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Judgment: approved by the Court for handing down | *Delivered:* **05/06/07**
(subject to editorial corrections)

HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CARLSON WAGONLIT TRAVEL LIMITED

(Appellant-Respondent);

- v -

ROBERT CONNOR

(Respondent-Claimant).

Girvan LJ

The factual and evidential content

[1] The respondent Robert Connor ("Mr Connor") was employed by Mayfair Travel from August 1989. The business was sold to CWT Travel Limited, the appellant, ("CWT") in 1995 and the respondent's employment was transferred to CWT on 1 November 1995. He was employed as a branch manager. CWT is a world-wide travel management company. In September 2001 CWT employed 1,700 staff in 127 locations in the United Kingdom. Following a down-turn in business after the events of 9 September in the USA the appellant reduced its staff numbers to 1,216 in 41 locations in the United Kingdom. In May 2004 the appellant's Belfast office in Artola House was its only outlet in Ireland.

[2] A review of the Belfast operation was carried out in the light of a health and safety inspection of the premises which revealed serious electrical problems. On 22 March 2004 Mr Munday, the UK Director of Operations, informed the surveyor retained by the property department managing CWT's property throughout the United Kingdom that the Belfast office was to close and that he should take no further action in relation to seeking alternative

premises. The Country Management Committee ("the CMC") which had overall charge in the United Kingdom of CWT operations made the final decision on 30 March 2004 to close the operation and move it to its Glasgow office. CWT placed an advertisement for additional job vacancies available in Scotland as a result of this move.

[3] On 7 April 2004 Mr Hallan, the branch manager of the Glasgow office, informed Mr Connor of the decision to close the Belfast office with effect from 28 May 2004. Mr Connor was not previously aware of this possibility. On 8 April Mr Hallan and CWT's Human Resources Manger, Ms Francois, went to the Belfast office to announce to the rest of the staff the decision to close the Belfast operation at the end of May 2004 and to move the business to Glasgow. Ms Francois said that over the next few weeks the appellant would consider alternatives to the proposals. She mentioned the possibility that staff could transfer to other CWT locations. It was her view that it would not be practicable for staff to relocate.

[4] On 15 April 2004 Mr Hallan and Ms Francois returned to the Belfast office to meet with the staff individually. Staff refused to speak to Mr Hallan. Ms Francois met each member of staff individually. She gave each a letter of consultation dated 15 April 2004 and a draft compromise agreement. The letter confirmed that the appellant had decided to close the Belfast office as from 28 May when the employees would become redundant. The letter stated:

> "We are reviewing alternatives and as discussed will be pleased for you to consider relocation in any other office within CWT and we will look at vacancies that were available."

The letter set out the amount of notice, pay and redundancy payment of which each employee would be entitled if no alternative employment was available. Employees were advised by Ms Francois that they would be paid an ex gratia payment provided that they signed a compromise agreement. In Mr Connor's case the ex gratia payment was calculated as compensation for redundancy and notice pay and for loss of the use of a car. Ms Francois explained to Mr Connor that if the compromise agreement was signed this would enable CWT to pay the payment in lieu of notice without deductions of tax and national insurance. She explained that if the compromise agreement was signed the respondent would be precluded from taking legal action against CWT.

[5] In her one to one discussion with Mr Connor Ms Francois mentioned the possibility of transferring to other CWT locations. She advised that she could look at vacancies on the appellant's intranet and so called Jobs Flash. She did not however, discuss with him any specific post or location. She

could have provided him with a list of all the vacancies which CWT had available but she did not do so. She did not relay details of her discussions with Mr Connor to Mr Hallan. According to her evidence she was waiting for Mr Connor to come back to her to express an interest in transferring to a specific post of location in Glasgow or elsewhere but he did not do so.

[6] On 23 April 2006 Mr Connor attended a manager's meeting in Glasgow. He was then informed that several new members of staff had been identified to handle the Belfast business. None of these were Belfast employees.

[7] On 28 and 29 April Anna Keitch, a human resources consultant, attended the Belfast office to provide advice to staff in relation to areas such as job seeking options, producing CVs and interview techniques. The respondent refused to meet her to discuss his CV.

[8] The closure of the business was brought forward to 10 May but the effective date of termination was treated as 28 May 2004. The Belfast business transferred to Glasgow at the end of May. In April 2004 there had been available as specific vacancies in Glasgow the posts of a section manager, business travel consultant and a support and administration team. The position of section manager would have been the closest to the respondent's existing role though at a lower salary.

[9] The respondent took up employment on 24 May 2004 with another travel business in a lower paid position and with the loss of pension rights, private medical care, company car and one week's annual leave.

[10] The Tribunal concluded on the evidence that the respondent did not contact the appellant at any stage to inquire what vacancies might have been available.

[11] Under CWT's redundancy policy redundancy was viewed as the last resort and every opportunity would be taken to find a suitable alternative employment. It provided that the company would carry out reasonable consultation with all individuals concerned. It would endeavour to find suitable alternative employment. If no such alternative employment was available the redundancy would be served. Staff members were encouraged to look at other options during this period and raise any suggestions to their manager. A suitable alternative position was deemed to be one that carried the same salary level and was within reasonable travelling distance from home or place of work.

[12] Between March and July 2004 the appellant closed a number of other offices in Great Britain. In those cases there were meetings with employees at which Ms Francois would explain to the person concerned that they could

transfer to new locations of the business or apply for other vacancies within the company. If the employee expressed an interest in alternative employment the meeting would move to the stage of working out the transfer details such as wage increase to compensate for increased travel cost, terms and conditions and job specifications in respect of the new posts, trial periods and so forth. The package offered would vary depending on the individual circumstances of the employee.

The Tribunal's conclusions

[13] The Tribunal reached the following conclusions:-

(a) Mr Connor was dismissed by reason of redundancy. The redundancy arose out of the closure of the Belfast office and the transfer of the business to Glasgow.

(b) having regard to the circumstances including its size and resources CWT did not act reasonably in treating the redundancy as a sufficient reason for dismissing the respondent; and

(c) in the circumstances Mr Connor was unfairly dismissed.

[14] In reaching its conclusion that CWT did not act reasonably the Tribunal took into account the following matters:-

(a) CWT did not adhere to the standards of behaviour expected of a reasonable employer.

(b) CWT acted unreasonably in holding out to Mr Connor and other Belfast employees that it would consider alternatives to the closure of the Belfast office, that decision having already been made and there being no possibility of meaningful consultation on that issue.

(c) if CWT genuinely wished to consider an alternative to closure it acted unfairly in not consulting with the respondent at an earlier stage;

(d) Mr Connor was not offered suitable alternative employment in circumstances where there were suitable vacancies for him and he had expressed an interest in relocation. While there was no vacancy for branch managers at that time CWT should not have assumed that Mr Connor would not have been willing to relocate and to consider posts less well paid and with lesser responsibility; and

(e) CWT by its actions and attitude discouraged the respondent from actively following up vacancies.

[15] The Tribunal concluded that it was just and equitable to award Mr Connor compensation for losses arising out of his dismissal. It considered that Mr Connor had established on a balance of probability that if he had been given sufficient particulars of alternative employment and an available relocation package he would have accepted another position with the appellant at another location. The Tribunal accepted the evidence of Mr Connor that if he had been offered an alternative job he "would have been crazy not to accept it" as his new salary was £6,000 less and he had fewer benefits than in his job with CWT.

The questions posed in the case stated

[16] The questions posed by the Tribunal in the case stated are as follows:-

(1) On the evidence before it both oral and documentary, did the Tribunal err in law and reach a conclusion that no reasonable Tribunal could have reached in deciding that the respondent had been unfairly dismissed?

(2) On the evidence before it, both oral and documentary, did the Tribunal err in law and reach a conclusion which no reasonable Tribunal could have reached in deciding that the appellant had failed to consult adequately with the respondent?

(3) On the evidence before it, both oral and documentary, did the Tribunal err in law and reach a conclusion which no reasonable Tribunal could have reached in deciding that the appellant had failed to offer the respondent suitable alternative employment and, therefore, dismissed him unfairly?

(4) On the evidence before it, both oral and documentary, did the Tribunal err in law and reach a conclusion which no reasonable Tribunal could have reached in deciding that the respondent could have accepted another position at another location without identifying either the position or location.

The statutory provisions

[17] The relevant statutory provision is to be found in Article 130 of the Employment Rights (Northern Ireland) Order –

130 (1) determining for the purposes of this Part whether the dismissal of 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.

(2) A reason falls within this paragraph if it –

(c) is that the employee was redundant, or

(3) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair)having regard to the reason shown by the employer) –

(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.

(4) Where the employee is taken to be dismissed for the purposes of this Part by virtue of Article 128, Paragraph (4)(a) applies as if for the words "acted reasonably" onwards there were substituted the words "would have been acting reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee if she had not been absent from work, and".

(5) Paragraphs (3) and (4) are subject to Articles 131 to 139 and 144.

[18] Article 174 of the Order provides:-

(1) For the purposes of this order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(ii) to carry on that business in the place where the employee was so employed.

(6) In Paragraph (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

The arguments

[19] Mr O'Hara QC who appeared with Mr Mulqueen on behalf of CWT argued that no reasonable tribunal could have decided that Mr Connor was unfairly dismissed. There was no factual basis for the finding that Mr Connor would have accepted employment else where if he had been offered it. CWT did offer to consult with Mr Connor but he declined to consult indicating that he was seeking alternative employment in Northern Ireland. Mr Connor had been made aware of the possibility of moving to other CWT locations, of vacancies on the intranet and existence of Jobs Flash which notified employees by regular email of existing vacancies. Mr Connor failed to identify any particular location in which he would consider working. Counsel relied in particular on Whittle v. Parity Training Limited EAT/0573/02SM. There was nothing to suggest that earlier consultation would have prevented redundancy in the circumstances. Mr Connor had stated that he would think about transferring but had to discuss with his partner but he did not return to CWT to indicate a desire to transfer to another CWT location. The Tribunal was wrong to conclude that CWT was putting the onus on Mr Connor to find alternative employment within the CWT organisation. It failed to give consideration to Mr Connor's managerial status and responsibility in being proactive in sourcing alternative employment. Mr Connor never indicated that he would be interested in a subordinate position. CWT's redundancy policy stated that during the consultation period the company would endeavour to find suitable alternative employment but suitable alternative employment was one that carried the same salary level and was within a reasonable travelling distance from his home or place of work. No such suitable alternative position existed for Mr Connor in Northern Ireland. He did not at any point consider his willingness to leave Northern Ireland to take up such a position. Mr Connor in fact informed Miss Keitch that he was seeking alternative employment in Northern Ireland and was meeting Mr Scott of Selective Travel on 29 April 2004. He commenced employment with Selective Travel on 24 May 2004.

[20] Mr Wolfe on behalf of Mr Connor stressed that in a number of significant respects CWT failed to follow the terms of the LRA Code of Practice in redundancy consultation and procedures. The code pointed to the need for meaningful consultation about avoiding dismissals, reducing the numbers of employees to be dismissed and investigating the consequences of the dismissal. (Paragraph 12 page 6 of the Code). Employers should ensure

that all employees are made aware of the contents of any agreed procedure and of the opportunity available for consultation and making representations. (Paragraph 21 page 8). Good employment relation practice required discussion during the consultation process of arrangements for travel, removal and related expenses where work is offered in a different location. (Paragraph 22 page 8). Employers should consider whether employees can be offered suitable alternative work. When such work is available within the employers own organisation or with an associated company the employee should be given sufficient details to enable him or her to decide whether to accept it or not. Any offer whether in writing or not should be put to the employee even where the employer believes that it will be rejected. The offer must be made before employment under the previous contract ends. The offer must be for the new job to start either immediately after the end of the old job or after an interval of not more than four weeks. An employee who unreasonably refuses an offer of suitable alternative work may lose entitlement to redundancy pay. (Paragraph 3.7 page 13).

[21] Mr Wolfe contended that the question whether a dismissal is fair is a question of fact for the industrial tribunal. Tribunals have a wide latitude to determine cases on questions of fact. The evidence and findings of fact in the Tribunal's decision provide a strong basis for the Tribunal's decision. There was ample evidence to support the Tribunal's conclusions. The Tribunal was plainly unimpressed with the approach adopted by CWT with regard to its responsibility to take reasonable steps to avoid compulsory redundancies to identify for the claimant suitable alternative employment within the organisation.

Conclusions

[22] An employee's claim that his dismissal for redundancy is unfair is one tier of a three tiered set of legal rights that attempts to regulate managerial decisions about redundancies. The other two are the law of redundancy payments and the law of consultation with trade unions over the handling of redundancies. There is some overlap between the three. In order for an employee to claim that he was unfairly dismissed for redundancy he must have been dismissed for redundancy. One of the factors in the test of the reasonableness of the employer's decision to dismiss an employee for redundancy is whether an employee has consulted with a recognised trade union. Where an employer has successfully shown than an employee has been dismissed for redundancy an employee may be able to complain that the redundancy was an unfair dismissal on the ground that it was unreasonable under Article 130.

[23] In Polkey v. AE Dayton Services Limited [1987] IRLR 50 Lord Bridge set out a general guideline that in cases of redundancy dismissal an employer would generally not act reasonably unless he warns and consults any

employees affected or their representatives, adopts a fair basis to select employees for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. The Tribunal acting as an industrial jury must take everything into account subject only to an appeal on a matter of law. In Bessenden Properties Limited v. Corness [1977] IRLR 338 Roskill LJ stated –

> "It may be hard on employers in the embarrassing situation in which the employer found himself in this case to have the matter so largely removed out of their control and left to the discretion of the so-called industrial jury. But once the case falls within the section then the tribunal is entitled to take everything into account."

In Vokes Limited v. Bear [1973] IRLR 362 the NIRC indicated that in the circumstances which an employment tribunal should take into account should not be limited in scope but should "embrace all relevant matters that should weigh with the good employer when deciding whether he should dismiss his employee." In exercising its discretion the Tribunal must apply the standard of the reasonable employer judged by "the objective standard of the way in which a reasonable employer in the circumstances in the relevant line of business would have behaved." (See BL Cars Limited v. Lewis [1983] IRLR 58.) The reasonableness of the employer's decision must be judged on the basis of whether the action fell within the range of reasonable responses of employers generally. (NC Watling & Co Limited v. Richardson [1978] ICR 1049).

[24] Tribunals and appellant courts have developed three main heads on which dismissal for redundancy could be regarded as unreasonable:

(i) where the employer's method of selection as between comparable employees was unreasonable;
(ii) where the employer failed to adopt a proper procedure of warning and consultation; and
(iii) where the employer failed to make reasonable efforts and look for alternative employment before declaring the employee redundant.

While courts are slow to question an employer's assessment of the needs of the business to declare redundancies they have accepted that a reasonableness test can be applied to the employer's criteria for selection and to the way that they have been applied.

[25] In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary

to the evidence; or the decision was perverse in the sense that no reasonable tribunal properly directing itself could have reached such a decision.

[26] Since CWT was dismissing all its employees in its Belfast operation and was closing that business down no question arises in relation to the method of selecting individual employees for dismissal on the grounds of redundancy. The Tribunal reached its conclusions on the inadequacy of the consultation process and in relation to the failure to make efforts to find alternative employment before declaring the employee redundant. In approaching those issues the case stated in paragraph 7 makes clear that the Tribunal was seeking to decide the issue by applying the proper question, namely whether CWT acted as a reasonable employer should have done in the circumstances.

[27] In Grundy (Teddington) Limited v. Plummer [1983] IRLR 503 the EAT said –

> "In the particular sphere of redundancy good industrial practice in the ordinary case requires consultation with the redundant employees so that the employer may find out whether the needs of the business can be met in some other way than by dismissal and if not what other steps the employer can take to ameliorate the blow to the employee."

In William v. Compare Maxam Limited [1982] ICR 156 the EAT, in the context of the employer recognising an independent union, said that an employer will seek to give as much warning as possible of impending redundancies so as to enable the employees affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary find alternative employment in the undertaking or elsewhere. A failure to follow a procedure prescribed in the Code may lead to the conclusion that the dismissal was unfair when, if the procedure had been followed, would have been held to have been fair (see Earl v. Slater and Wheeler (Airlyne) Limited [1973] 1 WLR 51 approved by Lord Dilhorne in W Devis & Sons Limited v. Atkins [1977] AC 931 at 953).

[28] The Director of Operations UK was informed of the wiring problems on 27 February 2004. On 18 March 2004 the property department surveyor was asked to make enquiries about the availability of alternative office space in Belfast. Although Invest NI had been keen to consider an application for assistance, on 22 March Mr Munday advised him that the Belfast office was to close and that no further steps should be taken to seek alternative employment. On 30 March the CMC made the final decision to close and move the business to Glasgow and job vacancies were advertised on the Travel Weekly internet site on 5 April 2005. On 7 April Mr Connor was informed and the rest of the staff were informed the next day. There had been no prior discussion, warning

or consultation. The Tribunal's conclusion that there was no meaningful consultation on the alternative to closure was a conclusion the Tribunal was fully entitled to make on the evidence.

[29] The issue of the inadequacy of the consultation process is not a distinct issue which can be viewed separately from the central issue which led the Tribunal to its ultimate conclusion, namely the failure to make reasonable efforts to look for alternative employment for Mr Connor before declaring him redundant. The duty to consult relates not merely to the question of the closure of the Belfast office and the need to close it but also, as was said in Grundy (Teddington) Limited v. Plummer, relates to consultation on the steps that could have been taken to ameliorate the blow to the employee. In Vokes Limited v. Bear (1974) ICR 1 the NIRC categorised a redundancy as unfair on the grounds that the employer had failed to investigate whether there were job vacancies within the group which might have been offered to the employer as an alternative to being made redundant. In that case as the NIRC put it thus:

> "The employer had not done that which in all fairness and reason he should do namely to make the obvious attempt to see if an employee could be placed somewhere else within this large group".

In Modern Inspection Moulding Limited v. Price [1976] ICR 370 Phillips J said –

> "Inasmuch as there is an obligation on the part of the employers to try to find suitable alternative employment within the firm it must follow that they are in a position pursuant to the obligation to make an offer to the employee of suitable alternative employment that they give him sufficient information on the basis of which the employee can make a realistic decision whether to take the new job".

[30] The respective roles and functions of the employer and the employee in considering alternative deployment within a large organisation have been the subject of various decisions not all of which are fully reconcilable except by remembering that the Tribunal concerned must decide the individual case on its own factual matrix. In Thomas and Betts Manufacturing Limited v. Harding [1980] IRLR 255 Eveleigh LJ and Browne LJ stressed that appellant courts should be slow to allow what are essentially questions of fact to be dressed up as questions of law. Eveleigh LJ deprecated –

> "the attempts that are made in industrial relations cases to spell out a question of law developed upon precedent to create rules that have been applied by

> the industrial tribunals in considering a straightforward question of fact".

Namely the question whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason having regard to equity and the substantial merits of the case. In some cases courts have considered that an employer has not acted unreasonably in failing to consider the possibility of offering employment in a subordinate post to the employee (see Barrett Construction Limited v. Dalrymple [1984] IRLR 385). In others (for example Thomas and Betts Manufacturing Co Limited v. Harding [1980] IRLR 255) the Court of Appeal has endorsed the wide discretion of tribunals by rejecting the argument that the investigation of the possibility for alternative employment must be limited to the section of the business in which the individual was employed. While the case law shows that the range of reasonable responses test places some limits on a tribunal's determination of what is reasonable, nevertheless the tribunal must have regard to all the surrounding circumstances. In appropriate cases the tribunal may require a higher standard of a reasonable employer to offer long standing and more senior employees an opportunity of alternative employment. By the same token more senior employees in many instances can be expected to be more pro active in their own interest than more junior staff might be expected to be (see Whittle). However, as has been read in cases in other fields "context is everything."

[31] The Tribunal's decision in the present instance must be seen in the overall context of the actions of an employer which decided to close the Belfast office without any proper or real consultation. It failed to understand or apply the LRA guidelines. CWT made no effort to consider redeployment of the applicant in a manner tailored to Mr Connor's particular needs or status. It effectively threw the onus on Mr Connor to consider his own options without meaningful input on the part of the employer. All this was happening in a tight timetable in a context where there had been no consultation or prior discussion of the impending problems leading to the closure of the Belfast business. After the letter of 15 April 2005 and the meeting with Ms Francois (at which on the evidence as found by the Tribunal said that he would think of transferring) the employer left it to Mr Connor to come back with ideas and, thus, it did not proactively pursue the question of a fair and reasonable redeployment package for the applicant within its large organisation. By 23 April the jobs in Glasgow had been allocated disregarding the moral claims the Belfast employees had for consideration as redeployed employees. In Whittle v. Parity Training Limited at paragraph 25 the Tribunal said that the further up the ladder of authority an employee goes the more a reasonable employer is entitled to expect something of a more pro-active approach once the opportunity of consultation is given. The critical factors are, first, the opportunity of consultation and secondly the fact that the employer in that instance had looked at the possibility of redeployment in the company or within the associated company. The tribunal in that case concluded that the

employers had taken reasonable steps to find the applicant alternative employment by considering alternative solutions within the group and there were no suitable alternatives available. The positions which the applicant identified were reasonably treated by the respondent as not being suitable in view of the fact that at no stage did the applicant indicate to his employers that he might accept a subordinate position. Although, as was found by the Tribunal the applicant had at the meeting in April 2005 given an indication that he would think of transferring CWT took no steps to identify any particular suitable post or suitable package in relation to any subordinate post. In the context of the redeployment of the business to Glasgow it made no effort to engage the Belfast workers with a view to relocation or redeployment in Glasgow. In these circumstances the employer did not endeavour to identify suitable alternative employment. While there is force in the point that an employee carries a responsibility to meaningfully consult on his role and to be pro-active it is a question of fact and degree in every case whether the employer has done what is reasonable, in light of all the circumstances and in the light of the employee's and employer's attitude and conduct. Here the Tribunal formed a view which could not be said to be perverse or lacking an evidential basis. Accordingly, we would answer no to each of the questions raised in the case stated and dismiss the appeal.