

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 4 July 2007

**Before**

**THE HONOURABLE LADY SMITH**

**MISS S AYRE, FIPM, FBIM**

**MS A MARTIN**

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**APTUIT (EDINBURGH) LTD**

**APPELLANTS  
(RESPONDENTS)**

**MRS I KENNEDY**

**RESPONDENT**

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellants (Respondents)

Mr K.R.W. HOGG  
(Solicitor)  
Messrs Allcourt Solicitors  
1 Carmondean Centre  
Carmondean  
LIVINGSTON  
EH54 8PT

For the Respondent (Claimant)

Mr I KENNEDY  
(The Claimant in Person)

## **SUMMARY**

### **Unfair Dismissal – Automatically unfair reasons / Compensation**

The claimant was dismissed for redundancy. The Tribunal found her dismissal to have been automatically unfair in respect that she had not been notified of her right of appeal. No question concerning her right of appeal had been put in issue by the claimant. The Tribunal Chairman considered, from his reading of the productions, that the dismissal was automatically unfair as the Claimant had not, on that documentation, been notified of her right of appeal. No notice that he thought it was an issue was given to the respondents. The Tribunal also held that they would, in any event, have found the dismissal to be unfair in respect that there was no proper consultation, no organised effort to find alternative employment for the claimant and a role was available which was given to another employee without it being advertised. The Employment Appeal Tribunal held that the Tribunal had erred in failing to put the respondents on notice that they considered the question of intimation of the claimant's right of appeal to be an issue in the case and that there was no proper basis for the Tribunal's finding that the dismissal was unfair in any event. Observations on Tribunal's obligations in circumstances where there appears to be a point of law in a party litigant's favour that has not been identified by that party.

## **THE HONOURABLE LADY SMITH**

### **Introduction**

1. This is an appeal from a decision of an Employment Tribunal sitting at Edinburgh, Chairman Mr I McFatridge, registered on 23 February 2006. The claimant had been made redundant and the Tribunal found that she had been unfairly dismissed and awarded compensation. The employers appeal against that finding; we propose to refer to parties as claimant and respondents.

2. The claimant represented herself before the Tribunal and before us. The respondents were represented by Mr K R W Hogg, solicitor both before the Tribunal and before us.

### **Background Facts**

3. The respondents are part of a multi-national business and are engaged in the supply of clinical supplies of various types to Europe. They have three sites in the Edinburgh area. The claimant was employed by the respondents at their Bathgate factory where kits of medicine were prepared for distribution to persons who were participating in clinical trials. She was a secondary staging co-ordinator which involved her acting as liaison between secondary packaging and the warehouse department. She also worked as a project supervisor.

4. In about August 2004, the overall management of the business decided that savings required to be made. The respondents' general manager for supplies to Europe based at Bathgate, Mr Jeff Hepburn, instructed his subordinates to find a way of making the necessary savings. After discussions with his subordinates, he came up with a plan which involved redundancies. One aspect of that plan was that the role fulfilled by the claimant would be deleted.

5. During the week of 15 November 2004, the claimant was advised that her job was at risk of redundancy. She received a letter sent on 16 or 17 November 2004 confirming that fact, indicating that no final date had been identified for implementation pending employees' own representations but it was envisaged that departures would be at the end of March 2005. Thus, although it seems that more than 20 employees were due to be made redundant, since more than 90 days was to elapse prior to the redundancy taking effect, the requirements of section 188 of the **Trade Union and Labour Relations Act 1992** anent consultation did not apply, the effect of which is that the statutory dismissal procedures set out in Schedule 2 to the Employment Act 2002 did apply (see: paragraph 4(1)(b) of the **Employment Act 2002 (Dispute Resolution) Regulations 2004**).

6. The letter sent on 16 or 17 November also invited the claimant to consider the proposals and express views. On 24 November 2004, the claimant wrote asking for a meeting to discuss "in depth" the position of her post.

7. A meeting took place on 29 November 2004 which was attended by the claimant, Mr Hepburn and Mrs Day (from the respondents' Human Resources department). It is evident from the Tribunal's findings that a number of matters were discussed. The claimant was advised that no individual selection criteria had been used in her case; the criteria used was job role and the job of staging co-ordinator was being deleted. She questioned why, if that was so, had there been a reference in the letter to selection criteria and it was explained that a generic letter had been used. There were discussions at the meeting regarding the involvement of a Mr Rogers in the decision making process, the reason for his involvement and for the non-involvement of the claimant's own manager was discussed and explained, and the fact that the claimant felt she was being unfairly dealt with when she had only agreed to take on the role of staging co-ordinator a year earlier was aired. Mr Hepburn responded that when she moved into

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that role it would not have been known that she was putting her job at risk, as had in fact proved to be the case.

8. The respondents' Mrs Day wrote to the claimant after the meeting in a letter which confirmed the terms of the meeting. The following day, the respondents' Human Resources department wrote to the claimant intimating that she was to be dismissed by reason of redundancy on a date no later than 30 March 2005. That letter made no mention of the claimant having a right of appeal. At some point thereafter, the claimant had a further meeting with Mrs Day. The Tribunal, wrongly referring to Mrs Day as "Mrs Hall", make the following finding in respect of that meeting:

**"34. At some point subsequent to 30 November 2004 the claimant had a meeting with Mrs Hall of the Human Resources Department. Mrs Hall could not remember anything about whether or not the meeting had taken place and the claimant could not remember anything that took place at the meeting."**

9. As to what happened by way of the making of representations to the respondents thereafter, the only available picture is that which can be gleaned from a combination of the Tribunal's judgment and from the Chairman's letter dated 6 July 2006 in response to an order of this Tribunal dated 7 June 2006. The latter does not contain any findings of fact. The order of 7 June required the Tribunal to answer the following questions:

**"i. Whether there was any evidence as to the issue of whether or not the claimant was advised of her right of appeal?**

**ii. If so, from which witnesses and what was it?**

**iii. Whether there was any evidence as to the issue of whether or not the claimant appealed against the decision that she be selected for redundancy?**

**iv. If so, from what witnesses and what was it?**

**v. Whether the claimant presented any case to the tribunal to the effect that she had not her right of appeal intimated to her or had not been afforded a right of appeal?"**

10. In the discussion part of the judgment the Tribunal, without making any findings of fact, had recorded that the claimant said:

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**“40.....that at some point in February 2005 she and one of her fellow employees who were also under threat of redundancy, had tried to contact the respondents’ HR Director, Mr Gruer, to complain about the situation. This was occasioned by the fact that they understood that someone had been hired as a new start to replace someone who had earlier been made redundant and who had left by February 2005. The claimant indicated that she had e mailed Mr Gruer but that he had not responded. She had then telephoned him and he told her that he would try to get back to her but he was very busy. She then asked if it was ok for her to speak to someone else, another manager that she knew, and he said yes.”**

11. Matters are explained a little differently although broadly to the same effect, in the Chairman’s letter. He refers to the claimant’s evidence:

**“She said that in February 2005 she had e mailed Gary Brewer with concerns she and other workers had that people who had already left having ostensibly been made redundant were in fact being replaced by new starts. The Claimant said: ‘Brenda Barr spoke to him and he promised to get back to her. Brenda Barr was then told that no-one would come in the back door to fill our positions. I telephoned Mr Brewer and he promised to get back to me. It was overall about the way it was handled. Mr Brewer was very busy I asked him if it would be possible for me to speak to Mr Constable and he said it would be fine.”**

12. It would appear that the Mr “Gruer” referred to by the Tribunal in their judgment and the Mr “Brewer” referred to in the Chairman’s letter are the same person and it seems unfortunate that, in common with other errors in the judgment , that was not picked up. There would not appear to have been any further questioning of the claimant on this matter. In particular, the question of whether she spoke to Mr Constable, if so how, in what circumstances and to what effect, does not appear to have been followed up on, a matter to which we will return later in this judgment.

13. The claimant was not offered alternative employment and she was made redundant on 31 March 2005. She obtained part–time employment in a local hospital thereafter, earning about £100 per week. Prior to her redundancy she had, according to what she told us, earned about £1000 net per month, earnings which the Tribunal record at paragraph 36 as having been £155 per week and at paragraph 50 as having been £255 per week.

## **The Tribunal's Judgment**

14. The Tribunal found that the claimant's dismissal was automatically unfair. They refer to the provisions of the dismissal procedure set out in Schedule 2 to the 2002 Act including paragraph 1(4) and go on at paragraphs 45 and 46 to find:

**“45. The Tribunal considered that although they were prepared to accept that the respondents had complied with the first part of the disciplinary process they had failed to offer the claimant an appeal.**

**46. It therefore followed that the dismissal was automatically unfair in terms of the Act.”**

15. Further, at paragraph 47, the Tribunal refers to the claimant having had

**“no right of appeal”**

and in his letter of 6 July 2006, the Chairman refers, in the penultimate paragraph, to his having said to Mr. Hogg, in the course of his submissions, that:

**“the affording of a right of appeal was part of the statutory dismissal procedure.”**

16. In respect that they found the dismissal to have been automatically unfair, the Tribunal go on, at paragraphs 52 and 53, to consider and deal with the appropriate award of compensation in that regard. They state:

**“52. Section 31 of the Employment Act 2002 provides that where dismissal is automatically unfair in terms of Section 98A the Tribunal shall apply an uplift of between 10% and 50% of the compensatory award.**

**53. In this case the Tribunal felt that the failures of the respondents were serious. They are a large organisation. There appears to have been no consultation whatsoever and the Tribunal were of the view that they had treated this long standing employee in a shoddy manner. The Tribunal awarded an uplift of 40% which they considered appropriate in all the circumstances. The total amount of the compensatory award is therefore £20,832.”**

17. They had calculated the claimant's loss on the basis set out in paragraphs 50 and 51:

**“50. The claimant's wage was £255 per week approximately. She had income from her new job of £100 per week. Her wage loss was therefore £155 per week.**

51. She had 44 weeks' wage loss to the date of the Tribunal. The Tribunal felt that taking everything into consideration it would be appropriate to award her wage loss at this level for a further year. Her total wage loss would therefore amount to £14,880."

18. The Tribunal also found that, in any event, the dismissal was unfair. That was because, as is evident from the terms of paragraph 47:

**"The respondents had not engaged in any meaningful consultation with the claimant whatsoever."**

**"The meetings appeared to have been completely perfunctory with no right of appeal."**

**"Although the respondents indicated that they would attempt to find alternative employment for the claimant they do not appear to have gone about this in any kind of organised way."**

**and**

**"...there does appear to have been a role available which she could have taken but instead of advertising this or giving the claimant the opportunity to apply for this along with other applicants they simply awarded this to someone else .."**

19. The last point was a reference to an associate packaging technician having left shortly before the end of March 2005 and her job having been offered to another employee (who accepted it) who would otherwise have been made redundant without it being offered to the claimant or anyone else. There is no finding that the claimant would have been interested in that post and we note, from the notice of appeal, that it is said that by the time the job became available, the claimant had in fact left.

20. The Tribunal do not appear to have considered whether, if the statutory dismissal procedures had been complied with, there was a chance that the claimant would, in any event, have been dismissed. Nor did they consider whether, had the consultation and job searching procedures been carried out in whatever manner it was that they envisaged should have happened, the claimant would still have been dismissed.

21. In respect that it is clear that what weighed most heavily with the Tribunal was what they saw as a failure to comply with the statutory dismissal procedures, it is important, for the purpose of this appeal, to note how it was that that matter arose as an issue.

22. There is no mention in the ET1 of any complaint about the lack of intimation of a right of appeal or that the claimant was not afforded a right of appeal that she wished to exercise. The complaint is purely of the selection process having been unfair. In the ET3, the respondents' response includes:

**“The claimant continued to protest about the position and the respondents attempted as best they could to deal with all issues raised. The claimant appealed. The appeal was heard and all matters were dealt with at the appeal.”**

23. No application to amend the ET1 was made thereafter. Nor did the claimant, who represented herself before the Tribunal, make any complaint about the lack of an appeal or intimation of her right thereto. What happened is explained by the Chairman in his letter of 6 July 2006 in a passage which appears to start by referring to the first day of the hearing:

**“It was only later in the day when I had had the opportunity to read the productions in detail that I saw that there appeared to be no mention in any of the productions of the Claimant having been told of a formal right of appeal. I resolved to ask the witnesses regarding this. I asked the witness from the HR Department, Mrs Day, about this and she agreed that there was nothing in any of the letters. ....Mrs Day was unable to say that she had advised the Claimant of her right of appeal. I then asked the Claimant what her position and her position was that she had never been told that she had a right of appeal. She quite fairly said that she knew that she could appeal but that no-one had actually told her about this and who to appeal to or how to go about it. She then gave evidence about the meeting she had had with another Director whose name I have written down as a Mr Constable.”**

24. We are left in the dark as to what happened at the meeting with Mr Constable as the Chairman does not say what the Claimant said about it.

25. The Chairman's letter also advises that during submissions, the respondents' agent said that the fact that the question of whether or not a right of appeal had been offered was not

important at which he, the Chairman, interrupted to say, as we have already noted, that the affording of a right of appeal was part of the statutory dismissal procedure.

### **The Appeal**

26. Mr Hogg opened his submissions for the respondents by indicating that at the heart of the respondents' complaint lay the fact that, in effect, the Chairman had taken over and prosecuted the case for the claimant to the extent that he had failed to appreciate the need to remain impartial. It had not been until the stage of submissions that it had become apparent that the Tribunal was treating the matter of failure to comply with the statutory dismissal procedures as an issue in the case. Had the respondents known before then that it was an issue, they would have led other evidence in respect of the questions of whether or not the fact of her right of appeal had been intimated to the claimant, whether she had actually been afforded an appeal and whether or not, even in the absence of appeal or the right to it being intimated, there was a chance of the claimant being made redundant in any event. They had, however, been taken by surprise. The Chairman had not told them that he thought it was an issue at the point at which, according to his letter, he had identified that it was. He should have done.

27. In any event, there were four respects in which the Tribunal had erred in law. The first was they were not entitled, on the findings made, to conclude that there had been a failure to comply with the statutory dismissal procedures. There was no evidence or finding in fact that the respondents had failed to offer an appeal or afford an appeal or recognise the claimant's right to appeal, yet that was what seemed to be the thrust of the Tribunal's thinking, particularly given the terms of paragraph 45 in which the critical finding was made. Further, the basis for their finding of failure to comply was that the letter of 30 November 2005 did not mention any right of appeal yet it was not necessary, for compliance, that the existence of the right be communicated in writing. According to the Chairman's letter, the claimant had said in UKEATS/0057/06/MT

evidence that she knew she had a right of appeal but he had not explored with her how it was that she had come to know that: had anyone told her? If so, who? This was not something that Mr Hogg had explored with her as he had no inkling, at that time, that the Tribunal were going to regard compliance with the statutory procedures as being an issue in the case.

28. The second respect in which the Tribunal had erred in law was that their assessment of the consultation meetings as being “perfunctory” could not stand in respect that that characterisation of them was wholly unexplained. The lack of justification for their approach was highlighted by the fact that they had not made any findings at all about what happened at the meeting that took place some time after 30 November. Further, it was manifestly wrong, given the findings about what did take place, to say that there was no meaningful consultation. The Tribunal had adopted a condemnatory approach to the respondents that was not justified.

29. The third respect in which the Tribunal had erred in law was in respect of the 40% uplift. No relevant explanation was given for it. It appeared to have been assessed by reference to matters which were not relevant and without recognition of the extent to which the uplift was discretionary and could even be dispensed with altogether in certain circumstances. Further, the respondents had had no opportunity to make submissions regarding an uplift as it was not raised by the claimant as a possibility nor did the Tribunal raise it as something that they were considering.

30. The fourth respect in which the Tribunal had erred in law was in respect of the award in respect of loss of earnings. The allowance of loss continuing for a further year was wholly unexplained

31. In all the circumstances, Mr Hogg moved that the appeal be allowed and the case remitted to a freshly constituted Tribunal for a rehearing.

32. The claimant explained that she had difficulty in following the legal issues that arose. We sought to explain them to her slowly and carefully both during Mr Hogg's submissions and in the course of her own. She stated that she was unfairly dismissed, that the truth had been told at the Tribunal and that the Tribunal's judgment was the right judgment.

### **Relevant Law**

33. Section 98 of the Employment Rights Act 1996 ("the 1996 Act") provides that redundancy is a potentially fair reason for dismissal and that the question of whether or not the dismissal is fair or unfair:

- "(4) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
- (b) shall be determined in accordance with equity and the substantial merits of the case."** and Section 98A of the 1996 Act provides:

and Section 98A of the 1996 Act provides:

- "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—**
- (a) one of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 ( dismissal and disciplinary procedures) applies in relation to the dismissal,**
- (b) the procedure has not been completed, and**
- (c) the non- completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.**
- (2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."**

34. Section 29 of the 2002 Act provides for Schedule 2 to have effect which, in turn provides for a dismissal procedure which includes a requirement that the employee be invited to a meeting to discuss the dismissal and, in the event of such a meeting taking place:

“(4) After the meeting, the employer must inform the employee of his decision and notify him of the right of appeal against the decision if he is not satisfied with it.”:

Section 31(3) of the 2002 Act provides:

“If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

- (a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies,
- (b) the statutory procedure was not completed before the proceedings were begun, and
- (c) the non – completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure,

it must, subject to subsection (4) increase any award which it makes to the employee by 10 per cent and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount but not so as to make a total increase of more than 50 per cent.”

And section 31(4) provides:

“The duty under subsection (2) or (3) to make a reduction or increase of 10 per cent does not apply if there are exceptional circumstances which would make a reduction or increase of that percentage unjust or inequitable, in which case the tribunal may make no reduction or increase or a reduction or increase of such lesser percentage as it considers just and equitable in all the circumstances.”

35. Accordingly, there are no restrictions as to the means by which the statutory requirement to notify the claimant of the right of appeal after a dismissal meeting must be communicated. Oral intimation will be as good as written intimation and if written intimation is opted for it does not need to be in any particular form. The question is: was the fact that the employee had a right of appeal communicated to him? Further, whilst the failure to communicate that right means that, in terms of section 98A, any dismissal that occurs is unfair, it is still relevant to consider whether there was, notwithstanding the failure, a chance that the employee would have been dismissed in any event. A **Polkey** reduction may be appropriate (**Alexander and another v Bridgen Enterprises Ltd** [2006] IRLR 422), a reduction which could, as in the **Alexander**

case, amount to 100%, depending on the circumstances. If, for instance, an appeal took place notwithstanding the failure of an employer to notify the employee of the right to appeal as required by paragraph 2(4) of Schedule 2 and dismissal still ensued the view might well be taken that the **Polkey** deduction should be substantial.

36. Further, in a case where there is no automatically unfair dismissal, the effect of section 98A(2) is now recognised as being that procedural failures may be wholly excused so as to render the dismissal fair if it is shown that the employee would, on a balance of probabilities, have been dismissed in any event. Again, if one of the elements of alleged unfairness concerns appeal intimation, the fact that an appeal did take place and was unsuccessful would seem to be relevant to consideration of that issue

## **Discussion**

37. We propose to begin by making some general observations prompted by the fact that it is clear that the respondents have been left with a strong sense of grievance and also that Mr Hogg felt that he had, unfairly, had his competence called into question given the terms of the last paragraph of the Chairman's letter of 6 July. That was in circumstances where he evidently felt that the Tribunal had not been open with him about the way in which they were approaching the case.

### *General*

38. This case is illustrative of the problems that can arise where a party is unrepresented and a Tribunal Chairman considers that he has identified a point of law in the claimant's favour that has not been foreshadowed at any time in the claimant's case. It will inevitably be a matter for his judgment as to whether it is appropriate that he take steps to make it an issue in the case. Much will depend on the particular facts and circumstances. However, what is plain is that if

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he does decide to do so, it is vital that he is mindful of the fact that it is not for him to act as advocate for the unrepresented party and, in the interests of achieving fairness as between parties, the represented party must be advised about the issue he thinks he has spotted at the earliest possible opportunity. Only then will that party be given a proper and fair opportunity to consider it. It may be, for instance, that that party would wish to advance an argument that it is too late for the issue to be raised. It may be that that party will want to lead evidence with regard to it, evidence that may have to come from witnesses not yet cited. An adjournment may have to be considered. It will inevitably be, at the very least, that that party will want to consider, if the matter is to become an issue in the case, how he would wish to address it in submissions and it is only fair that he be given time to do so.

39. What evidently happened in this case was that the Chairman considered that he had identified a case that the claimant's dismissal was automatically unfair, on account of the lack of written notice of her right of appeal, sometime at the end of the first day of the hearing. He did not, however, share his thoughts with the respondents' agent notwithstanding the fact that no complaint about appeals or any lack of intimation thereof was mentioned in the ET1, no complaint had been raised by the claimant at the hearing in that regard and thus, the agent did not have a reason to assume that they required to approach the case on the basis that it was an issue.

40. Rather than tell the respondents that he thought that this matter was a relevant issue that required to be considered, the Chairman asked some questions of witnesses for the purpose of what was in his mind although it seems that he did not follow them through in the way that we would have expected if he had been being careful to remain impartial. To take, for instance, the claimant's evidence that she knew she had a right of appeal. He advises that she also said that she had not been told of it by anyone but one wonders if that can be right. Her responses

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immediately beg the question of how then was it that she knew that she had a right of appeal? If she was told of the right by the respondents at any point after receiving the letter dismissing her, then the statutory requirements would, in fact, have been complied with. There is, as we have noted under the “relevant law” section of this judgment, no need for the intimation of the right of appeal to be in any particular form notwithstanding the fact that it would obviously be prudent for an employer to put it in writing and a sensible course would be to include it in the letter of dismissal.

41. There is also the matter of the claimant’s subsequent meeting with Mr Constable. The reference to it raises the question of whether or not that meeting could be said to have amounted to an appeal meeting yet the Chairman does not appear to have explored that with the claimant. Again, that was something which, in our view, the demands of impartiality required him to do. Nor does he appear to have explored the possibility of whether the meeting referred to in paragraph 34 amounted to an appeal meeting.

42. Further, the Tribunal have given no consideration to the question of what could or would have been the outcome if there had been intimation of the right of appeal, matters which, as we have explained, would appear to be of relevance.

43. We have characterised these observations as general because they affect the whole of the case but we would wish it also to be recognised that we regard them as matters of considerable substance. Of themselves they are sufficient to persuade us that the appeal should be allowed. We will, however, also deal separately with the individual criticisms of the judgment that were made on behalf of the respondents.

*Finding that dismissal automatically unfair*

44. We are satisfied that the tribunal have erred. Firstly, it does seem that the Tribunal approached this issue on the basis that there requires to be intimation in writing. However, more significantly, when it came to making the finding of failure to complete the procedure, they set the test too high. They found the respondents to be in breach because they had not “offered” the claimant an appeal. That is not what the procedure requires. There is no question of the Schedule requiring the employer to offer an appeal to a dismissed employee. The employee must have the fact of the right of appeal communicated to him but it is then for the employee to inform the employer that he wants to appeal. Given that the Tribunal also refer to the claimant having “no right of appeal” (paragraph 47) and not having been “afforded” a right of appeal, in the Chairman’s letter, we are not satisfied that the Tribunal had the right test in mind. If, in remarking that the claimant was not “offered” an appeal, the Tribunal had in mind the statutory procedure which obliges an employer to respond to an employee’s intimation of his wish to appeal, it was not fair to make the determination that they made as there were no findings in fact to the effect that the respondents ever refused a request by the claimant to exercise her right of appeal.

*Dismissal unfair in any event*

45. We agree that it is just not possible to ascertain from the judgment in what way the meetings between the claimant and the respondents could properly and fairly be characterised as “perfunctory”. The description of the meeting that took place on 29 November 2004 contains details of exchanges between parties which appear, on the face of it, to have been reasonable, to have involved the claimant being able to put forward her concerns and queries to the respondents and them being appropriately responded to. Since no details of the meeting referred to at paragraph 34 (or the meeting with Mr Constable in the event that the Tribunal also

had it in mind) are given at all, we are at a loss to know what the Tribunal considered to have been perfunctory about them.

46. We also agree that the Tribunal do not appear, from their findings, to have had justification for their finding that there was “no consultation whatsoever”. The letter intimating the risk of redundancy invited views, the meeting to which we have referred above on 29 November involving relevant discussion, took place and there appear to have been possibly another two meetings of unknown content.

#### *Uplift*

47. The Tribunal approached the question of the uplift in award on the basis that section 31 of the 2002 required them to apply an uplift of between 10 and 50%. It does not. An uplift of 10% is required, absent exceptional circumstances (see: section 31(4)), but any uplift between 10% and 50% is discretionary and must be justified as being just and equitable in all the circumstances. Further, it is plain, in our view, that the circumstances in question are those surrounding the failure to complete the statutory procedure. We agree with Mr Hogg that the Tribunal took irrelevant matters into account here in respect that they were, apparently, influenced in arriving at 40% by the fact the failures (i.e. not just the failure to complete the statutory procedure but the other failures identified by them) were “serious”, that the respondents are a large organisation, that there appeared to have been “no consultation whatsoever” and that they had treated this “long standing” employee in a “shoddy” manner. These matters should not have influenced the decision on uplift at all since they did not relate to any failure to complete the statutory procedure.

*Loss of earnings*

48. Finally, we agree that the Tribunal have failed adequately to explain how and why a further year's loss of earnings is justified in this case.

**Disposal**

49. In all the circumstances, we will pronounce an order upholding the appeal. The case will, thereafter, be remitted for a rehearing. We will remit to a freshly constituted Tribunal as we are readily satisfied that in all the circumstances, particularly that of the respondents' sense of grievance for which there seems to be some justification, it would not be appropriate to remit to the same Tribunal.