EMPLOYMENT TRIBUNALS

Claimant: Mr M Dyer

Respondent: Robert Sheppard Construction Limited

Heard at: Cardiff by CVP **On:** 6th, 7th and 21st May 2021

Before: Employment Judge G Duncan

Representation
Claimant: Mr Arthur, Solicitor
Respondent: Mr Johns, Counsel

REASONS

Introduction

1. The Claimant is Mr Martin Dyer. The Respondent is Robert Sheppard Construction Limited. The Claimant was employed by the Respondent construction company from 1 December 2015. The employment was terminated on 6 March 2020.

2. The Claimant has been represented throughout the proceedings by Mr Arthur, Solicitor. The Respondent has been represented by Mr Johns, Counsel, at the hearing today but they have only instructed solicitors within the last few weeks prior to the final hearing.

3. The Claimant, by way of ET1, received by the Tribunal on 25 May 2020 states that he was unfairly dismissed following a predetermined redundancy process. Further, his ET1 outlines that the Respondent failed to pay him for his contractual notice period, unpaid wages, accrued holiday and bonus payment. The claim for accrued holiday was subsequently withdrawn.

4. The Respondent, by way of ET3, states that the Claimant was dismissed as a result of a genuine redundancy situation following a fair process. The Respondent disputes that the Claimant is owed any sums for holiday pay and unpaid wages. The Respondent disputes that the Claimant is owed for any unpaid bonuses.

5. It is necessary to outline the procedural background to the proceedings. The matter was first considered by the Tribunal at a Preliminary Hearing on 23 July 2020 by EJ Jenkins. It is necessary to have regard to the issues identified at the hearing at paragraph 14 onwards of the order as they remain relevant to the full hearing. It is also relevant to note that the Tribunal made directions through to full hearing with statements of evidence due by 15 October 2020 and that the case thereafter be listed for a full hearing. Accordingly, the claims were listed for consideration on 6 and 7 May 2021.

6. On 15 April 2021, the Respondent made an application to admit additional documents and supplementary witness statements. The application was listed before EJ Moore on 4 May 2021. EJ Moore granted the Respondent's application and directed that the statements be served upon the Claimant at 4pm on 4 May 2021 and be sent to the Tribunal by midday on 5 May 2021. The order specifically states that EJ Moore had reservations as to whether the case was capable of conclusion within the two day listing and that, in light of the late disclosure of documents, it may have been necessary for the Claimant to make an application for a postponement with the Respondent at risk of costs. At the time, all parties, commendably, were doing their best to ensure that the full hearing remained effective.

7. At 5:05pm on the 5 May 2021, the Respondent made a further application to adduce amended witness statements from two of their witnesses. In the covering email to the Tribunal, it is stated that on reviewing HR correspondence and systems, the Respondent's position in respect of the employment contract dated 1 December 2015 requires updating. To be fair to those that represent the Respondents, they appear to have been placed in the unenviable position of their client recognising, very late in the day, that their previously asserted position regarding the contract was completely incorrect. In light of the Respondent's change of position, the Respondent's solicitor made an entirely necessary application to seek permission to amend the statements. Helpfully, the statements received include track changes so to ensure that the Claimant, and Tribunal, can readily identify the amendments made.

Preliminary Issues

8. On the morning of Day 1 of the full hearing, it was therefore necessary for the Tribunal to consider the late application made by the Respondent. Before considering this issue, however, it was necessary to raise with the parties a potential conflict of interest. Upon reading the documents during the late afternoon on 5 May 2021, I identified that the Respondent's solicitors are DAS Law. I raised with the parties that my wife works for DAS Law and has done so for approximately 12 months. Having made enquiries on 5 May 2021, I was able to inform the parties that my wife has had no involvement with the case and has had no direct communication with the relevant case handler at DAS Law in respect of this case or any other. Having consulted the relevant guidance on judicial conduct, and considered the principles in the case of Locabail (U.K.) Ltd v Bayfield Properties Ltd [2002] QB 451, I expressed my initial view that I was not in any way conflicted or unable to fairly consider the case before me. Having expressed my initial view, I informed the parties that I would be adjourning for a short period so to enable the representatives to take instructions from their

respective clients and to prepare any submissions on the issue, if so advised. Further, before the adjournment, I requested an update on the Claimant's position in response to the Respondent's application. I was informed by Mr Arthur that, by virtue of the late hour of the application, and the fact that his wife had needed to attend several hospital appointments on 5 May 2021, he had been unable to consider the statements until the morning of the hearing and had been unable to take instructions in respect of the same. In light of this, I invited Mr Arthur to confirm his position upon his ability to proceed with the hearing. Prior to the adjournment, I expressed my view that, given the contents of the statements and the nature of the amendments, it was entirely necessary for the statements to be adduced given that they went to the crux of one the central issues between the parties. I considered that given the need to adduce the statements, the question was one of fairness to both parties in proceeding with the hearing.

9. Upon the parties returning following the short adjournment, I was informed that both parties agreed that there was no conflict of interest and the case could proceed. Regardless of their agreement, I am entirely satisfied that I am able to determine the claims on an impartial basis in accordance with the guidelines in Locabail.

10. Further, I was informed by Mr Arthur that he was not in a position to proceed with oral evidence. Both parties were understandably keen for the matter to proceed without having to list the case for a further hearing in six months' time when a likely listing would be given. I therefore canvassed with Mr Arthur whether he would be in a position to proceed during the afternoon of Day 1. Mr Arthur informed me that this was unlikely to give him the time he required to read the statements carefully, take instructions and prepare adjustments to his cross-examination. I expressed the view that this was entirely understandable in the circumstances. It was therefore agreed that the matter would be adjourned so to commence the evidence on Day 2 and the case would be listed for an additional day on 21 May 2021.

11. In consideration of the claims, I have read the initial bundle running to 116 pages including the Claimant's statement, the supplementary bundle adduced by the Respondent running to 85 pages and the Respondent's witness statements to include the two amended versions filed on 5 May 2021.

12. I heard oral evidence from the following:

    a) Mr O'Neill – Financial Director;
    b) Mr Sheppard – Managing Director;
    c) Mr Price – Contracts Director;
    d) Ms Owen – Human Resources Consultant at Wurkplace Limited;
    e) The Claimant.

13. The oral evidence concluded on Day 2 and it was agreed that the parties would draft written submissions. I have had regard to the written submissions in preparing these reasons.

Findings of Fact

14. It is agreed that prior to the Claimant commencing employment with the Respondent on 1 December 2015, the Claimant was engaged in providing services to the Respondent on a self-employed basis. The parties agree that the Claimant was initially engaged as a joiner. He provided his services on a self-employed basis for at least five years prior to the formal commencement of his employment with the Respondent. It is accepted that the standard of work provided by the Claimant was of a sufficient standard to lead to the offer of employment.

15. The background of self-employment is potentially relevant as it provides context for the discussions that took place around the formation of the employment contract. It is agreed that a number of meetings took place to discuss the terms of employment. Mr Sheppard explained in his evidence that the company needed to balance up the cost to the company against the potential benefits. He stated that he took guidance from professionals regarding the cost implications. One such professional was the Respondent's accountant, Mr Geffcott. It is agreed that Mr Geffcott was present during a meeting at which the terms of employment were discussed but I have no evidence from Mr Geffcott. Instead, I have conflicting accounts of the discussions that took place and the terms of the contract that were agreed.

16. The Claimant asserts that his notice period is, and always has been, six months in duration. The Respondent asserts that the Claimant's notice period is limited to one month. In consideration of the issue, both parties make allegations regarding the veracity of the documents that purport to represent the terms of the contract.

17. The Respondent initially advanced a case to state that the terms and conditions of employment are represented within a document at page 39 of the bundle. The Respondent was clear in the ET3 that the terms and conditions were dated and signed by the Claimant on 1 December 2015, the day that he commenced his employment. Para 16 of the document at page 41 states that the notice period is of one month duration. The Respondent, at the time of filing the ET3, was adamant that the 2015 document represented the terms of the contract. There is no reference within the ET3, or the initial statements filed in preparation for the bundle compiled in October 2020, to the 2015 terms and conditions having been altered, adjusted or backdated. The ET3 is clear, the 2015 document was the employment contract and remained valid.

18. In the Claimant's statement at paragraph 10 and 11, he outlines his recollection of the meetings that took place between himself, Mr Sheppard and Mr Geffcott. He details that the parties discussed the possibility of becoming a director, profit share, employment, directorship, notice period, dividends and job title. Mr Sheppard agrees that those matters were discussed before concluding that the terms of the relationship between the parties should be an employment relationship. Of all those matters discussed though, Mr Sheppard states that there was no agreement that the notice period was six months. Contrary to Mr Sheppard's account, the

Claimant asserts that the six month notice period was agreed upon and was one of many terms included within a contract signed by both parties. The Claimant states that the contract he signed in 2015 has never been disclosed by the Respondent.

19. The Claimant states that during the early part of 2016, the Respondent was struggling financially and Mr Sheppard asked the Claimant to take a pay cut. The Claimant states he reluctantly agreed as he felt he had a vested interest in the survival of the business. At paragraph 13 of the Claimant's statement, he asserts that the parties discussed bonuses in the later part of 2016. He states that a meeting was convened and Mr Price was included in the profit-share. The Claimant states that he was provided with an Incentive and Bonus Policy for the year April 2016 to April 2017 as found at page 52 of the bundle. It is agreed by the Respondent that this policy is a valid document produced as an accurate representation of the company bonus scheme for that year.

