had a significant impact on the claimant and that it did not refer to the restructuring of the Supervisors. The repeated assertions, particularly by Ms Marshall, to the contrary are simply not credible.

52. The position of the respondent was that the restructuring process referred to in the occupational health referral had been completed on 16 January 2017. The decision to go further than restructuring the Supervisors and to reduce the two Manager posts to one Manager's post had not even been thought of at that stage. It had only occurred to the respondent on 2 February 2017.

53. Mr McAleer had previously worked in the Donegal plant. He had close ties to the other plants in Omagh and Gloucester. Ms Marshall had the same ties. They knew that the other plants each had one Manager in the boning hall (not two). It is not at all likely that, after a lengthy consideration, over some months, of the numbers of Supervisors required, the respondent had not considered the obvious impact of such a change on the historical anomaly of two Managers in the boning hall. It is even less likely given that Mr McAleer made it plain in the first paragraph of his witness statement that the second manager in the boning hall had only been retained after 2014 on a temporary basis, "during change over to new structure" following the introduction of the four day shift for production operatives.

54. The report of Dr Tohill in response to this referral was completed very quickly on 2 February 2017. Dr Tohill stated that the claimant had been aware of "a planned restructuring for management in the boning hall". Dr Tohill went on to state;

> *"5 – he is fit to engage with management in relation to a planned restructuring process for the management of the boning hall. He described being aware of this process and is keen to obtain the detail.*

His concentration and cognitive function is sufficient for him to be able to meet, understand the issues and options and outcomes.

6 – I discussed this in detail with him. He is preparing himself for any outcome which is beneficial or detrimental in relation to his employment. He appears to have the mental resilience to cope with outcomes. He has good protective factors in this respect within his life".

55. This medical report clearly talked of a future or "planned" restructuring. It did not refer at any stage to the already completed restructuring of the Supervisors. It referred to the restructuring of "management", not to the restructuring of Supervisors. It talked about potentially detrimental outcomes for the claimant and specifically for his employment. It did not talk about teething problems while settling the Supervisors into their new working pattern. It referred specifically to outcomes for his employment. It referred to his perceived resilience to deal with such outcomes.

56. None of this is consistent with the restructuring, to which Dr Tohill and Ms Marshall had referred, being the already completed restructuring of Supervisors which would have had only a minimal and transitory impact on the claimant as a Manager. The references to restructuring can only be considered to be a reference to the restructuring of the two management posts and to the reduction of those two posts to one post, with a potentially detrimental outcome for the claimant's employment.

57. The position of the respondent was that a decision to reduce the number of Managers in the boning hall from two Managers to one Manager had not been taken until 2 February 2017. According to the respondent it had not been discussed at all before that date. The position of the respondent therefore was that it had not occurred to anyone within the respondent's organisation before 2 February 2017 that the appointment of a fifth Supervisor would inevitably impact on a need for two Managers in the boning hall, which had in any event had been a historical anomaly since 2010 and which had been retained in 2014 on a necessarily temporary basis to deal with a new shift structure.

58. This does not sit easily with Dr Tohill's terminology in the report of the same date, ie, 2 February 2017, which can only be read as indicating that this restructuring of the management posts had already been planned at that date and that it had been known to the claimant and had indeed been notified to Dr Tohill. Furthermore it seems to the tribunal to be highly improbable that, in the extensive discussion of the operation of the boning hall, no one had noticed the historical anomaly of having two rather than one Manager in the boning hall. Mr McIlwaine stressed in evidence that the discussion of the boning hall had extended over 18 months and that it had involved significant financial investment and significant re-organisation of the work processes. Such a process would inevitably have stumbled upon the historical anomaly of having two Managers.

59. The tribunal considers on the balance of probabilities that the respondent's decision to reduce the management posts to one management post had been taken before 2 February 2017 and that it would inevitably have been interlinked with and would have formed part of the decision to appoint the fifth Supervisor.

60. It is not credible, as asserted by the respondent, that this decision had first been taken by Malachy McAteer at a Senior Board Meeting on 2 February 2017. It is not credible that it had only seemed important at that stage that Campsie had two boning hall Managers while the other three plants had only one such Manager. The respondent's evidence had been that the plants had been regularly benchmarked against each other and that this had happened during the regular Senior Board Meetings. It is therefore highly improbable that such an important issue had spontaneously occurred to Mr McAteer as a damascene flash of light in the course of the Senior Board Meeting on 2 February 2017.

61. Malachy McAteer, who had been the Omagh Director and Terry Acheson, the owner of the respondent company, who had been present at the Senior Board Meeting on 2 February 2017 did not attend the tribunal to give evidence. Mr McIlwaine, the Finance and Human Resources Director did give evidence but his evidence-in-chief did not address this issue at all and did not deal with what he alleged in cross-examination had been an 18 month programme of reorganisation and significant financial investment. Furthermore, in cross-examination Mr McIlwaine had described all of this as "a bigger process" in relation to the boning hall. He had confirmed in his statement that the boning hall in Campsie had been financially underperforming. It is not possible that the position of the Managers had not featured in that process until 2 February 2017.

62. No documentation or minutes of the meeting on 2 February 2017 exist. It was described as a walkabout inspection. The absence of any notes or records, however brief, seems odd in the context of a regular Senior Board Meeting where one would expect some minutes and notes to be retained, if only to check that decisions had been implemented correctly.

63. Malachy McAteer and Kara Marshall stated that they were notified on 6 February 2017 for the first time of the decision to reduce the Managers to one Manager. That seems highly unlikely.

64. On 9 February 2017, Mr Otterson, the group HR Manager wrote to Dr Tohill stating that the claimant "plans to return on Monday – are you happy for us to prevent him from returning on Monday based on your assessment?" Mr Otterson did not ask if the claimant was fit to return to work; instead he asked if he could "prevent" him from returning. The claimant had provided a GP's "*fit for work*" note dated 9 February 2017.

65. The claimant's first redundancy consultation was on Wednesday 15 February 2017 with Mr McAleer and Ms Marshall. He was given an "at risk letter". He was notified during the course of that meeting of the availability of a general operative post in the boning hall and a night cleaner post.

66. The claimant raised the issue of the fifth Supervisor's post and stated that he had not been considered for that post. He was told by Mr McAleer that that post had been filled before the decision had been made to make one of two Managers redundant. As indicated above, the tribunal concludes that the decision to make a manager redundant had been made before Mr Culbert had been appointed.

67. The "at risk letter" invited the claimant to a second consultation on 22 February 2017 and made it plain that the claimant had the right to be represented.

68. The claimant followed this up with a written submission on 20 February 2017. Again he raised the issue of the fifth Supervisor's post and suggested that the respondent should consider "bumping", ie, making the fifth Supervisor redundant and moving the claimant to his post. He said that the respondent had not considered all the alternatives to redundancy and that the redundancy process was shambolic and that it had only pointed in one direction, ie, towards him. He stated that this redundancy process had been a "witch hunt" to relieve him of his job due to his illness.

69. The second redundancy consultation on 22 February 2017 discussed alternatives. The respondent refused to consider "*bumping*". The claimant alleged that the exercise had been focused on him.

70. A third redundancy consultation was held on 23 February 2017.

71. The redundancy selection exercise used standard criteria which had been used in previous redundancy schemes and which had been agreed with the trade union. They were;

    (i) attendance records.

    (ii) skills and abilities.

    (iii) length of service.

    (iv) disciplinary record.

72. The redundancy selection pool was restricted to the two Managers in the boning hall; the claimant and Mr Collins.

73. Mr Collins and the claimant had scored equally on attendance. Mr Collins had clearly also had absences from work on ill-health grounds. Mr Collins had scored one point more than the claimant on skills and abilities. He had scored four points more than the claimant on length of service, he had 22 years continuous service rather than three years' continuous service. Both Mr Collins and the claimant had scored equally for disciplinary matters.

74. The redundancy selection pool did not include the five Supervisors in the boning hall. The respondent took the view that they were entirely different posts and not interchangeable.

75. The pool did not include any one outside the Campsie plant. That was not a matter which had been raised in the course of the redundancy consultation by the claimant. It had been first raised in the course of the present tribunal hearing.

76. The claimant was selected for redundancy. He was invited to a further redundancy meeting on 3 March 2017. At that meeting he was given notification of his redundancy scoring and his selection.

77. The claimant appealed against this decision on 6 March 2017. He alleged the redundancy process had been targeted at him because of his period of sickness and argued that the pool should also have included the five Supervisors within the Campsie plant. As indicated above, the claimant did not seek to argue that the pool should have been extended beyond the Campsie plant. The claimant had in any event clearly indicated that he had not been interested in applying for a technical post in Omagh; he had no car. He had also tried working in the Donegal plant and he had not liked it.

78. The appeal was arranged for 15 March 2017 to be heard by Mr Nigel McIlwaine. The claimant chose not to have a representative although that opportunity had been offered to him in plain terms. The claimant's appeal against the redundancy selection was dismissed.

Decision

79. Article 130(1) of the 1996 Order places the onus of proof on the respondent to establish that the reason for the dismissal had been a potentially fair reason for the purposes of that Order. The only potentially fair reason argued for by the respondent was that of redundancy. The respondent did not argue that some other substantial reason had applied.

80. If the respondent does not discharge that burden of proof, the dismissal is unfair for the purposes of the Order. The unanimous decision of the tribunal is that the respondent has failed to discharge that burden of proof. In such circumstances, the claimant does not need to positively establish an alternative reason for the dismissal and the tribunal does not need to reach any such conclusion. That said, it seems clear, on the balance of probability, that the principal reason for the claimant's dismissal had been his sick leave.

81. Much of the respondent's evidence in the matter was simply not credible. In summary, it's evidence was that a lengthy and detailed process had taken place over some 18 months to reorganise the staffing and the work in the boning hall in Campsie. Significant financial investments had been made. Shift patterns had been changed, initially for production operatives in 2014 and then for supervisors in 2017. A fifth supervisor had been recruited. Only Campsie had two managers in the boning hall. All the other plants had only one manager. The two managers in Campsie had been an historical anomaly since 2010 when the boning hall for lamb had closed. A decision had been made in 2014 to retain the second manager to deal with "the changeover" to the new shifts for production operatives. That "changeover" had been a transitory process and the post of second manager had therefore been recognised as temporary. Ms Marshall and Dr Tohill had clearly been aware on 26 January 2017 of a planned restructuring of the two managers' posts.

    The fifth supervisor had been recruited and appointed in some haste while the claimant had been absent on sick leave. The claimant had not been consulted or even informed about this process, even though it had clearly been within his area of responsibility. The claimant's return to work had been delayed.

82. Despite all of that, the tribunal is asked to believe that the decision to make one of the two managers redundant had been made spontaneously by Mr Malachy McAleer during an unminuted and undocumented senior board meeting on 2 February 2017, and that this decision, or the need for such a decision, had not occurred to anyone before then.

83. The tribunal therefore unanimously concludes that the respondent has not discharged the onus of proof to establish a potentially fair reason and it concludes that the dismissal was therefore unfair.

Remedy

84. The claimant has already received a statutory redundancy payment which equated to the basic award for unfair dismissal. The question of a basic award therefore does not arise.

85. The tribunal must first consider what would have happened but for but for the unfair dismissal. It must first determine what would have happened to the claimant if there had been no unfair dismissal. Secondly it must determine the appropriate period of future loss, running from the date of dismissal and not up to or from any other date.

86. The tribunal cannot determine that the claimant would have been made redundant in any event, even if he had not had repeated absences on sick leave. The respondent had retained two boning hall managers since 2010 when the second boning hall had closed. The entirely unconvincing evidence brought forward by the respondent, to the effect that the decision to make one boning hall manager redundant had been a spontaneous decision on 2 February 2017, does not enable the tribunal to make such a finding.

87. If the respondent had wished to argue for a reduction in compensation for future loss to reflect the percentage chance of a redundancy dismissal in future, it should have brought forward convincing evidence. It did not. The tribunal therefore has no firm basis on which to make a Polkey deduction.

88. Given that the respondent had shown no urgency between 2010 and 2017 in bringing the number of boning hall managers into line with that in other plants, the tribunal has no evidence on which it could properly determine that, if the claimant had not been on sick leave, he would have been made redundant in any event in the near future.

89. As stated above, the fixing of an appropriate period for future loss is not a scientific exercise. That said, the evidence before the tribunal was that the claimant did not fully mitigate his financial loss and that he did not make appropriate efforts to do so.

90. The claimant had applied for and had gained employment in Seagate at a lower wage. He made no further efforts to obtain higher paid employment nor employment at a wage equivalent to that he had been paid by the respondent.

91. The claimant has failed to produce clear evidence of what he earned in Seagate. He produced only two payslips from that employer. One showed net pay of £385.26 and the other showed net pay of £1514.66. That is entirely unsatisfactory. Other

payslips could and should have been produced. The claimant in his schedule of loss alleges that he had been paid net wages weekly of £322 in Seagate. No evidence was produced to establish that figure. The tribunal was sorely tempted to leave the matter at that point and to determine no future loss whatever. It is not for the tribunal, in a mixture of guesswork and charitable inference, to do the work of the claimant for him, and to work out his net earnings at Seagate.

92. However, the extremely faded small print of one payslip dated 15 December 2017 recorded that the claimant had been paid gross £9299.10 to that point.

93. The claimant's Jobseekers Allowance had ceased on 23 July 2017. His employment with Seagate would have started immediately thereafter. Again the necessary evidence to fix this date more precisely had not been presented by the claimant and the tribunal was left to sift through the documentation to find the date. That is entirely unsatisfactory.

94. That appears to represent a period of 21 weeks with a gross weekly average pay for that period of £442.81. That would work out at £364 net per week, not the £322 per week argued for by the claimant with no supporting evidence. The net weekly loss of wages after 23 July 2017 is therefore £94.

95. Given the claimant's failure to fully mitigate his loss, the tribunal concludes that the appropriate period for future loss would be 26 weeks from the date of dismissal. That is when, in the opinion of the tribunal, he could have obtained equivalent employment to that with the respondent.

96. Future loss is therefore calculated in the following way.

(i) Loss of net wages from 3 March 2017 to 23 July 2017

20 weeks @ £458 per week = £9160

(ii) Loss of net wages from 23 July 2017 for 6 further weeks

6 weeks x £94 = £564

SUB TOTAL = £9724

(iii) Less 4 weeks' notice pay

4 x £458 = £1832

SUB TOTAL = £7892

(iv) Loss of statutory rights £500

SUB TOTAL = £8392

97. The total amount payable to the claimant is therefore £8392.

98. For the purposes of the recoupment notice to enable the Social Security Agency to deduct Jobseekers Allowance from that sum:

(i) The monetary award is £8392

(ii) The prescribed element is £8392

(iii) The relevant period for the prescribed element is 3 March 2017 to 1 September 2017.

(iv) The monetary award does not exceed the prescribed element.

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

Vice President:

Date and place of hearing: 29 and 31 January and 1 February 2018, Belfast.

Date decision recorded in register and issued to parties:

Case Ref No: 3093/17

CLAIMANT: Anthony Millar

RESPONDENT: Foyle Food Group Limited

ANNEX TO THE DECISION OF THE TRIBUNAL

STATEMENT RELATING TO THE RECOUPMENT OF JOBSEEKER'S ALLOWANCE/INCOME –RELATED EMPLOYMENT AND SUPPORT 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; The Social Security (Miscellaneous Amendments No.6) (Northern Ireland) 2010.

   (a) Monetary award of £8392

   (b) Prescribed element of £8392

   (c) Period to which (b) relates: 3 March 2017 to 1 September 2017

   (d) Excess of (a) over (b) £0

   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, Income-related Employment and Support Allowance or Income Support received by the claimant in respect of that period; (b) is not payable until the Department for Communities 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, Income-related Employment and Support 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 for Communities 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.