

EMPLOYMENT TRIBUNALS



Claimant
MR. E. KELLY

V

Respondent
**MR. MICHELE GASPARRO
& MR. MARIO GASPARRO
T/A GASPARRO & SON**

Heard at: London Central

On: 20 and 21 June 2019

Before: Employment Judge Mason

Representation

For the Claimant: In person.

For the Respondent: Mr. Michele Gasparro

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The title of the Respondent is amended as shown above.
2. The Claimant's claims for monies in lieu of notice and arrears of wages for the period 1 to 31 October 2018 are dismissed on withdrawal, the Respondent having agreed to pay the Claimant a sum equivalent to one month's statutory sick pay entitlement.
3. Unfair dismissal
 - 3.1 The Claimant's claim for unfair dismissal succeeds.
 - 3.2 The Claimant is not awarded a Basic Award as he has received a Statutory Redundancy Payment.
 - 3.3 The Respondent is ordered to pay a Compensatory Award of £849.79 being £349.79 SSP 1 to 30 November 2018 together with £500 for loss of statutory rights.
 - 3.4 For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996 the Tribunal states:
 - (i) Total monetary award: £849.79
 - (ii) Prescribed element (i.e. compensation for loss of earnings (at the rate of SSP) up to the date of the hearing): £349.79
 - (iii) Period to which prescribed element is attributable: 1 November 2018 to 30 November 2018.
 - (iv) Excess of total monetary award over prescribed element: £500.

4. Holiday pay:
By consent, the Respondent will pay to the Claimant a sum equivalent to one day's accrued holiday (£51.77) in settlement of this particular claim.
5. Interest on the sums awarded accrues from the day after this Judgment at the rate of 8% per annum unless the full amount is paid within 14 days.

REASONS

Background, issues and procedure at the Hearing

1. On 17 March 2015, Mr. Elliott Kelly ("the Claimant") started employment with Mr. Michele Gasparro and Mr. Mario Gasparro t/a Gasparro & Son ("the Respondent"). Any reference in this Judgment to "Mr. Gasparro" is to Mr. Michele Gasparro. The Claimant's employment was terminated in October 2018; there is a dispute as to whether this was 2nd or 31st October.
2. The Claimant claims he was unfairly dismissed. He says in his claim form (ET1) that he believes his role was not redundant as another worker (JB) assumed his role; he says he was dismissed purely on the basis of his knee injury. The Respondent denies he was unfairly dismissed and says he was dismissed by reason of redundancy, and that in all the circumstances of the case the Respondent acted fairly and reasonably.
3. The following claims fell away or were resolved during the course of the Hearing:
 - 3.1 The Claimant brought a claim in respect of the Respondent's alleged failure to pay him monies in lieu of 11 days accrued but untaken holiday. The Respondent says he is only owed 1 day. During the course of the proceedings, the Respondent's calculations were explained to him and the Claimant accepted that he is only owed 1 day.
 - 3.2 The Claimant also brought a claim for one month's notice pay but the parties resolved this during a break and the Claimant withdrew this particular claim together with his claim for arrears of wages which covers the same period (i.e. 1-31 October 2018).
4. The issues in this case as discussed with the parties at the outset are as follows.
 - 4.1 Reason for dismissal:
 - (i) Was the reason for the Claimant's dismissal a potentially fair reason (s98(2) Employment Rights Act ("ERA"))?
 - (ii) The Respondent says the principal reason was redundancy. Was there a cessation or diminution in the requirement for employees to carry out work of the particular kind carried out by the Claimant?
 - 4.2 Fairness
 - (i) If the Claimant's dismissal was genuinely by reason of redundancy, did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and all the circumstances of the case, having regard to the Respondent's size and resources (s98(4) ERA).

- (ii) Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances? The Tribunal must be careful not to substitute its own view.
- 4.3 Compensation
- (i) The Claimant has received a Statutory Redundancy Payment (SRP) which extinguishes entitlement to a Basic Award.
 - (ii) Is the Claimant entitled to a Compensatory Award to compensate for his loss of earnings and loss of statutory rights and, if so, should there be:
 - a. any reduction on the basis the Claimant failed to take all reasonable steps to mitigate his loss?
 - b. any reduction or limit to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome? (Polkey)
5. The Respondent provided a bundle of agreed documents (“R1”) and the Claimant also provided an additional bundle (“C1”).
6. On the first day of the Hearing, having established the issues, I retired to read R1, C1 and the witness statements. I then heard from the Respondent’s only witness, Mr. Gasparro, who was cross-examined by the Claimant. I explained that I placed no weight on the additional witness statements provided by the Respondent (Mr. Rodrigues, Mr. Ramsay and Mr. Quane) as they did not attend the hearing to verify their statements and be cross-examined. The Claimant gave evidence and was cross-examined by Mr. Gasparro. I then listened to the parties submissions. I reserved judgment which I now give with written reasons.

Findings of fact

7. Having considered all the evidence in the round and having reminded myself that the standard of proof is the balance of probabilities, I make the following findings of fact.
8. Mr. Gasparro and his father run a fruit and vegetable stall based at Leather Lane Market EC1. The Respondent is a licensed market trader [R1 Tab 4 Letter dated 18 April 2019 from Markets & Street Trading Team, London Borough of Camden]. In the event a licensed trader, such as the Respondent, employs an assistant dealing with the general public, the assistant must be registered as an “official assistant” with London Borough Council in order to ensure the assistant can be covered for public liability insurance.
9. The Claimant started employment with the Respondent on 17 March 2015. He was not given a contract of employment or letter of appointment. All terms of his employment were agreed verbally and the following terms are not in dispute:
- 9.1 His job title was Sales Representative.
 - 9.2 He worked 32.5 hours per week.
 - 9.3 His monthly salary was £1,100 gross, £1,052.12 net [R1 Tab 2 payslips 30 September 2018].

- 9.4 His duties included setting up the stall, preparing boxes of fruit for delivery, selling to customers, taking card payments and helping with stock levels. About 5-10% of his duties involved deliveries.
- 9.5 He was registered with London Borough of Camden's Street Trading Team as an official assistant [R1 Tab 4 Letter dated 18 April 2019 from Markets & Street Trading Team, London Borough of Camden].
- 9.6 He was entitled to one month's notice of termination of his employment.
- 9.7 His annual holiday entitlement was 28 days (to include bank and public holidays); the Respondent's holiday year runs from April to April.

10. The Respondent's only other employee was JB who commenced employment in May 2018. JB remains in the Respondent's employment on the same terms as prevailed at the time of the Claimant's employment and I find that the key terms are as follows:
 - 10.1 JB's job title is Delivery Runner. His duties are mainly delivering to offices [R1 Tab 2 Job Description]; he does not serve or interact with customers;
 - 10.2 He is not registered as an official assistant with London Borough of Camden [R1 Tab 4 Letter dated 18 April 2019 from Markets & Street Trading Team, London Borough of Camden].
 - 10.3 He works 12 hours per week; as he is in receipt of state benefits he can only work a maximum of 16 hours per week [R1 Tab 3 confirmation from JobCentre Plus].
 - 10.4 His hourly wage (£8.33) is almost the same as the Claimant's (£8.40) but on a monthly basis JB earns significantly less [R1 Tab 2 payslip];

11. Having compared the Claimant's role with JB's role, I find that whilst there was a small overlap, their roles were substantially different:

12. The Claimant accepts that "footfall" to the Respondent's stall reduced during the 12 months prior to termination of his employment. I also accept Mr. Gasparro's evidence (which was not challenged) that he mentioned to the Claimant on more than one occasion that trade was poor and advised him that if he was offered another job, he should take it. The Claimant was therefore aware of the Respondent's financial concerns.

13. In late **July 2018**, the Claimant suffered a knee injury whilst playing football. On **26 September 2018**, he again suffered a similar knee injury whilst playing football and was unable to walk or straighten his leg and sent a message to Mr. Gasparro that evening to tell him he could not work. On **27 September 2018**, Mr. Gasparro replied advising him to take 2 weeks off. The Claimant agreed this was best [R1 Tab 6].

14. On **2 October 2018**, Mr. Gasparro telephoned the Claimant and told him his employment was terminated. The word "redundancy" was not mentioned and the Claimant was not offered notice (or monies in lieu) or a statutory redundancy payment. I accept Mr. Gasparro's verbal evidence that (i) he made the decision to dismiss the Claimant some time before the 26 September 2018 and (ii) he decided to advise the Claimant of this decision when Mr. Gasparro's parents returned from holiday on 2 October 2018.

15. After the telephone conversation on 2 October, Mr. Gasparro and the Claimant then exchanged the following messages [R1 Tab 6]:

15.1 **2 October 2018,**

Mr. Gasparro:

"Hi Mate. So sorry about today. It's just the way the market has been going. If there is anything I can do to help you please ask. I'd like to think we would still be friends after this. Sorry again mate! x"

Claimant:

"We still our friends it's something that is out of your control, it's ok it's just a shock when you wake up having a job then you're going to bed not having one without a months notice to sort yourself out anyway you're still my friend and thanks for offering you're help x"

Mr. Gasparro:

"I understand mate. Again, I'm so sorry and it's horrible as we have been working together for 3 and half years so it's the last thing I wanted. You have a son and responsibilities so I didn't want to do that to you. We're still mates to use me if you get in trouble. Do you want me to ask around Spitalsfield market for you? X"

15.2 **15 October 2018**

Claimant:

"I hope you're good. I just wanted to get in touch to explain how shocked I was when you – without any warning released me from my job. I never expected you not to give me any notice whatsoever having worked for you solid for 3 years. Of course, the last thing I wanted was for me to have this injury and not be able to work. I'm currently looking for my next employment – but you've left me in a tough situation. I feel that I've given my all to you and your family inside and outside of work these past few years, and think that the very least you could do is offer me a months wages - that would have been my notice period.

I'm asking you as a friend and as an employer".

Mr. Gasparro:

"Let me look into this for you. How is your leg? Would you be able to work your notice?"

15.3 **17 October 2018:**

Claimant:

"I'm unable to work a notice as I've been signed off by my doctor as unfit to work, I still can't straighten my knee and may need an operation.

As I am no longer employed and currently looking for a job I've been to the job centre who have told me I need the following from you via email or post.

An official letter stating the date and reason of the termination of my contract.

A wage slip from the end of the financial year.

And my P45

- in order to be accepted for JSA.

It would also help if you could write me a reference for future employment and provide me with copy of my contract.

It would be great if you could do those things for me. And also get back to me about Octobers wages. If you could correspond with me via email or WhatsApp that would be great."

Mr. Gasparro:

"Sorry to hear that you are unable to fulfil your notice period due to your knee injury playing football.

With regards to an official letter, we will have one written up and in the post by the end of the week.

Please could you provide your new home address so that this letter can be sent officially to help you receive JSA from the job centre.

As you know, when you started your employment with us, neither of us signed or entered into a written contract and all aspects of the job were agreed verbally. Therefore we are unable to supply you with a copy of a contract. If there was a contract you would have a signed copy.

Furthermore, the fact that you started employment with us means that you were happy with the verbal agreement between us.

Unfortunately we are unable to give you a wage slip from the end of the financial year as you are no longer employed by us and will be the responsibility of your new employer come April 2019.

With regards to your October's wages, we would have been only too happy to pay this to you had you been able to serve your notice period. Unfortunately, we cannot pay you this as you have not fulfilled your notice period due to your injury.

With regards to the P45, as you have been made redundant, this can only be used once we have paid your redundancy pay which our accountant has calculated to be £761.52 which is tax free.

Please confirm in your response that you are happy with us to proceed with this payment to your bank account, which will allow our accountant to conclude your employment with us and issue your P45.

15.4 21 October 2018

Claimant:

The Claimant advised Mr. Gasparro of his new address and added:

"Sorry for my mistake it's my end of year wage slip from March 2018, not 2019.

Can you confirm how the figure for my redundancy payment of £761.52 has been calculated please then I can make a decision thanks.

Thank you for offering to write a reference for me, it will be very helpful in the pursuit of future employment.

Just wanted to say thank you for the help you and everyone else are giving me at this difficult time, it's much appreciated".

15.5 24 October 2018

Mr. Gasparro:

"As requested, here is a letter confirming the reason why we have had to terminate your employment with us.

As you and I know, Leather Lane market has experienced a significant reduction in trade.

The last 8 months have been particularly poor, and our takings from sales on the market have reduced by over half of what they once were.

On top of this, Camden council has increased our second pitch fee from £6 to £13.50 per day.

This is an increase of £150 per month. We now operate on one pitch only as we simply cannot afford this increase in rent.

The decision to end your employment with us was solely due to these reasons.

I did mention to you several times that if a job opportunity was to arise elsewhere you should take it, as termination of your employment with us was inevitable.

It is unfortunate that you was unable to fulfil your notice period due to your knee injury.

However, you are entitled to redundancy pay which is calculated at 1 weeks pay for every full year worked. This amount is £761.52.

Please reply confirming that you are happy for us to pay your redundancy pay into your account and we'll notify our accountant who can conclude your employment with us and will issue your P45 and your end of year p60 for 2018.

With regards to your reference for future employment, we would be only too happy to do this for you. We will send this to you shortly."

Mr. Gasparro also provided a favourable letter of reference.

Claimant:

"Thanks a lot Michael, that's going to help me out loads. I thought that was the case with the redundancy and appreciate you offering that to me and accept the amount"

15.6 26 October 2018

The Claimant asked Mr. Gasparro to add to the letter the date on which he was made unemployed, specifically that his contract was terminated on 3 October.

16. Having considered these texts, I have concluded that on 2 October 2018, during the telephone conversation between the Claimant and Mr. Gasparro:

16.1 It was clear to the Claimant that he was being dismissed and that although the word "redundancy" was not used, the reason he was given for his dismissal was due to a downturn in trade.

16.2 It was both sides intention that the Claimant's employment was being terminated immediately. Subsequently, Mr. Gasparro realised the Claimant was entitled to be given notice of termination of his employment but he also concluded that as the Claimant was unable to work out his notice due to his knee injury and had not provided "fit notes" he was not entitled to be paid in lieu

of notice. The Respondent therefore did not pay the Claimant for the month of October 2018 (either at his normal rate of pay or SSP).

17. I therefore find that in fact the effective date of termination of the Claimant's employment was 2 October 2018. I have considered the subsequently issued P45 [C1 16-19] which shows a leaving date of 31 October 2018 but this does not determine the leaving date and is therefore inconclusive.
18. With regard to matters after termination of the Claimant's employment, I find as follows:
 - 18.1 On **16 October 2018** the Claimant worked for Mr. Mark Ramsay, another market trader. I accept the Claimant's evidence that he worked for a few hours in a non-physical role.
 - 18.2 I accept Mr. Gasparro's evidence that:
 - (i) JB remains employed by the Respondent in the same role and on the same hours as before. JB has not absorbed the Claimant's previous duties. Significantly, the Respondent has not registered another assistant with London Borough of Camden [R1 tab 4].
 - (ii) Mr. Gasparro has absorbed the Claimant's duties.
19. The Claimant contacted ACAS on **26 November 2018** and an Early Conciliation Certificate was issued on **14 December 2018**. On **11 January 2019** the Claimant presented this claim to the Employment Tribunal. On **29 March 2019**, the Respondent submitted a response.
20. With regard to the Claimant's losses, the following findings of fact are relevant:
 - 20.1 The Claimant was issued with "fit notes" advising that he was not fit for work for the period 26 September 2018 to 12 November 2018, 7 November 2018 to 19 December 2018 and 3 January 2019 to 1 February 2019 [C1 4-6]. He was therefore not fit to work until 1 February 2019.
 - 20.2 On **1 April 2019**, the Claimant commenced new employment as a SEND assistant teacher. At the hearing, he said that whilst he may have ongoing losses, he accepts that they are hard to prove and quantify and he is therefore prepared to limit his claim for loss of earnings up to 1 April 2019 (therefore the 5 month period 1 November 2018 to 31 March 2019).
 - 20.3 From **1 November 2018 to 1 April 2019**, the Claimant received Universal Credit.

SUBMISSIONS

Claimant's submissions:

21. The Claimant maintains that the Respondent dismissed him as result of his absence from work as a result of his knee injury. He accepts that there was reduced footfall to the stall but does not accept that his role was genuinely redundant as he believes JB is carrying out his duties.
22. If he was redundant, he says his dismissal was nevertheless unfair because the Respondent failed to follow procedures; specifically, there was no warning or consultation, he was not offered reduced hours or alternative employment and was not given due notice.

Respondent's submissions:

23. Mr. Gasparro maintains that there was a genuine redundancy situation as the Claimant's role was no longer financially viable and this is the reason why the Claimant was dismissed.
24. Mr. Gasparro accepts that certain procedures were not followed, specifically:
- 24.1 There was no consultation with the Claimant in a "formal sense" prior to 2 October 2018; however, he points out that he warned the Claimant on several occasions that if he was offered another job, he should take it.
- 24.2 The Claimant was not offered an alternative role but says there were no vacancies. He did not consider "bumping out" JB as JB had a new born son and he believed that the Claimant would not have accepted that role given the significant reduction in income.
- 24.3 The Claimant was not given a right of appeal.

RELEVANT LAW

25. **Reason for dismissal**

25.1 **Section 98 (1) ERA:**

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

- (i) the reason (or if more than one the principal reason) for the dismissal
- (ii) that is either a reason falling within subsection 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.

25.2 **Section 139(1) ERA:**

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 –
 - (i) to carry on the business for the purposes of which the employee was employed by him, or
 - (ii) to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business –
 - (i) for employees to carry out work of a particular kind, or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

- 25.3 Once the Tribunal has determined that the reason was genuinely redundancy, it will not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen.

26. **Reasonableness of Dismissal:**

26.1 **Section 98(4) ERA:**

Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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.
- 26.2 In deciding whether an employer has acted reasonably in dismissing for redundancy, the Tribunal's function is not to ask whether it would have thought it fairer to act in some other way; the question is whether the decision lay within the range of conduct which a reasonable employer could have adopted (**Williams v Compair Maxam Limited** [1982] ICR 156).
- 26.3. "*In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, 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 with his own organisation*" (**Polkey v AE Dayton Services Ltd** [1988] ICR 142).
- 26.4 Consultation will only be meaningful when it happens at a formative stage rather than when there is a fait accompli. (**R V British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price** [1994] IRLR 72)
- 26.5 Where no consultation about redundancy has taken place, the dismissal will normally be unfair unless the Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances. It is a question of fact for the Tribunal to consider whether consultation as so inadequate as to render the dismissal unfair. Lack of consultation in any particular respect will not automatically lead to that result. The Tribunal must view the overall picture, to the date of termination. The essential obligation is to give the employee the opportunity of being consulted (**Mugford v Midland Bank Plc** [1997] IRLR 208).
27. **Unfair dismissal Compensation:**
- 27.1 In addition to a Basic Award (section 119 ERA), **Section 123(1) ERA** provides for a Compensatory Award: "... *the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".
- 27.2 **Mitigation:**
Section 123(4) ERA requires a Claimant to mitigate their loss and a Claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the Claimant to take will then be a question of fact for its determination.
- 27.3 **Polkey v AE Dayton Services Ltd [1987] ICR 142 ("Polkey"):**
Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had

proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other; it is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

Conclusions

28. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant was unfairly dismissed.
29. Reason for dismissal:
- 29.1 The Respondent has shown a fair reason (s98 ERA) as I am satisfied that the Claimant's dismissal was by reason of redundancy as defined in section 139(1)(b)(ii) ERA as the Respondent's requirement for work of the particular kind carried out by the Claimant had diminished and was expected to diminish further.
- 29.2 The Claimant accepts there was a reduction in footfall (and therefore in sales) in the 12 month period prior to his dismissal. Selling was his primary role and I am therefore satisfied that the Respondent has shown that its requirement for the duties carries out by the Claimant had diminished. This is sufficient to show a redundancy situation and it is not for the Tribunal to determine whether or not it was a sound commercial decision or to require the Respondent to justify how or why the diminished requirement has arisen; there is no need to show economic justification or a business case.
- 29.3 It follows that I do not accept that the real or underlying reason for the Claimant's dismissal was his absence from work as a result of his knee injury. This may have played a part in the timing but was not the principal reason.
30. Procedural fairness:
- 30.1 The Claimant was not consulted prior to the decision being taken to make him redundant. By Mr. Gasparro's own account, the decision was made prior to the Claimant being informed of the decision on 2 October 2018. The Claimant may have previously been informally alerted to the Respondent's financial concerns but this is not the same as genuine consultation.
- 30.2 It was fair to select the Claimant for redundancy as he was in effect in a pool of one, JB being in an entirely different role. It was within the range of reasonable responses to identify the pool as consisting only of the Claimant.
- 30.3 There were no alternative vacant positions.
- 30.4 It was within the range of reasonable responses for the Respondent not to consider bumping JB out taking into account its limited size and resources and the difference in the roles. I have also concluded that even if bumping out had been considered, the Claimant would not have accepted JB's role because:
- (i) He was unable to work due to his injury until 1 February 2019;
 - (ii) It would have represented a significant reduction in pay.
- 30.5 The Claimant was not given a right of appeal.
31. It is apparent from my above conclusions, that whilst the Respondent has shown a fair reason for dismissal (i.e. redundancy) it did not follow a fair procedure as the Claimant was not consulted and was not given the right of appeal. I have therefore concluded that the Claimant was unfairly dismissed.

32. With regard to compensation:

32.1 Basic Award:

The Respondent is not ordered to pay the Claimant a Basic Award as he has received a Statutory Redundancy Payment of £761.52 which is calculated in the same way i.e. based on age (31 years), length of service (3 years) and gross weekly wage.

32.2 Compensatory Award:

- (i) The Respondent having agreed to pay the Claimant a sum equivalent to his wages for October (at the rate of SSP), the Claimant's losses are confined to the period 1 November 2018 to 1 April 2019 when he found new employment.
- (ii) I accept that the Claimant took all reasonable steps to mitigate his loss given that he was signed off sick until commencement of his new employment on 1 April. The Respondent has not sought to argue otherwise.
- (iii) If a fair procedure had been followed, it is very likely (but not inevitable) that the Claimant would have been dismissed in any event. This therefore results in only a small Compensatory Award to take account of any additional period for which the Claimant would have been employed had proper consultation been carried out and the Claimant given a chance to appeal. I believe meaningful consultation would have taken 2 weeks in an organisation of this size followed by a further 2 weeks for an appeal.
- (iv) The Claimant is therefore entitled to a Compensatory Award to reflect 4 weeks net pay at the rate of SSP which equates to £349.79 together with an additional sum of £500 for loss of statutory rights.
- (v) The Claimant was in receipt of Universal Credit and the Recoupment Regulations therefore apply as explained in the attached annex. The effect of this is that the Respondent is obliged to pay the Claimant the sum of £349.79 forthwith and withhold the sum of £500 pending receipt of a Recruitment Notice (if any) from the Secretary of State.

33. I have also awarded the Claimant one days' holiday pay as agreed.

Employment Judge Mason

24 June 2019

Judgment sent to Parties

12 July 2019

Claimant
MR. E. KELLY

V

Respondent
**MR. MICHELE GASPARRO
& MR. MARIO GASPARRO
T/A GASPARRO & SON**

**ANNEX TO THE JUDGMENT
(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the **Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349**.

The Tribunal has awarded compensation to the Claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the Respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states:

- (a) the total monetary award made to the Claimant;
- (b) an amount called the prescribed element, if any;
- (c) the dates of the period to which the prescribed element is attributable; and
- (d) the amount, if any, by which the monetary award exceeds the prescribed element.

Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the Respondent to the Claimant immediately.

When the Secretary of State sends the Recoupment Notice, the Respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Secretary of State informs the Respondent that it is not intending to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the Claimant.

The Claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the Claimant and the Secretary of State.