20. The parties though dispute whether the Claimant was also handed the document found at page 47 of the bundle entitled "Statement of main terms and conditions of employment". The document includes an electronic signature purporting to be of Robert Sheppard and an electronic date of 10 October 2016. The Claimant states that he signed this document, albeit the version in the bundle is unsigned. Mr Sheppard asserts that the document is a fabrication and that he has never seen the document. He states that the document is completely unlike anything that the company have drafted.

21. Of note, contained within the bundle at page 94 is a Land Registry document demonstrating that the Claimant acquired land at 13 Rhyd Y Byll, Rhewl Ruthin, on 3 May 2018. This is highly relevant as it was an overwhelmingly clear indication to the Respondent that their case relating to the veracity of the 2015 document was inaccurate. The reason being that the document at page 39 includes the employee address as 13 Rhyd Y Byll and it was therefore impossible for the document to have been signed and dated on 1 December 2015 almost two-and-a-half years prior to the Claimant acquiring the property.

22. Despite this, the statement filed by Mr Robert O'Neill, undated, but circulated following the hearing on 4 May 2021, accompanied by a statement of truth, states at para 6 that "On the 1 December 2015 I met the Claimant at the office at Bryn Fynnon Farm prior to his induction on the first day of his employment with the company… I handed the Claimant a single copy of his employment contract and left him to take some time reading through". Mr O'Neill goes to considerable lengths to give an impression that he recalls the specific meeting. At paragraph 4 he explains the formal induction process that the Claimant would have engaged with. At paragraph 7, Mr O'Neill asserts that "I also supplied the Claimant with a pen so he could sign and date the document appropriately on the final page". At paragraph 8, Mr O'Neill recalls specific details such as signing the document himself and scanning the contract onto the company computer system. The impression that Mr O'Neill seeks to create is that he specifically recalls the meeting, the date, the events that took place and the discussions surrounding the contract. The Land Registry document did not act as a sufficient trigger to enable the Respondent to recognise their combined

recollections relating to the document were completely incorrect. At paragraph 10 of his initial statement, Mr O'Neill states, in relation to the 2015 document, that "it would appear the document has been altered to provide an updated address for the Claimant to ensure the Claimant's cover under our site insurance". He opines that it "may have been made by admin staff without the Claimant's knowledge…I am of the opinion that this does not change the validity of the employment terms, nor the document as a whole". It is now agreed that this too is incorrect. It amounts to the Respondent's first shift in position from asserting that the document at page 39 was signed and dated as drafted on 1 December 2015, to one whereby the Respondent accepts that the document at page 39 is not the original contract as previously suggested. The shift in position is effectively that page 39 represents a slightly amended version of the contractual terms.

23. The Respondent's case is now put on the basis that they have recently recognised that the document found at page 39 cannot have been the terms as signed on 1 December 2015 as Wurkplace only provided the templates for such contracts in 2017. It has been stated that this realisation emanated from a conference with the Respondent's legal team following the hearing on 4 May 2021. It was this realisation that triggered the late application on 5 May 2021 seeking to adduce the further amended statements. For the first time during the life of these proceedings, the Respondent accepts that the document at page 39 cannot have been signed in 2015. Further, for the first time, Mr O'Neill asserts that a meeting took place sometime after 12 April 2018 in which he states that the Claimant requested that the document be backdated to 1 December 2015 so to tie into his commencement date of employment so no benefits were at risk. He states that he agreed to the request, as it served no benefit to the company. Mr O'Neill describes the alleged meeting post 12 April 2018 with the same detail and certainty as he described the events of the meeting that he previously was adamant had taken place on 1 December 2015.

24. I am therefore faced with construing the terms of the employment contract in relation to notice period. The Claimant invites me to find that the terms are as per the 2016 version with only an electronic signature and date. The Respondent invites me to find that the terms are as per a backdated contract signed in 2018 but representing terms agreed in 2015 and that has been the subject of a number of positional shifts on the part of the Respondent.

25. In consideration of the issue, I have had regard to the totality of the evidential canvas and have had particular regard to the following:

    a) The picture painted by the Respondent's own actions is of a company with a shambolic and/or non-existent system for record keeping before the involvement of Wurkplace in 2017. I appreciate that the Respondent's position regarding the formation of the 2015 document is now settled, and I accept the underlying reason for the most recent change of position, but even if I were to accept the Respondent's account regarding backdating, the numerous shifts of position demonstrate to me that the Respondent was in disarray in terms of record keeping prior to 2017;
    b) In further support of this view is the fact that in the initial statement of Mr O'Neill, he suggests that admin staff may have amended a signed

contract of employment. I am equally concerned by his evidence that a signed version would have been scanned and saved on the Respondent's system before amendment. I am uncertain as to whether Mr O'Neill was suggesting that the PDF itself was being amended but, in my view, the mere fact that the Respondent would hypothesis that admin staff have amended contracts without the knowledge of individuals party to a contract is deeply concerning. It indicates to me that the Respondent's internal processes were completely flawed and that staff will, if they consider it to be appropriate, amend contracts in certain circumstances. I struggle to comprehend why an employment contract would need to be amended simply to adhere to insurance obligations;

c) I am troubled by the manner in which Mr O'Neill has placed a statement before the Tribunal, signed, with a statement of truth, purporting to recall the finer detail of a meeting that occurred two-and-a-half years before he now states it occurred. As outlined above, his amended statement purports to recall the same level of detail at a completely different meeting altogether;
d) The Respondent states that the 2016 document at page 47 is a fabrication by the Claimant. Mr Sheppard states that it is not a document used by the Respondent. In my view, however, it is highly relevant that the Respondent accepts that the bonus policy is a genuine document. The bonus policy appears to contain the same company logo as the 2016 version of the terms and conditions. Further, both documents share a similar font. I am acutely aware that the Respondent states that the document is a fabrication, and that the Respondent would likely submit that anyone fabricating a document is likely to make the most basic attempt to match the document with other material available, however, in my view, it is a point in favour of the Claimant when considered alongside the totality of the evidence. In particular, I have regard to the agreed fact that the Claimant was subject to a decrease in pay in 2016 and that there is some logic in both parties seeking to formalise the change in position. In my view, the timing of the document's origination on the Claimant's case, set against the wider circumstances, is a point in favour of the Claimant;
e) The Claimant gave a detailed and clear account on the origination of the six month notice period. In oral evidence, he gave a forthright and compelling explanation that Mr Sheppard had a reputation for "falling out with people" and so he wanted to protect himself. He explained that he had built up a reputation in self-employment and that he did not want to risk being employed only for the employment to be terminated on a whim. The explanation, in my view, also accords with the fact that the parties accept there were a number of meetings to discuss the precise terms of the working relationship they were seeking to formalise in 2015 and that those meetings spanned a significant number of issues. The Claimant's evidence that the six month notice period was a vital factor in the negotiations fits into an evidential picture in which he places significant weight upon the protection afforded by a longer notice period;
f) The Claimant has been clear and consistent on this issue throughout the documentary evidence since it was first mentioned following dismissal. The Respondent makes the point that the Claimant failed to mention the notice period in the emails following the at risk meeting and the appeal letter. The Claimant though states that he engaged a solicitor at an early

stage and put the matter in his hands. I can see that the Claimant requested at page 58 by way of email dated 6 March 2021 that his solicitor be copied into correspondence. I have regard to the fact that the notice pay was referenced as an issue in correspondence from his solicitor on 8 April 2020 at page 72. In my view, whilst the Claimant fails to mention the notice period in his appeal letter, the next substantive correspondence makes the point clearly. I therefore attach limited weight to the Respondent's submissions on this point. On the contrary, I place substantial weight upon the evidential chronology. The Claimant asserts in his statement, dated 15 October 2020, at paragraph 18, that Mr Sheppard wanted the Claimant to sign a new contract around April 2018 and that "when I asked why, he stated that he had lost my old one and everyone was signing a new one. I refused as I was satisfied with the contract I had already in place". This suggestion would be consistent with the Claimant's position that a document was signed on 1 December 2015 but has never been presented before the Tribunal. This clear statement is made many months before the Respondent has realised that the document at paragraph 39 was not signed in 2015 and, of greater relevance, months prior to Mr O'Neill's statement being circulated in May 2021. Mr O'Neill states at paragraph 22 of his amended statement that the backdated document would have been signed sometime after April 2018 when the contracts were finalised from Wurkplace. In my view, the chronology is consistent with the Claimant's version of events and has been clearly asserted months before the Respondent's numerous changes of position.

26. Having considered the totality of the evidence, and attaching particular weight to the points above, I find that the document at page 47 dated 10 October 2016 is, on the balance of probabilities, an accurate representation of the terms agreed between the parties upon the commencement of the Claimant's employment. I have had particular regard to the submission made on behalf of the Respondent that the case now put forward largely squares with the Claimant and the changes of position should not undermine credibility. I agree with this point in principle, however, the difficulty for the Respondent is that the changes of position, alongside the other factors outlined above are, in my view, consistent with a shambolic level of record keeping weighed against a very clear case advanced by the Claimant. Again, against that clear picture presented by the Claimant, is the inconsistent evidence advanced by the Respondent. I reject the suggestion that the Respondent has deliberately constructed or fabricated a case against the Claimant on this issue. I consider it inherently more likely that the Respondent's witnesses have identified a document that they believed to represent the terms agreed in 2015, only for that belief to unravel in light of evidence that undermines that belief. The Respondent's witnesses, in my view, have been reactionary in trying to piece together the various pieces of documentation that they have unearthed in the course of the proceedings. The position has changed as the evidence has changed. They have, in my judgment, embarked upon a process where they have repeatedly taken their best guess as to what the contractual terms were as of the date of the Claimant commencing employment. As a result of their collective confusion, poor record keeping and general guesswork, I can attach limited weight to the Respondent's witness evidence upon this issue.

27. I have specifically considered the question posed by the Respondent in submissions, namely, is the Claimant's signature on the document dated 1 December 2015 a forgery? I am not satisfied, on the balance of probabilities, that this is a forgery. I have not been presented with cogent evidence to allow such a finding to be made. Further, in my judgment, I have not been presented with a credible explanation as to how the Claimant's signature has come to find itself on a document that is dated 1 December 2015, when it was not created until at least 2017. I accept the Claimant's evidence when he states that he did not sign the document that was placed before him in 2018. I am unable to make any finding as to how this document was created. It may have been a fabrication by the Respondent, it may have been an administrative member of staff amending the contracts as was suggested by Mr O'Neill, it may have been signed by the Claimant at the request of the Respondent or it may have been created through some other means during the course of the Respondent's quite shambolic record keeping, I do not know. I have considered the totality of the evidence on this issue and the possible explanations alongside those evidential matters outlined in support of my finding that the document at page 47 is an accurate reflection of the terms agreed between the parties at the commencement of the employment. It is in all of those circumstances that I find as fact, on the balance of probabilities, that the notice period agreed in December 2015 was for a period of six months. I reject the Respondent's contention that the notice period was for a period of one month.

28. As part of the discussions that took place in 2016, it is agreed that incentives and bonuses were discussed. It is agreed that the policy at page 52 for April 2016 to April 2017 was implemented for that financial year. The Respondent states though that the particular policy at page 52 was limited to that particular financial year. The Claimant states at paragraph 15 of his statement that he received bonus payments in the subsequent years which were discussed on a year by year basis. The Respondent witnesses state clearly that bonuses were considered annually and were at the discretion of the company directors. There is a measure of agreement between the parties in that bonuses were paid, the dispute is whether the Respondent is contractually bound to make the bonus payment that had been discussed in 2019. The Claimant asserts that the precise terms of the bonus were discussed and agreed. Mr Sheppard states that the bonus for the year was discussed informally but that no decision had been made as to whether the discretion should be exercised. Again, there is a substantial dispute between the parties in respect of the issue. In considering the dispute, I have had regard to the fact that the terms and conditions dated 10 October 2016 at page 48 states that the bonus and incentive scheme will form part of this contract of employment. In that respect, the policy outlined at para 52 would appear to be incorporated into the contract. However, the difficulty for the Claimant from 2017 onwards is that I am not presented with any updating incentive scheme for subsequent years and it would appear that the decisions made in those subsequent years have been subject to the discretion of the directors at the end of the financial year. Further, it would appear that the conditions that needed to be satisfied so to obtain such a bonus were changed depending upon the Respondent's objectives for the year. I do not have any precise breakdown of the objectives to be achieved by the Claimant in order to justify the bonus in 2019 to 2020. Further, both parties appear to agree that the company was going through a degree of

financial turmoil in the months prior to the Claimant's dismissal. I am not satisfied, on the balance of probabilities, that the bonus and incentive scheme was sufficiently defined so to amount to a contractual term for the year 2019 to 2020. Whilst I accept that informal discussions took place regarding the principle of bonuses for 2019, I am not satisfied the objectives that would justify such a bonus have been satisfied and I am not satisfied that the discussions in 2019 amount to a legally binding agreement. Accordingly, I find that for the purposes of the financial year 2019 to 2020, the ultimate decision regarding any bonus and incentive scheme was at the discretion of the directors.

29. On 10 January 2019, the Claimant engaged in a text message exchange with Mr Sheppard. It was agreed that the Claimant would receive an extra "£200 per month for car". The message states that "just do us an expense form each month and we get a bit of VAT back and you won't pay tax on it". It is accepted that the Claimant would receive the additional £200 per month. It is disputed as to whether the Claimant is entitled to receive as a loss of car allowance. I will consider this further under conclusions.

30. On 2 March 2020 the Claimant states that he arrived at work to find the locks had been changed on the office so that he was unable to gain entry. This is disputed by the Respondent.

31. The Claimant was asked to attend the Respondent's Waverton office. On arrival at the office, the Claimant was met by Ms Owen and Mr Sheppard. The Claimant was informed the Respondent was embarking upon a redundancy process. The Claimant outlines in his statement at paragraph 25 that he believes the decision to make the Claimant redundant had been predetermined. He states that he did not receive a new fuel card and he was not invited to join the Respondent's new Facebook page. He states that his personal items were removed from the office prior to 2 March 2021. Again, those issues are disputed by the Respondent. It is agreed that the first the Claimant knew of the redundancy process was during the meeting.

32. In consideration of the allegations relating to the Facebook invite, change of the locks, fuel card and removal of personal items, there is an absence of contemporaneous evidence to assist me resolve the issue. I have regard to the fact that the first time that the Claimant made such allegations was by way of solicitor correspondence on 8 April 2021 at page 72 of the bundle. Since that time, the Claimant has been consistent in his assertions. He provides a detailed account as per paragraphs 24 to 26 of his statement, albeit there appears to be some duplication of events. In oral evidence, he gave a robust and detailed account in response to these points being challenged in cross-examination. He stated that the locks were changed and that he knew the man who had changed them. He stated that a man named Lee Brian had gone to his office on the Saturday before the meeting and had removed personal effects, tools, clothing and certificates of qualification. He states that he had to pick the items up on 2 March 2021. I considered that the Claimant was amplifying his written evidence under cross-examination. He was clear and provided detail in such a manner that gave me a clear impression that he was recounting events to the best of his ability. Contrary to this was the evidence of Mr Sheppard. Whilst he denies that the locks were changed, he states that he has had no knowledge of the

fuel cards or whether personal items were removed. His written evidence, and the written evidence of the Respondent's other witnesses, do not assist me a great deal on this point. In cross-examination, Mr Sheppard was asked whether the Claimant was requested to go to a different office and whether he was included in a new Facebook group, the locks were changed and fuel card withdrawn. Mr Sheppard provided a detailed account of the reason for attendance at a different office but I formed the view that he was attempting to deflect in respect of the other issues. He went to great lengths to describe the alternative office and describe the Claimant as aggressive on the phone, but he was generally unable to assist me with regard to the matters relating to fuel cards, Facebook groups and personal items. In my judgment, Mr Sheppard's evidence on these issues was vague. And in an absence of cogent evidence from the other Respondent witnesses, I prefer the Claimant's evidence in respect of these issues. I therefore find that the Claimant was withheld a new fuel card, he was not invited into a new Facebook group, his personal items were removed prior to 2 March 2021 and that the locks were changed to his office.

33. At some stage during the course of the meeting, the Claimant was handed a copy of the letter found at page 55. The letter states that the Claimant's role "may be at risk of redundancy. The reasons given for being at risk are stated as organisational change caused by the financial effects of the industry and costs relating to New Build work. The letter states that "We also discussed with you that we want to consult with you and that we require you to return back to Robert Sheppard by email by 4pm on Wednesday 4th March 2020 with any recommendations you may have as an alternative". The Claimant was not required to work during the consultation period. The precise time at which the Claimant was handed the letter is disputed, however, in my view it is not necessary to determine the point. It is clear, and accepted, that the letter must have been drafted prior to the hearing and the precise time at which the Claimant was handed the letter is largely irrelevant.

34. At 11:32 on 2 March 2020, the Claimant sent Mr Sheppard an email with a number of proposals to keep costs down. The Claimant, in his oral evidence, accepted that the proposals were relatively minor in the wider need for financial savings, however, in my opinion, the proposals clearly indicate the Claimant's willingness to engage in meaningful consultation. This view is supported by the Claimant's further email sent at 15:42 on 4 March 2020 at page 57 of the bundle. A number of specific points are raised relating to the pooling and selection process and alternative roles. He raises concern regarding his job title. Both emails were sent within the deadlines set by the Respondent. Neither email received a response.

35. On 6 March 2020, the Claimant sends another email to Mr Sheppard requesting some indication regarding the way in which the redundancy process will proceed. He requests that his solicitor is copied into correspondence.

36. At 17:47 on 6 March 2020, by way of email at page 59 of the bundle, the Claimant is sent a redundancy outcome letter by the Respondent's accounts department. The letter can be found at page 61 of the bundle. The letter outlines that the Respondent has considered the Claimant's

recommendations but does not directly respond to the Claimant's first email. It states that alternative employment has been considered but there were no suitable roles. The letter responds in brief to the Claimant's email sent on 4 March 2020.

37. The Claimant appeals the decision by way of letter dated 9 March at page 63 of the bundle. In summary, the Claimant asserts the decision to dismiss was made before the meeting on 2 March 2020, no consultation process took place, no explanation was given for the redundancy, no selection pool was considered, the Claimant was not afforded the right to be accompanied to the meeting on 2 March 2020 and the Respondent failed to consider alternatives to dismissal. Further, the Claimant states that he is entitled to his contractual bonus. The Claimant requests that the appeal should be heard in "writing only".

38. Mr Price responds to the appeal letter on 11 March 2020 confirming that he will consider the appeal and asks the Claimant to confirm that he does not wish to attend an appeal meeting. The Claimant confirms that he wishes the appeal to take place on the paperwork only by way of email 12 March 2020.

39. By way of letter dated 20 March 2020, Mr Price upheld the decision to terminate. Mr Price considered that the decision was not made prior to 2 March 2020 as the letter was handed to the Claimant during the meeting. He states that the meeting on 2 March 2020 was a consultation meeting and that the consultation period lasted until 6 March 2020. Mr Price states that the reason for redundancy is the financial difficulties and restructuring of the company. It was reaffirmed that the Claimant is the only site manager within the company and that the Claimant appears to have been confused regarding the role of Contracts Manager, a completely different role. Mr Price states that there is no statutory right to be accompanied at the meeting. He states alternatives were considered but no roles were available. Mr Price outlines the Respondent's position in respect of the bonus policy and states that the Claimant is not entitled to the same.

40. Following the appeal letter, the Claimant's solicitor engages in correspondence with the Respondent as per pages 72 to 79. Both parties detail their respective positions.

41. In consideration of the claims, it is necessary to consider the Respondent's circumstances at the time of the redundancy process. The parties agree that the Respondent was in a difficult financial position. The Claimant gave a compelling account of his view as to why the Respondent had reached a financially precarious position. He stated that the company had effectively been mismanaged with a succession of poor financial decisions being made. The Respondent's witnesses focused more upon the other attempts to rectify the financial difficulties, for example, selling vehicles, assets, working longer hours as directors and, most importantly making redundancies. Regardless of the underlying reason for the financially precarious position, it is agreed the Respondent was in difficulty. The Claimant in the course of cross-examination, accepted that the Respondent was in a position whereby they needed to let staff go by virtue of a redundancy situation.

42. The Claimant directs considerable criticism at the Respondent's alleged failure to include other individuals in the pool. Mr Sheppard, at paragraph 13 of his statement, asserts that there is a significant difference between the Claimant's new build site that he was managing and a large commercial property that required a large management team inclusive of a Contracts Manager, Quantity Surveyor and Contracts Director. Mr Sheppard was clear that there was only one site manager that managed new builds and that was the Claimant. Further, it was asserted that the Claimant did not hold similar job descriptions or qualifications to the aforementioned individuals. Having heard Mr Sheppard's oral evidence on this issue, and considering the lack of evidence adduced by the Claimant to specify how and why certain individuals had similar roles, I accept the evidence of Mr Sheppard on this point. I therefore find, on the balance of probabilities, that there were no other individuals that shared similar job roles.

43. I have read and heard a substantial amount of evidence on the Claimant's job title. The Claimant states that his role was Senior Construction Manager whereas the Respondent states his role was Site Manager. Having heard the evidence, I consider the precise title to be irrelevant to the matters that I must determine and therefore I do not make any findings in respect of the exact job title. What is important, in my view, is a proper understanding of the tasks undertaken by the Claimant and this is not in dispute.

44. The Claimant levies criticism at the Respondent for failing to consider alternative job roles as part of the redundancy process. The Claimant states that he would have considered lesser roles, the most obvious being a joiner. The difficulty for the Claimant in that respect is that the Respondent had just terminated the working relationship with a number of joiners and made various other redundancies.

The Law

45. The key statutory considerations are found under section 98(1) and (2) of ERA 1996. It is for the employer to show the reason for dismissal. Where the employer can show a potentially fair reason for dismissing the claimant, the determination of the question whether a dismissal is fair or unfair 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 shall be determined in accordance with equity and the substantial merits of the case.

46. *Section 139 ERA 1996* provides that:

> *(1) For the purposes of this Act 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.

47. The leading case in respect of redundancy is that of **Williams v Compare Maxam Ltd [1982] ICR 156**. In general terms, employers acting reasonably will give as much warning as possible of impending redundancies to employees, consult about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job.

Conclusions

48. I have carefully considered the totality of the evidence relating to the reason for dismissal. In my view, the evidence is strongly in support of a finding that this was a genuine redundancy situation. It was agreed by the Claimant that the Respondent was in financial difficulty and that on a more general basis it was necessary for the Respondent to consider redundancies. I also have regard to the Respondent's evidence that a number of individuals that were engaged on a self-employed basis were no longer required to provide services and a number of other staff members were made redundant. In light of my findings on this issue, and the agreed evidence to include the concession made by the Claimant, I conclude that this was a genuine redundancy situation. I therefore find that the reason for dismissal was redundancy as defined by section 139(1)(b) of ERA 1996. Accordingly, the reason for dismissal is a potentially fair reason and I am required to move on to consider whether the dismissal was fair or unfair.

49. I have specifically considered the size and resources of the Respondent company. It is relevant that this is a relatively small company that engaged an HR advisor in the years prior to the redundancy and during the process.

50. As outlined above, employers acting reasonably will give as much warning as possible of impending redundancies. On any reading, the Claimant was given very little notice of the meeting on 2 March 2021. He was told that day that he was invited to a meeting but it was not specified that the meeting was an at risk meeting. He had no opportunity to consider his position in advance of his attendance and he had no opportunity to speak to colleagues, a union representative or lawyer in advance of the same. In my view, it is clear that the Claimant was afforded limited notice of the redundancy situation and this gave him little time to prepare in advance of the meeting. Even if he had wanted to be accompanied at the meeting, the Claimant was given no opportunity to make such arrangements.

51. Further, the Respondent accepts that the meeting on 2 March 2021 was the only meeting to have taken place. The meeting effectively serves as a hybrid

at risk and consultation meeting with the Respondent making it clear that the Claimant could make any representations that he wishes to make in the following 48 hours. I have no minutes of the meeting but it is agreed that there were discussions around the redundancy process and issues between the parties more generally. The Respondent invites me to conclude that meaningful consultation took place by virtue of the meeting and the subsequent emails that were sent by the Claimant. In my view, the Claimant is actively attempting to engage in a consultation process. He sends an email on 2 March 2021 and another on 4 March 2021, neither received a response. In my view, the lack of response to emails, combined with an absence of a further consultation meeting, are indicators that the Respondent failed to engage in meaningful consultation. These factors are set against my findings relating to the Respondent removing personal items, changing the locks to the office, failing to invite the Claimant to join a Facebook group and not providing new fuel cards. Alongside this is the fact that the Respondent choose to request that the Claimant did not need to continue working during the consultation period. In my view, the findings outlined earlier in my judgment, combined with the speed of consultation, lack of notice and failures to respond to the Claimant indicate that the Respondent had predetermined the outcome of the redundancy process prior to the commencement on 2 March 2021. I conclude that the Respondent failed to engage in meaningful consultation as a result.

52. In light of my findings relating to the absence of comparable roles, I conclude that the process and identification of the pool of one was fair in the circumstances. Further, in light of my findings relating to the Respondent's actions in making other staff redundant and terminating engagement with self-employed individuals, I conclude that the Respondent did consider alternative roles as per the redundancy letter and that there were no such roles available.

53. I therefore conclude that given the predetermined decision to make the Claimant redundant, and the failure to give notice and meaningfully engage, that the Claimant was unfairly dismissed in all of the circumstances and that the Respondent's actions were outside the range of reasonable responses. However, in light of my conclusions relating to the Respondent's financial circumstances and absence of alternative roles, I consider that the Claimant would have been made redundant even if a fair process had been followed. I will hear submissions from the parties in respect of how long a fair process would have taken in the circumstances.

54. In consideration of the notice period and breach of contract, my findings are clear. The Claimant was contractually entitled to a six month notice period and not the one month that the Respondent suggests. I conclude that the Respondent was therefore acting in breach of contract.

55. In respect of the claim for bonus pay, I have made clear findings that the Respondent was not contractually bound to make such a payment for the reasons that I give above. I conclude that the bonus payment was discretionary in all of the circumstances and therefore that the claim for unpaid bonus pay is not well founded.

56. The Claimant withdrew the claim for unpaid holiday pay and I therefore shall formally dismiss the claim today.

57. In respect of the claim for unpaid wages relating to the fuel payments at £200 per month, I made a finding that the Respondent made such a payment to the Claimant by agreement. In my view, however, the payment is an expense rather than a payment for the purposes of unpaid wages. Given my view that this amounts to an expense, the Claimant can argue that the amount should be recovered by way of breach of contract. However, I am persuaded by the Respondent's submission that there is no loss to the Claimant as he was not using his own vehicle for the purpose of attending sites and undertaking work. There is therefore no loss or depreciating effect on his vehicle by virtue of the Claimant not engaging in employment post-dismissal. I therefore conclude that the payment was an expense in the true sense of the word and I find that the claim is not well founded.

58. The matter therefore remains listed for consideration of remedy in light of my findings and to consider the Respondent's application for costs.

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Employment Judge **G Duncan**

Date 21 May 2021

REASONS SENT TO THE PARTIES ON 2 June 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche