EMPLOYMENT TRIBUNALS

Claimant: **Mr. Gareth Williams**

Respondent: **Mr. David Jones and Gary Jones a partnership trading under the name of D Jones and Sons**

Heard at: **Mold** **On: 6 and 7 February 2019**

Before: **Employment Judge R Powell (sitting alone)**

Representation:
Claimant: Mr. Wayne Williams
Respondent: Mr. Gary Jones

JUDGMENT having been sent to the parties on 14 February and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. This case concerns four core issues:

2. Whether or not the Respondent unfairly dismissed the Claimant.

3. Whether or not the Respondent failed to provide sufficient consultation prior to the dismissal of the Claimant on 16th December 2017 and thereby acted in breach of sections 188 and 189 of the Trade Union and Labour Relations (Consolidation) Act 1992.

4. Whether the Respondent failed to pay one week's net wages to the Claimant and thereby made an unlawful deduction from the Claimant's wage in breach of section 13 of the Employment Rights Act 1996.

5. Whether or not the Respondent failed to provide the Claimant with a written statement of the terms and conditions of his employment in accordance with sections 1 – 4 of the Employment Rights Act 1996.

1. Of these, the unfair dismissal and protective award complaints have been the main focus of the parties' interest. Their approach to the preparation and presentation of their respective cases has reflected their proportionate approach.

2. I note that the claim form pleaded two other claims; the first was for a redundancy payment and the second was a breach of contract claim in respect of notice pay. I understand from Mr. Wayne Williams, the Claimant's son, that those two payments have been received and those two claims are thereby withdrawn and, by consent, I dismiss them.

Agreed Facts

3. Dealing with the four live claims, there was a good deal of agreement between the parties. Based on their agreement I find the following:

4. The Respondent's business ceased to trade after 16 December 2017.

5. The Claimant was dismissed without notice on 16 December 2017.

6. The reason for the Claimant's dismissal was redundancy.

7. There was no consultation with the Claimant, or his colleagues, prior to the decision to dismiss.

8. At the relevant time 20 or more of the Respondent's staff were under consideration for potential dismissal.

9. The above agreed facts have led, for both the unfair dismissal and protective award claims, to a focus on the Respondent's conduct and its reasoning for its actions or inactions.

Findings of fact about matters which were not agreed

10. I have heard evidence from Mr. G Jones and Mr. D Jones who were both cross-examined by Mr. Wayne Williams on behalf of his father. I have heard evidence from Mr. G Williams who was cross examined by Mr. G Jones. I have had the opportunity to consider a bundle of papers which, with some additional papers, are now close to 200 pages. I have been taken to the relevant pages in the bundle by the parties. There are a good number of text messages, WhatsApp messages, examples of duty rosters,

and advertisements which were presented as corroboration of some aspects of both parties' evidence. As is often the case, a substantial proportion of the documentary evidence was not central to the determination of the case.

The Character and relevant history of the Respondent's business

11. I have had the benefit of hearing from Mr. D Jones who founded the Respondent's business. This was a small transport company which had been established some 40 years ago and, at some time after its inception, Mr. G Jones joined the business. During the 30 years of his participation he gradually became manager of all of the Respondent's operations whilst his father continued to have oversight of the financial side of the business. Much more recently a third generation of the family, Mr. G Jones' son, joined the business. He resigned in September 2017.

12. The Respondent operated a number of bus routes in North East Wales and its environs and employed a good number of staff principally to drive the buses. The Claimant, Mr. Gareth Williams, joined the Respondent on the 1 April 2007. He continued employment until his dismissal in December 2017. The Respondent and the Claimant had a satisfactory relationship throughout, or at least until16 December 2017, when he, along with the other employees, was dismissed.

13. Turning now to the more contentious elements of the evidence.

14. The Respondent, according to the evidence of Mr. G Jones which, in this respect I accept, had been successful in business. Upon the closure of a competitor bus company, a number of contracts (essentially additional bus routes and services) became available. The Respondent was invited to take on these routes. The decision was made to undertake that work and extra staff were taken on albeit that some of those staff that had come from the previous employer who had operated those routes.

15. The description in the ET3, confirmed in evidence by Mr. Jones and Mr. David Jones was as follows:

"the expansion did not run smoothly and there were difficulties with some drivers which led to pressures on Gary Jones to staff the timetables and undertake some driving himself. An example would be if a requested holiday could not be accommodated because of the lack of cover of a driver or then the driver would go off sick. Ultimately a grouping of drivers developed who were very negative about the business and the management and would seek to effect more loyal and productive drivers, this disruption and negativity led to good drivers leaving so putting the timetables under further pressure. The difficulties in keeping the timetable

staffed increased by the news that Gary Jones heard in early November that 5 of the drivers had applied to work for a major regional bus company."

16. Mr. D Jones stated that the early November news of five further drivers intending to leave, was effectively a death knell to the Respondent's belief that it had any realistic prospect of continuing to serve all of its contractual obligations effectively.

17. It would have been around that time, based on Mr. D Jones' evidence, that he went to see the Respondent's accountant to seek legal advice about the potential closure of the business. The advice from the accountant led the Respondent to understand that there would be potential liabilities to staff who were dismissed in respect of redundancy and notice pay. No advice was received from the accountant of the risks that might occur if there was a failure to undertake consultation.

18. In the period into November 2017 Mr. G Jones' health deteriorated as set out in his statement, noted in the ET3 and corroborated on page 69 of the bundle which refers to Mr. G Jones suffering from left hand chest pains albeit the doctor's opinion was they were not related to his heart at that time. Nevertheless, the doctor's note corroborates Mr. G Jones's evidence before me that the task of trying to manage the staffing rotas, covering the driving for absent drivers and dealing with all the related matters of running a bus company were causing him increasing levels of stress.

19. The Respondent's managerial efforts in November through to 16 December did not achieve improvement in the number of staff who made themselves available for vacant shifts, there had been no success in recruiting staff to fill vacancies and there had not been any success in managing to recruit any assistant manager to replace the role made vacant by Mr. G Jones's son.

20. In these circumstances a decision was made to cease trading altogether. That decision was communicated to the Local Authority (on whose behalf the Respondent operated the public bus routes) on 15 December 2017. The Respondent asked the Council not to make the matter public until it had spoken to its staff which they intended to do the next day. Unfortunately for the Respondent, and for its employees, the Local Authority published the cessation of the Respondent's provision of services so that those members of the public who depended upon the bus services would have as much notice as possible.

21. This information was quickly disseminated through the community. So much so that the Respondent's drivers first knowledge of the Respondent's decision came from passengers or through social media

sources. By the time the Respondent met with its drivers in the early evening of 16 December a good number of the staff were already aware of the decision.

22. . I have seen a transcript of the meeting, which is not significantly disputed between the parties, it shows that the purpose of the meeting conveyed the decision to dismiss all employee.

23. There was a letter provided to the staff which I have also seen at page 62 in the bundle, again it is set out in short terms to what had been done and why from the Respondent's view the decision had been made. It reads:

"As you were aware, we were experiencing ongoing driver issues and also staff shortages resulting in us not being able to fulfill our contracts and provide transport for our customers. A decision we did not think we would ever have to make however due to ill-health brought on by the stress and pressure of operating a business it is of all our best interests to cease trading"

24. The letter goes on to say that staff's "week in hand" pay would be given to them on 21 December along with any outstanding holiday pay, notice pay entitlement was being calculated for later payment.

25. In cross-examination questions were put as to why the Respondent had not discussed the issue of potential dismissals and the termination of the business prior to the decision being communicated on 16th December 2017.

26. Mr. G Jones gave three reasons: his health, the pressure of work and a desire not to put people on notice because those who were planning to leave, or who were minded to damage the company, would be likely to leave earlier and/or cause greater disruption to the Respondent's business in its closing period. Mr. Jones latter stated another reason was the Respondent's opinion that there was no realistic prospect of recruiting additional confident and reliable staff, nor was there reasonable prospect of recruiting a suitable assistant manager to share the load with Mr. G Jones.

27. I have set out additional findings of fact in my analysis.

28. It will be noted that in respect of the unlawful deduction of one week's pay I have not cited any evidence or made any findings of fact.

29. There has been no evidence put before me to establish the alleged deduction. It was not mentioned in Mr. G Williams's evidence; no documentary evidence has been identified and the Respondent's

witnesses were not challenged on this issue. All I have in evidence before me is Mr. G Jones's denial.

Analysis and Conclusions

An Unlawful Deduction from Wages

30. I have considered sections 13, 14 and 27 of the Employment Rights Act 1996.

31. I bear in mind that in relation to an unlawful deduction the burden rests on the Claimant to prove that which was "properly payable" and the alleged deduction.

32. As I have noted, the Claimant has not given direct oral evidence nor have I been referred to any documentation which could amount to a factual foundation for a conclusion that the Respondent had failed to make a payment which was properly payable. The Respondent has denied the claim; a denial which was not challenged.

33. Applying the civil burden of proof, there has been insufficient evidence to prove a deduction.

34. I therefore find that this claim is not well founded.

Section 1-4 of the Employment Rights Act 1996; A statement of Terms & Conditions

35. It is an undisputed matter of fact that in 2009 the Claimant signed a contract, and signed an "opt out" from the Working Time Regulations 48 hour week.

36. Initially the Claimant's case had been that there had been no contract at all, that was plainly not correct given he confirmed the signature on the Respondent's copy of the 2009 contract was his own. I am not concerned as to the Claimant's honesty, but I accept the submission made by the Respondent that if the Claimant was less than capable of recalling he had signed a contract in 2009 he might also be unreliable in recalling whether he had received a copy of the document. The Respondent's evidence from Mr. G Jones was that he had done so.

37. I am also cautious to note that, in dealing with an issue that is a little over 8 years in the past, it would be particularly difficult for the Respondent, a family firm without a practice of documenting all communications with

employees, to “prove the negative”. In those circumstances, I also further bear in mind that the Claimant bears the burden of proving the facts.

38. I think it more likely than not that the Claimant’s recollection is at fault and that given he had definitely signed a contract in 2009 it is more likely than not that he received a copy of that contract. In those circumstances I find that the claim is not well founded and is dismissed.

Unfair Dismissal

39. The parties agree that the Claimant was dismissed and that he was dismissed for a potentially fair reason; redundancy. The Claimant has received his notice pay and statutory redundancy pay. The parties also agree that there was no consultation with the Claimant prior to the decision to dismiss him.

40. The Claimant’s case is that meaningful consultation might have avoided dismissal; he seeks compensation based on that premise; that he would still be employed at the date of this hearing if the Respondent had consulted with the Claimant and his colleagues.

41. The Respondent’s case is that consolation would have made no difference; the Claimant would have been dismissed in any event because the Respondent decided to cease trading altogether.

42. The case of ***Williams -v- Compair Maxam*** Ltd [1982] I.C.R. 156 sets out guidance for the Employment Tribunal and employers on the reasonable conduct of consultation in a redundancy process. It sets out five stages, not all of these will be relevant in every case. The first is that there should be consultation prior to any decision to make redundancies to allow representations upon the possible ways by which the impact of redundancy might be avoided or mitigated. There should be, where there are trade unions, consultation with the unions and in the alternative group consultation with the employees. Thereafter, there should be consultation with individual employees about selection criteria and their personal circumstances. Thereafter for those employees who are selected as provisionally redundant, there should be further consultation of consideration of suitable alternative employment or trying to manage the business in a way which reduces the number of employees put at risk or actually made redundant.

43. In this case none of the steps relevant to this small employer (who did not recognise a trade union for collective consultation purposes) were taken. It is also relevant to note that the Respondent was under a formal legal duty

to consult with the employees in accordance with Section 188 of TULR(C)A 1992.

44. The procedural steps are identified by the case law and statute noted above are, save in exceptional cases, fundamental aspect of the reasonable response of an employer.

45. An employer can of course argue that the there was, in all the circumstances of the particular case, no requirement to consult or perhaps, that consultation would have been utterly futile. The latter argument is essentially the Respondent's case.

46. In determining this issue I follow the guidance given by the Employment Appeal Tribunal in the case of **Poat v Holiday Inn Worldwide** [1994] UKEAT 883:

"What the Tribunal has to do is not to ask "would it have made any difference if the employer had consulted?" but say to itself, "Could the employer, in the circumstances, reasonably have concluded at the time when he reached his decision that it would be utterly futile or utterly pointless to engage in consultation?"

47. I have reached the conclusion that the Respondent could not have reasonably concluded that consultation would be utterly futile. I have reached this for two discrete reasons.

48. In this case the Respondent could not reasonably consider failing to comply with a statutory duty (and thereby expose the Respondent to the risk of litigation and possible punitive awards for failure to comply) was a reasonable response or a futile exercise.

49.

50. Independently from the above, the Respondent could not reasonably have considered that consulting with the employees, and alerting them to their impending dismissal, might not have had a salutatory effect on those who were perceived to be willfully unreliable. Nor could it reasonable believe that consultation could not have generated some positive mitigation of the problems, if not a complete solution.

51. In this case Mr. Wayne Williams during his cross examination of the Respondent's witnesses identified suggestions which might, in early November 2017, have altered the Respondent's intended total cessation of the business and thereby reduced the number of redundancies. I will paraphrase some of them thus;

(1) was it necessary to give up all the contracts when the business might have maintained some of the new contracts?

(2) Could the business not have given up all the “new“ contracts and returned to its previous stable and manageable size?

(3) Was there an option of taking on agency staff as an interim measure?

(4) Were there options of trying to carry on in an interim period with somebody in support of Mr. Jones so that his work load was reduced?

52. I am not satisfied that a reasonable employer could have concluded that consultation was pointless.

53. In my judgment, I do not accept that “consultation is futile” was a consideration the Respondent took into account. It is more likely, based particularly on Mr. G Jones evidence, that he was firstly wary of risking staff leaving before the Respondent had managed the termination of the bus route contracts and a good deal of antipathy towards some members of staff.

54. For these reasons, the Respondent’s failure to consult with the Claimant and his colleagues was an unreasonable response by the employer in all the circumstances of the case. I therefore find the Respondent unfairly dismissed the Claimant.

55. The second issue I must determine is whether or not in truth such consultation would have made any material difference to the decision of this Respondent or the date on which the decision to dismiss was affected.

56. In my Judgment had this employer acted fairly it would have started consultation on or around the time that Mr. D Jones went to the accountant to enquire about matters such as redundancy costs. In my mind that is clear evidence that any reasonable employer probably has contemplated the possibility of redundancies before going to seek advice upon costs and management of such a process.

57. Nevertheless, taking into account the points that Mr. Williams put in cross-examination I have come to the conclusion that consultation by this employer, acting with an open mind, would not have made any material difference to the Respondent’s decision for these following reasons:

(1) Mr. G Jones was the only effective full-time manager and he was unwilling to continue with the weight of practical and management responsibilities.

(2) There was a substantial degree of lack of trust between Mr. Jones and a substantial part of the work force he was managing such that he did not wish to be managing people of that ilk. That is evident from the way he spoke in the meeting of 16th and how he wished them a poor experience in their future employment as a just reward for the way they had treated him.

(3) The consequences of terminating the route contracts with the Authority were known and understood by the Respondent. It was going to have a ruinous effect on their reputation as a transport business. It was going to expose them to the potential of being struck off as licensees and it was going to expose them to the potential of being fined substantially (all of which has come true).

(4) Based on the Respondent's prior experience of trying to recruit competent drivers and a junior manager, they did not believe there was a reasonable prospect of doing so in the short or mid-term. Further, Mr. G Jones was not prepared to damage his health by continuing to work long hours in those circumstances.

58. In these circumstances I find that the Respondent has proven on the balance of probabilities that had consultation started in early November it would nevertheless have led to the same decision on or around 16 December 2017.

59. In light of the above I will summarise my findings on the unfair dismissal claim as follows:

(1) The Respondent unfairly dismissed the Claimant.

(2) It would not be just and equitable to make any award of compensation to the Claimant following the 16 December because it is undoubtedly the case that all the staff would have been dismissed on that day even if the Respondent had consulted with them in a reasonable manner prior to the decision to dismiss all of the staff.

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992

60. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that where an employer is contemplating dismissing 20 or more employees then it must comply with the consultation duties set out in sub section (2) (a)-(c) and, in this case, the statutory period of consultation would commence 30 days before the first date of dismissal takes effect.

61. Consultation includes provision of information such as the reason for the proposed redundancy, the number of employees, the type of employees, the method of selecting, the proposed method of carrying out dismissals, the procedure and other matters. The consultation based on that information should consider methods of avoiding dismissal or reducing the numbers of employees who have to be dismissed or mitigating the consequences of the dismissal.

62. An employer is liable under section 189 if they fail to comply with that duty and when the employer's conduct amounts to a wholesale failure to comply, as is the case before me, then the guidance of the Employment Appeal Tribunal and Court of Appeal in cases such as ***Susie Radin ltd v GMB*** [2004] I.C.R. 893 requires the Tribunal to consider making an award in respect of the full protected period and I am directed to use as my starting point the maximum 90 days, subject to any mitigating factors.

63. Section 188(7) states:

"if in any case there are special circumstances which render it not reasonably practicable for the employer to comply with the requirement of the act the employer shall take all such steps towards compliance with the requirement as are reasonably practicable in those circumstances."

64. My first conclusion is that the Respondent was contemplating closure of the business, and thereby the dismissal of all its staff, by the time Mr. D Jones went to see the accountant for advice. Mr. D Jones stated in cross-examination that he visited the accountant about 6 weeks before the 16th December which is consistent with the date pleaded in paragraph 5 of the particulars of response in the ET3; "early November".

65. In early November the Respondent could and should, have started to take reasonably practicable step to fulfil its duty to provide information to the relevant employees.

66. The provision of information could have been done in a letter, a letter which is not much more thorough than the letter which was drafted on or before 16 December 2017.

67. Even though Mr. G Jones may have been fully occupied with the practical tasks of rota management and having to undertake driving duties for missing drivers it was reasonably and practical for him, in conjunction with his father to have provided the required information in writing to the employees.

68. I also note on 16th December 2017 a consultation meeting was held with the staff and that was pre-planned so, whilst I understand the

circumstances that existed between November and 16 December, if a meeting could have been held on 16 December in my Judgment it could have been held earlier.

69. In those circumstances I find that in all probability the combined main causes of not dealing complying with the Respondent's statutory duty were:

(1) a degree of distrust between Mr. G Jones and some of the staff.

(2) the fear that the staff who were perceived to have been acting against the Respondent would "jump ship" upon notice that the business was intending to close.

(3) the continuing circumstance of Mr. G Jones's health which I do not doubt for a moment was inhibiting his physical contribution and was a physical circumstance with aggravated his already stressed condition.

70. Was then a special circumstance which entirely mitigated the requirement for the employer to do all that was reasonably practicable in the circumstances? No there was not. That is particularly so when Mr. D Jones was able to assist Mr. G Jones.

71. I find the claim for breach of section 188 well founded.

72. The next consideration is the quantum of the award. I am required by law to start at 90 days and then consider to what extent the Respondent has demonstrated any mitigation.

73. In clear mitigation are the matters of Mr. G Jones's health and the fact that he was the lynch pin in the running of the business.

74. A second mitigating factor is the Respondent's inexperience although that is qualified by the fact that they had the ability, and the means, to obtain professional advice had they wished to purchase it.

75. A third factor is the weight of work upon Mr. G Jones but an aggravating factor is the statement by Mr. G Jones that part of the rationale for not consulting with staff was the wish not to inform staff for fear that they might leave earlier or "bad mouth" the Respondent further.

76. I balance those matters with, in my Judgment, the reasonably straightforward practicability of undertaking of the group consultation and the provision of information and the fact that the 30 day consultation period is almost identical to the time the Respondent was contemplating redundancies and the date of dismissal.

77. In all the circumstances of this I have concluded the degree of mitigation is consistent was a reduction of 30 days. I therefore make an award for each relevant employee in a sum equivalent to 60 days.

Employment Judge R Powell
Dated: 28th April 2019

REASONS SENT TO THE PARTIES ON

30 April 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS