EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR A RICHARDS	**V**	**CONTRACT PRESSINGS (PRODUCTS) LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 24 MAY 2019

BEFORE: EMPLOYMENT JUDGE POVEY
MRS KIELY
MR PEARSON

REPRESENTATION:
FOR THE CLAIMANT: MR JONES
FOR THE RESPONDENT: NO ATTENDANCE

JUDGMENT

The unanimous decision of the Tribunal is:

1. The claim of unfair dismissal is made out.

2. The Respondent must pay to the Claimant the sum of **£6,560**, calculated as follows:

	£
Basic Award (1.5 x £370)	555.00
Loss of Earnings (104 x £30)	3,120.00
Loss of Statutory Rights	500.00
ACAS Uplift (25% x £3,620)	905.00
Failure to provide statement of terms & conditions (4 x £370)	**1,480.00**
Total:	**6,560.00**

REASONS

1. This is a claim by Anthony Richards ('the Claimant') against his former employer, Contract Pressings (Products) Limited ('the Respondent') for unfair dismissal. The Claimant seeks compensation. He was employed as a machine operator from 20 January 2012 until his dismissal on 16 February 2018.

Background

2. By way of background to the claim:

   2.1. On 12 January 2018, the Respondent notified the Claimant in writing that his employment was to be terminated with effect from 16 February 2018. It was subsequently agreed that the Claimant was not required to work his notice period;

   2.2. On 28th March 2018, the Claimant issued his claim in this Tribunal alleging unfair dismissal. The Respondent filed its response in form ET3 with the Tribunal on 30 May 2018. The claim was resisted in its entirety;

   2.3. There was a preliminary hearing on 16 November 2018. The Respondent did not attend or take any part in the hearing. The claims were clarified further. The Claimant claimed he had been unfairly dismissed by reason of protected disclosures (relating to health and safety). In the alternative, he claimed that if the dismissal was by reason of redundancy, it had been procedurally unfair. He also claimed to be owed notice pay, redundancy pay and had not been provided with a written particulars of his employment.

The Hearing

3. The Respondent did not attend the final hearing on 24 May 2019. Enquiries were made by the Tribunal's clerk, who was informed in a telephone conversation on the morning of the hearing that, whilst aware of the hearing, nobody from or on behalf of the Respondent proposed to attend. Instead, reliance was placed on the evidence already adduced by the Respondent.

4. In the circumstances, the Tribunal concluded that it was in the interests of justice and consistent with the overring objective to proceed in the Respondent's absence.

5. We heard oral evidence from the Claimant and received submissions from the Claimant and Mr Jones, who was assisting him. We were provided with a paginated file of documents to which were referred. We also had regard to the documents previously filed by the Respondent.

6. In the Tribunal's view, the key issue to determine was the reason for the Claimant's dismissal. It was not in dispute that he had been dismissed. What was in issue was the reason relied upon for dismissing him, whether the dismissal had been automatically unfair and, if the reason was a potentially fair reason, whether the decision to dismiss was both substantively and procedurally fair.

7. Judgment was given orally at the end of the hearing. A request was subsequently received from the Respondent for written reasons.

The Law

Unfair Dismissal

8. By reason of section 94 of the Employment Rights Act 1996 ('ERA 1996'), an employee has the right not to be unfairly dismissed.

9. Section 98(1) of the ERA 1996 requires that in deciding whether a dismissal was unfair, it is for the employer to show the reason for that dismissal. That reason must fall within a list of potentially fair reasons to be found within section 98(2) of which 98(2)(c) states:

> *A reason falls within this subsection if it –*
> *…*
> *(b) is that the employee was redundant…*

10. Section 139 of the ERA 1996 contains the statutory definition of redundancy. It includes, at s.139(1)(b), the situation where a dismissal is wholly or mainly attributable to the requirements of the business for employees to carry out work of a particular kind having ceased or diminished or expected to cease or diminish (see also Safeway Stores v Burrell 1997 ICR 523; Murray v Foyle Meats Ltd 1999 ICR 827).

11. The Tribunal has no jurisdiction to take account of the economic or commercial reason for redundancy itself. It is not for the Tribunal to assess or comment upon how an employer runs its business. We are only concerned with whether the reason for dismissal was redundancy and whether a genuine redundancy situation (as defined by section 139 ERA 1996) existed (per James W Cook and Co (Wivenhoe) Ltd v Tipper 1990 ICR 716, CA).

12. Section 98(4) of the ERA 1996 also requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for one of the reasons in s.98(2). On the issue of fairness in a redundancy dismissal, the Tribunal was bound to consider the guidance from the Employment Appeals Tribunal in Williams and others v Compare Maxam Ltd [1982] IRLR 83 as follows. First of all, was there a genuine redundancy situation? Secondly, did the employer properly consult? Thirdly, was the employee fairly selected for redundancy and finally, did the employer explore and consider alternative employment?

13. An employer will not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within is his own organisation (per *Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL*).

14. In addition, the Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. Our function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

15. Section 98(4) also requires a consideration of whether the procedure by which an employer dismissed an employee is fair. If an unfair procedure has been followed the Tribunal is not allowed to ask itself, in determining whether a dismissal was fair, whether the same outcome (i.e. dismissal) would have resulted anyway even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503HL).

16. If the reason for the dismissal is because the employee has made protected disclosures, then the dismissal will be automatically unfair (per sections 103A & 105(6A) ERA 1996).

Written Statement of Particulars

17. By virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, proceedings may be brought before the Tribunal in respect of a claim by an employee for the recovery of damages or any other sum for breach of a contract of employment, provided the claim arose or was outstanding at the termination of the employee's employment.

18. Section 1 of the ERA 1996 states:

> *Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.*

19. Section 1(2) of the ERA 1996 requires the statement to be given not later than two months after the beginning of employment and Subsections 3 and 4 set out the content of those particulars.

Compensation for Unfair Dismissal

20. The basic award for unfair dismissal is calculated using the formula set out in section 119 of the ERA 1996. That formula includes the Claimant's gross weekly wage at the date of termination of employment. Sections 123 to 126 of the ERA 1996 set out how the compensatory award is assessed and calculated.

21. The Tribunal has the power to increase or decrease awards by up to 25% where there has been an unreasonable failure by either party to comply with the ACAS Code of Practice on Disciplinary & Grievance Procedures (s.207A Trade Union & Labour Relations (Consolidation) Act 1992).

22. Where a claim of unfair dismissal is made out, the Tribunal has the power to award a sum equivalent to no less than two and no greater than four weeks wages for any breach by the employer of the duty to provide a written statement of particulars of employment (s.38 Employment Act 2002).

Findings of Fact - Liability

23. The Tribunal found the Claimant to be a credible and reliable witness. His evidence was measured, supported by documentary evidence and he did not seek to embellish or exaggerate his account. By reason of the Respondent's decision not to attend the final hearing, that evidence was not challenged. The Tribunal had no reason not to accept the Claimant's evidence in its entirety.

24. At all material times, the Claimant was employed by the Respondent.

25. It was the Claimant's case that the principal reason for his dismissal was connected to a number of concerns he had raised about health and safety within the workplace. In contrast, he had been informed when dismissed that his dismissal was by reason of redundancy and received a payment at the time, which purported to be a statutory redundancy payment. That payment was based upon five complete years of service.

26. The onus was on the Respondent (by reason of section 98(1) ERA 1996) to show the reason for the Claimant's dismissal. The Respondent consistently claimed (in both correspondence to the Claimant and to the Tribunal) that there was a genuine redundancy situation, following the loss of a major contract which accounted for 65% of the company's turnover. Although these were bare assertions, the Claimant confirmed that three other members of staff were made redundant at the same time as him and he did not take issue with the Respondent's claim that there had been a significant downturn in work.

27. In the circumstances, the Tribunal found that at the material time, there was a genuine redundancy situation (per section 139 ERA 1996).

28. Was that the reason for the Claimant's dismissal? Whilst we accepted that the Claimant had raised health and safety concerns with the Respondent, there was no other evidence to suggest that that was the reason for his dismissal. To a large extent, that was caused by the lack of transparency in the Respondent's dismissal of the Claimant. The Claimant believed that there was a link between issues he had raised and his dismissal.

29. What information the Respondent did impart consistently referred to redundancy as the reason. As found above, there was a genuine downturn in work. The Claimant told the Tribunal of a meeting with the Respondent's director, Mr Harries, after being notified of his dismissal. The Claimant asked if his dismissal was because of the health and safety issues he had raised. He was told that it had nothing to do with that and was solely because of the downturn in orders.

30. Viewed objectively, the most likely reason for the dismissal was redundancy. For those reasons, the Tribunal was unable to conclude that the Claimant's dismissal was for any reason other than redundancy.

31. In dismissing the Claimant by reason of redundancy, the Respondent notified him of the fact by a letter dated 12 January 2018, handed to him on the same day by the Respondent's manager (Andrew Lougher) at a meeting in his office. The Claimant asked to meet with Mr Harries in order to appeal the decision. That request was refused by Mr Lougher. Subsequent letters to the director requesting an appeal and also raising grievances in the manner in which the Claimant's dismissal had been handled went unanswered. The Claimant also requested (as he had in the past) for a statement of his terms and conditions of employment. That request was similarly ignored.

32. The Claimant secured alternative employment immediately after his employment with the Respondent ended. He is paid the same hourly rate and works the same number of hours. However, he no longer receives a £30 weekly bonus payment. This was paid by the Respondent if an employee attended for work and was paid when employees were on authorised, paid annual leave.

Conclusions - Liability

33. The Tribunal had no hesitation in concluding that the Respondent's decision to dismiss the Claimant by reason of redundancy was unfair. There was no adherence whatsoever to the principles underpinning fair redundancy dismissal. There was no prior consultation, no evidence of any fair criteria under which the Claimant was selected for redundancy and no evidence that any alternatives short of dismissal were considered. Once the decision to dismiss was made, the Claimant was denied a right of appeal and simply ignored.

34. For those reasons, the Tribunal was satisfied that the Claimant was unfairly dismissed by the Respondent.

35. The Tribunal also found that the Respondent never provided the Claimant with a statement of his terms and conditions of employment, contrary to section 1 ERA 1996.

Findings of Fact - Remedy

36. The Claimant did not seek an order for reinstatement or reengagement. Our task therefore was to determine what level of compensation, if any, to award to the Claimant by reason of the unfair dismissal. The Claimant relied upon a detailed schedule of loss.

37. The Tribunal determined from the evidence that the Claimant's average weekly wage was £370. Whilst overtime was available, it was, in our judgment, too irregular to be considered as part of the Claimant's basic wage. In contrast, the £30 bonus was included. That payment was regular and guaranteed for attending work and was paid when an employee was taking authorised, paid annual leave.

38. At the effective date of his dismissal (16 February 2018), the Claimant had completed six years of service. His redundancy payment was based upon five complete years. That was an error by the Respondent. As such, the Claimant was entitled to the shortfall between what he was paid and what he was entitled to. Applying the statutory formula, that equated to £555 (£370 x 1.5 x 1).

39. The Claimant has mitigated his losses by securing alternative employment. However, he is £30 per week worse off as a result of the unfair dismissal. He claimed compensation equivalent to this payment until he reached 65 years of age. Having regard to the length of time and the redundancy situation which existed at the time of his dismissal, this length of claim was not justified. Rather, we concluded that an award which lasted until the Claimant had secured full employment rights would be fair (i.e. two years or 104 weeks from 16 February 2018). We therefore awarded the Claimant £3,120 for loss of earnings (£30 x 104).

40. The Claimant would be required to work continuously for at least two years for a new employer to obtain the same range of statutory rights he had with the Respondent prior to his constructive dismissal (including the right not to be unfairly dismissed). As such, the Tribunal awarded the Claimant a further nominal sum of £500 to reflect that loss.

41. The Claimant sought an uplift to his compensatory awards by reason of the Respondent's failure to adhere to the ACAS Code in dismissing him. The Respondent failed to comply with any of the procedural requirements, either under the ACAS Code or in law. On the basis of those findings, there was a complete breach of the ACAS Code. An uplift of the full 25% on the compensatory award was warranted (which equated to £905).

42. Finally, the Tribunal awarded the Claimant the equivalent of four weeks wages for the failure to provide him with a statement of particulars of his employment. There was no explanation advanced by the Respondent for that failure. As such, the Tribunal had no reason not to award the full amount permissible. That equated to £1,480 (£370 x 4).

43. For the sake of completeness, the Tribunal made no award for injury to feelings (as the protected disclosure claim was not made out) or for notice pay (which had been correctly calculated and paid by the Respondent).

Postscript

44. In error, the judgment sent out earlier recorded the award for the failure to provide a statement of particulars of employment as £1,080. That was an administrative slip. The actual figure is £1,480 (for the reasons set out above) and the total judgment is £6,560. A Certificate of Correction accompanies these reasons.

Order posted to the parties on

……28 June 2019……

……

For Secretary of the Tribunals

EMPLOYMENT JUDGE S POVEY

Dated: 27 June 2019