Case Numbers: 3201300/2018 & 3201318/2018 & 3201326/2018
3201327/2018 & 3201328/2018 & 3201329/2018 & 3201230/2018
3201231/2018 & 3201232/2018 & 3201233/2018 & 3201234/2018
3201235/2018 & 3201236/2018 & 3201237/2018 & 3201238/2018
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3201247/2018 & 3201248/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Wilmott & Others**

Respondents: **(1) Car Carrying Limited in Liquidation**
(2) Secretary of State for Business Energy and Industrial Strategy

Heard at: **East London Hearing Centre**

On: **8 November 2018**

Before: **Employment Judge Russell**
Members: **Mr G Tomey**
Mr P Lush

Representation
Claimants: **In person**
1st Respondent: **Not represented, did not attend**
2nd Respondent: **Written representation**

JUDGMENT

The Judgment of the Employment Tribunal is that:

(1) **Each of the Claimants was unfairly dismissed, with the exception of Mr Ahern and Mr Feliciano whose claims the Tribunal lacked jurisdiction to hear as they did not have two completed years of service.**

(2) **If a fair procedure had been followed termination would have occurred within two weeks. All Claimants other than Mr Ahern and Mr Feliciano are awarded compensation of two weeks' pay.**

(3) **The Tribunal makes a protective award in favour of each of the Claimants in the maximum sum of 30 days' pay.**

(4) **The claims for redundancy pay and notice pay are dismissed upon withdrawal as the sums due have already been paid by the Second Respondent.**

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REASONS

1 By claim forms presented to the Tribunal on 22 June 2018 (Mr Pick), 26 June 2018 (Mr Currie) and 27 June 2018 (all other Claimants), the Claimants bring complaints of unfair dismissal, failure to pay notice, redundancy payments and/or a protective award arising out of the termination of their employment by the First Respondent, a small family run business. Each of the Claimants was a driver collecting and delivering motor vehicles on trade plates.

2 A schedule provided by Mr Wilmot identifies each of the drivers by name and their employee number. These run in sequential order. Mr Feeney (number 1945) had been continuously employed for two years and two months by the date of termination. All of the Claimants in these claims with the exception of Mr Ahern and Mr Feliciano have an employee number denoting longer service than Mr Feeney. By contrast, Mr Ahern is number 1970 and Mr Feliciano 1973. In the absence of any evidence to the contrary, the Tribunal infer that they had less than two years continuous' service at the effective date of termination. As such the Tribunal does not have jurisdiction to hear their unfair dismissal complaints.

If Mr Ahern or Mr Feliciano believe that they did have the required service, they must send in appropriate evidence to the Tribunal within 14 days of the date on which this Judgment is sent to the parties.

Findings of Fact

3 On 29 March 2018 the drivers received a telephone call from Mr Andrew Glander, a manager at the First Respondent and son of its owner, informing them that it would be their last working day as the company was closing. Thirty-one drivers were affected. By letter dated 5 April 2018, the First Respondent confirmed that it had ceased trading on 29 March 2018. The drivers were asked to return all company property and outstanding paperwork as soon as possible to generate their final pay statement and payment. The effective date of termination is confirmed as 29 March 2018.

4 We accept Mr Wilmott's evidence (on behalf of all of the Claimants) that this had come as a total surprise to him and his colleagues. There had been no previous warning that the First Respondent was considering whether it should be wound up and cease trading. Moreover, Mr Feeney told us today that even Mr Andrew Glander and Ms Leia Glander claimed on the 29 March 2018 to have previously been unaware of a proposed closure. It follows that each of the Claimants was dismissed with immediate effect without having had any prior warning of possible redundancy or the benefit of any consultation period.

5 The First Respondent failed to pay to the Claimants the sums due in respect of notice or redundancy pay. The Claimants made applications for payment to the Second

Respondent which has paid all sums due for notice and redundancy payments.

6 If any Claimant not present today has not received such payments, they must send in appropriate evidence to the Tribunal within 14 days of the date on which this Judgment is sent to the parties.

7 At appendix 4 to his statement, Mr Wilmot has produced an extract from a statement of the First Respondent's financial affairs. This confirms that at a Board meeting on 13 June 2018 an insolvency practitioner was instructed to commence the winding up process. In the section headed "History of the Business", the report records that in 2018 the directors looked to wind the company down due to a change in personal circumstances and a reduction in profitability. As March had typically been a very busy month for the business due to the release of new number plates, it was the directors' intention to trade through March and generate sufficient profit to settle all of its creditors and strike the company off. From this, it is clear that redundancies were contemplated well in advance of the 29 March 2018. When contemplating a cessation of trading at the end of March and winding up, it must have been clear to those running the First Respondent that their employees were at risk of redundancy. Had the directors of the First Respondent complied properly with their employment law obligations, an "at risk" warning and consultation period should have commenced once this decision was taken. It did not.

8 Section 188(1) and (1A) of the 1992 Trade Union and Labour Relations (Consolidation) Act set out an obligation for collective consultation in certain circumstances. Namely, where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals with the representatives of the employees who may be affected. In the absence of appropriate representatives, the obligation is to consult with the affected employee's directly. The consultation must begin at least 30 days before the first dismissal takes effect where (as here) there are over 20 but fewer than 100 affected employees.

9 In *Susie Radin Ltd v GMB & Others* [2004] EWCA Civ 180, the Court of Appeal made clear that in a claim for a protective award, the starting point is the maximum period of consultation. The Tribunal must then consider whether and to what extent any consultation took place and for what period of time it is just and equitable to make a protective award.

10 Having regard to our findings of fact above, it is clear that there was no consultation with the Claimants who were all affected employees. There was indeed no effort by the First Respondent to warn or deal appropriately with its drivers at all. It was known to the directors of the First Respondent earlier in 2018 (and certainly before the start of March) that it would trade through March and then close down. This is consistent with the telephone calls terminating the employment of all drivers on 29 March 2018. From the chronology and the 'out of the blue' nature of the dismissals, the Tribunal concludes that there was a deliberate decision by those running the First Respondent not

to tell the drivers and, therefore, a wilful refusal to comply with the consultation obligations in s.188(1) and 1(A). In such circumstances, we are satisfied that it is appropriate to award each Claimant the full amount of 30 days for the protective award period.

11 We went on to consider what awards should be made for the Claimants who were unfairly dismissed. There is no basic award as redundancy payments have already been paid by the Second Respondent.

12 In calculating compensation for loss of earnings pursuant to section 123 of the Employment Rights Act 1996, we took into account the closure of the business on 29 March 2018. This had already been decided and even if there had been a consultation period, we are satisfied that there is a 100% chance that each of the Claimants would have been made redundant in any event as there was no business left for them to work for. For these reasons, the compensatory award is limited to the period of time it have taken for the First Respondent to have carried out a fair redundancy procedure.

13 Taking into account the modest size of the First Respondent, its limited administrative resources and the number of drivers award involved, we are satisfied that a fair procedure could have been completed in two weeks. Each of the Claimants other than Mr Ahern and Mr Feliciano is therefore awarded two weeks' pay as compensation for unfair dismissal.

14 Not all of the Claimants are present today and not all of them have provided Schedules of Loss with supporting evidence. It is necessary to calculate the precise sums due to each Claimant, based upon their net pay prior to dismissal.

Within 14 days of this Judgment being sent to the parties, each Claimant must provide to the Tribunal a statement of the amounts claimed in respect of: (i) the 30 day consultation period and (ii) two weeks' net loss of earnings. The evidence required to support their claim is the most recent three months' payslips or, if payslips are not available, their P60. In the event that they failed to comply with this Order, the Remedy Judgment will be that they are not entitled to any payment.

15 The paragraphs set out in bold and underlined are Case Management Orders of the Tribunal made pursuant to the Employment Tribunal Rules of Procedure 2013.

Employment Judge Russell

14 November 2018