EMPLOYMENT TRIBUNALS

Claimant: Mr R N Jones & Mr C Childes

Respondent: Robyn Jones t/a Bob Jones & Sons

Heard at: Cardiff (CVP) **On:** 9 & 10 December 2021

Before: Employment Judge G Cawthray

Representation
Claimants: In person
Respondent: Mr Aled Jones, Solicitor

JUDGMENT having been sent to the parties on 15 December 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Issues

1. The issues were set out in the CMPH Order following a hearing on 9 July 2021.

2. **Unfair dismissal**

3. Were the Claimants dismissed? This is agreed.
4. What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. S139 of the Employment Rights Act sets out the definition of a genuine redundancy situation (edited to assist the Claimants).
   (1) For the purpose 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 -
   (2) 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

(3) (ii) to carry on the business in the place where the employee was so employed, or
(4) (b) the fact that the requirements of that business-
(I) for employees to carry out work of a particular kind, or
(5) (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,

5. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:
(1) The respondent adequately warned and consulted the claimant;
(2) The respondent adopted a reasonable selection decision, including its approach to a selection pool;
(3) The respondent took reasonable steps to find the claimant suitable alternative employment;
(4) Dismissal was within the range of reasonable responses.

6. **Remedy for unfair dismissal -**

7. Do the Claimants wish to be reinstated to their previous employment?
8. Do the Claimants wish to be re-engaged to comparable employment or other suitable employment?
9. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimants caused or contributed to dismissal, whether it would be just.
10. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimants caused or contributed to dismissal, whether it would be just.
11. What should the terms of the re-engagement order be?
12. If there is a compensatory award, how much should it be? The Tribunal will decide:
13. What financial losses has the dismissal caused the Claimants?
14. Have the Claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?
15. If not, for what period of loss should the Claimants be compensated?
16. Is there a chance that the Claimants would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
17. If so, should the Claimants compensation be reduced? By how much?
18. Does the statutory cap of fifty-two weeks' pay apply?
19. What basic award is payable to the claimant, if any?

Evidence & Procedure

20. There were initially three Claimants and one Respondent, with each Claimant is bringing a claim of unfair dismissal. The claim brought by Mr Lloyd was dismissed. This has been dealt with in a separate judgment.

21. Both Claimants gave evidence, having affirmed, by reference to a witness statement which I read and considered. Both Claimant's also gave oral evidence.
22. Mr Robyn Jones, on behalf of the Respondent, gave evidence having affirmed, by reference to a witness statement which I read and considered. He also gave oral evidence.
23. I was provided with a Bundle amounting to 86 pages, and I explained to the parties that I would only read the documents that I was directed to.
24. All parties summarised their positions after the completion of evidence.

Facts

25. The First Claimant (Neil Jones) started employment at the Respondent on 11 November 2004. The First Claimant butchered meat, worked in the shop and in recent years also undertook some deliveries.
26. The Second Claimant (Christopher Childes) started employment at the Respondent in 1985, initially as an apprentice and moving on to a butcher. The Second Claimant left the Respondent in 1995 and re-joined in 2005. The Second Claimant worked in the shop and butchered meat.
27. The Claimants worked on a part time basis working 16 hours per week. They were paid £150 per week.
28. The Respondent valued the Claimants and considered them to be good employees. The parties had a good working relationship prior to March 2020.
29. Prior to the pandemic the Respondent had two key business focuses: one being the sale of meat from the shop and the other being the supply of meat to hotels and restaurants. Most of the meat used was supplied from the Respondent's farms, but was supplemented by other local livestock markets where necessary.
30. Following the immediate announcement of the national lockdown the Claimants continued to attend work for a few days. However, before the end of March the Claimants, and other staff, were placed on furlough leave at the end of March 2020. The Respondent topped up the Government contribution of 80% so that the Claimants were paid their full wages whilst they were furloughed.
31. When the country was locked down in March 2020 the shop remained open but there was little custom. The supply of meat to hotels and restaurants significantly diminished. In response to the national lockdown the Respondent made a number of changes to its business. Mr Robyn Jones, as owner of the business, decide change the opening hours of the shop to the public from being open on six days per week to only open on one day per week, on a Saturday. Mr Robyn Jones made local deliveries to some customers and a few restaurants that were open for takeaway. He also started selling meat to wholesale markets. Mostly, this meat did not require butchering, and Mr Robyn Jones delivered the whole carcasses himself. Some meat did require butchering, the amount depending on orders, but Mr Robyn Jones did the butchering himself.

32. Towards the end of May 2020 Mr Robyn Jones considered that in view of the continuing pandemic, and the fact that the furlough scheme was to end in September 2020, that the new business model should continue as it had during the pandemic, namely the limited opening of the shop and sale of mostly whole sale meat. Mr Robyn Jones concluded that he could undertake the work required himself, and there was therefore no work for the Claimants, and a third employee – Steven Lloyd.
33. The Respondent sent the Claimants a letter on 3 June 2020 stating that the Claimants were being made redundant and informing them their employment would end on 28 August 2020. No prior warning of redundancy was given.
34. Mr Robyn Jones had formed the view that consultation would be pointless as there was no work for the Claimants due to the change in the operations of the business.
35. In evidence Mr Robyn Jones stated that it was a hard decision to make the Claimants redundant after working with them for many years.
36. In June 2020, after sending the Notice of Redundancy Mr Robyn Jones hurt his shoulder and he was not able to undertake all the work himself due to his injury.
37. Shortly after the notice of redundancy, at some time in 7 June 2021 the Claimants attended the Respondent's premises to collect their personal belongings and saw a Mr Crane, in butchering attire.
38. The First Claimant confronted Mr Robyn Jones about what Mr Crane was doing.
39. There is a dispute about what was said.
40. The First Claimant says that Mr Robyn Jones told them that Mr Crane was being paid £50 per day.
41. In his witness statement the Second Claimant, with reference to the conversation states: *"I then asked mr Jones why he hadn't contacted any of us fellow workers..? His reply to us was "it wouldn't be worth it for you " for £50 per day"*. The statement does not specifically state that Mr Robyn Jones told the Claimants that Mr Crane was being paid £50 per day.
42. When cross examined about this matter the Second Claimant, said that the Claimants confronted Mr Robyn Jones and that the reply was that it wouldn't be worth it to come in for £50 per day. It was put to him that Mr Robyn Jones did not say anything about paying Mr Crane and the Second Claimant responded – "it was about us getting £50 a day".
43. Mr Robyn Jones account is that he did not tell the Claimants that Mr Crane was being paid, as he was not, but tried to explain that the Claimants were financially better off by remaining on full pay and being furloughed rather than say coming in for a few hours and being paid say £50.
44. At that time the furlough scheme did not allow furloughed staff to work for their employer on a part time basis. Mr Robyn Jones considered it was financially better for the Claimants to remain on furlough, and tried to explain this to the Claimants.
45. Mr Robyn Jones' oral evidence was consistent when challenged on the basis of the conversation with the Claimants.
46. In response to cross examination the First Claimant said he thought Mr Crane had been working at the Respondent from March 2020, this was not consistent with the ET1 and witness statement, which state he had intel that a person, now known to be Mr Crane was working at the shop between June

and August 2020. The First Claimant said he may have made some mistakes about dates.

47. Mr Robyn Jones' oral evidence was also consistent with the documents in the bundle, namely correspondence between the parties' legal representatives.
48. On balance I find that the account of the conversation that took place is as explained by Mr Robyn Jones.
49. To be clear, I do not consider the Claimant to be deliberately misleading, but rather, there is a different recollection of the conversation, and clearly the Claimants were unhappy and upset about not being asked to return to work and Mr Robyn Jones' lack of contact.
50. The parties dispute the role of Mr Crane. The Respondent's evidence is that Mr Crane helped Mr Robyn Jones, free of charge as a favour, for few hours a week on a temporary basis, to help Mr Robyn Jones with butchering whilst he recovered from a shoulder injury. Mr Robyn Jones' evidence was also that he suffered another injury in autumn 2020 and required 21 stitches, and that Mr Crane again helped him out for a few weeks whilst he recovered. Mr Robyn Jones explained that he has known Mr Crane for many years and has given him work on his farms when Mr Crane needed work. The First Claimant, maintained that he did not think Robyn Jones knew Mr Crane.
51. The Claimants believe that Mr Crane was being paid £50 per day and worked for the Respondent twice a week.
52. The Claimants pointed to a photograph of a text message between the First Claimant and Mr Craine. The message was in Welsh, with a typed translation in English below, which stated:
    " Hi neil mate, Yes ive been there a few times butchering sheep!!
    I RESPOND.."WHY DID WE NOT GET ASKED BACK TO WORK THEN?"
    "MR Crane responds That he does Not know"
    "And were we on Furlough".
53. There was no challenge on the content of the message. The Claimants had dated the message as being on 23 May 2020, but there was no date displayed on the screen shot of the message.
54. There were other photos and text messages provided, which the Claimants assert show evidence that that Mr Crane was working for the Respondent. Namely a photo of Mr Crane dressed in butchers attire outside the shop on 28 July 2020.
55. Also in December 2020, but for completeness I could not identify a date on the message due to poor quality, there is a translation of a message that Mr Crane says "Butchers shop in town twice a week".
56. This period accords with Mr Robyn Jones needed some further help after an injury in autumn.
57. A separate conversation between the Second Claimant and Robyn Jones took place at some stage in which Mr Robyn Jones, in response to being asked it there was any work, explained that there was not and that the Second Claimant couldn't work due to furlough. It was not possible to make a finding of fact on when the conversation took place.
58. Shortly after the conversation at the shop in June 2020 the parties liaised via legal representative
59. On 18 June 2020 the Respondents solicitor sent letter to the First Claimant in response to queries the First Claimant had raised. The letter acknowledged no consultation prior to issuing notice of redundancy and said there was no

consultation as all staff being made redundant, therefore consultation would have served no purpose. The letter also explained the basis of Mr Crane assisting the Respondent, on a no pay basis as a favour following injury for a limited number of hours per week.

60. The First Claimant instructed a solicitor to write to the Respondent's solicitor and there is letter date 12 August 2020. It sets out the view that the First Claimant's belief is that Mr Crane has taken over the First Claimants job and the Respondent was purchasing 30-60 sheep per week.
61. The Resopondent's solicitor replied on 26 August 2020, setting out that Mr Crane did no more than 3 –4 hours work and Mr Robyn Jones did the work himself, and that there was a diminishment in the work required.
62. A letter dated 18 September from the First Claimant's solicitor contesting the work being undertaken.
63. The Claimants employment ended on 28 August 2021. All of the Claimants were paid their notice pay and a redundancy payment. The First Claimant was paid £2,400.00 and the Second Claimant £3,152.52.
64. On balance, I find that Mr Crane was not employed by the Respondent and helped Mr Robyn Jones on a temporary and ad hoc basis when Mr Robyn Jones was unable to undertake certain tasks himself due to injury. I find that Mr Crane mostly assisted Mr Robyn Jones once a week, but that this varied and was either on a Tuesday or Saturday.
65. I find there had been a change in the operation of the business, and a reduced requitement for work, in particular butchering and serving in the shop, and the amount of carcasses that required butchering did and do vary on a weekly basis depending on the orders received.

Law

66. Section 95 (1) Employment Rights Act 1996 (ERA) sets out when an employee is dismissed: ,

"95 Circumstances in which an employee is dismissed.

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) **F1**. . . , only if)—*

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c)t the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

67. Under section 94(1) ERA an employee has the right not to be unfairly dismissed by his employer.

68. Section 98 ERA states:

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it 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.

(2)A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason 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."

69. Under section 98(1) ERA, the potentially fair reasons for dismissal include redundancy.
70. In *Williams v Compair Maxam Ltd [1982] ICR 156,* the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were:
    (1) Whether the selection criteria were objectively chosen and fairly applied.
    (2) Whether employees were warned and consulted about the redundancy
    (3) Whether, if there was a union, the union's view was sought
    (4) Whether any alternative work was available
71. In *Polkey v AE Dayton Services Ltd 1988 ICR 142*, their lordships decided that a failure to follow correct procedures was likely to make the ensuing dismissal unfair unless the employer could reasonably have concluded that doing so would be futile. This meant that the employer would 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. Further, on the issue of quantum, the decision holds that whether procedural irregularities actually made any difference to the decision can be taken into account when calculating compensation.

72. Section 139 ERA defines redundancy as set out below:

"139 Redundancy.

(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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

(7) In subsection (3) " local authority " has the meaning given by section 579(1) of the Education Act 1996."

Conclusions

What was the reason/s for dismissal?

73. I conclude that the reason for the Claimants dismissal was redundancy. The Claimants were dismissed because of the change in the focus of the Respondent's business which led to a reduced requirement for work of a particular kind.
74. The redundancy situation arose because the Respondent determined that it wished to focus on wholesale of carcasses to markets and open the shop on

a much more limited basis. It is not the function of the tribunal to decide how a business should be managed. The existence of the furlough scheme did not mean that the Respondent was prevented from making redundancies.

75. There was in fact a reduction in the number of employees required, and all three employees were made redundant. Mr Robyn Jones undertook the work of the business himself, other than when he was assisted by Paul Crane on a temporary basis as set out above. I do not consider the ad hoc and limited assistance by Paul Crane, whether that be paid or otherwise, to be evidence that the was not a genuine redundancy situation given he was assisting Mr Robyn Jones following two periods of injury.
76. I conclude there was a genuine redundancy situation. As per the definition in section 139 ERA, the requirements of the business for employees to carry out work of a particular kind had diminished. It is the Respondent's prerogative to decide how to move the business forward, and the change in direction reduced the requirement for work of particular kind, being the work undertaken by the Claimants.

Whether the dismissal was unfair?

77. Warning and Consultation
78. Mr Robyn Jones made no attempt to warn staff about the potential consequences of the pandemic and the resulting changes in the business model.
79. The Respondent acknowledges he did not consult with the Claimants. Although I acknowledge that this was a difficult situation for Mr Robyn Jones, having worked with the Claimants for many years, consultation in redundancy situations is required, and no form of consultation took place. Consultation with individual employees is fundamental to the fairness of any dismissal for redundancy. The Claimants were clearly upset by the lack of contact and communication from the Respondent.
80. Selection criteria
81. This is not a case where a selection criterion has been applied as all employees were made redundant.
82. Alternative work
83. I accepted that following the change in the business model that Mr Robyn Jones undertook all work himself, other than when injured, and therefore there were no alternative roles available within the business. However, this point could and should have been discussed with the Claimants as part of a consultation exercise, and such a discussion may have helped to alleviate the Claimants upset.
84. Further, I note that the Claimants were not offered any right of appeal.
85. Range of reasonable responses
86. In reaching my conclusions I have considered all of the circumstances, noting that the Respondent was a very small employer with only 3 employees and that the pandemic caused challenges for the Respondent, as it has done for many employers.
87. Accordingly, I conclude that the dismissal was on the grounds of redundancy but the dismissal was procedurally unfair due to the lack of consultation, which is a key element of a fair redundancy process. I conclude that

Respondent's conduct in managing the redundancy process did not fall within the band of reasonable responses.

88. Unfair dismissal quantum
89. The Respondent argued, on the basis of Polkey, that the Claimant would have been dismissed in any event even if a fair procedure been followed. I agree with this. The Respondent has made significant operational changes to its business which means no employees are required. As noted above, it is not for the tribunal to attempt to second guess the employer's business decisions unless there was something manifestly absurd about them which mean they lacked credibility.
90. Having, considering the principles set out in Polkey I conclude that the Claimants would have been dismissed in any event. The Claimants have not put forward suggestions on how their redundancies may have been avoided. Accordingly, I do not consider that proper consultation would have resulted in a solution to avoid the Claimants redundancy dismissals in view of the changes to the business.
91. The Claimants cannot recover both a Basic Award and a redundancy payment, and they were paid a redundancy payment by the Respondent. As such, no Basic Award will be made.
92. The calculation of the Compensatory Award for unfair dismissal will be limited to pay and benefits for the period of time which I consider would have been reasonable to go through a proper redundancy consultation with the Claimants, and I determine that a reasonable process would have taken no longer than three weeks. In short, a reasonable consultation process involves the following: initial meetings to warn employees (at which the new business model would be explained), consideration of any comments/proposals made by the employees, consideration of alternative employment, a meeting to confirm the outcome and written confirmation of redundancy dismissal and as best practice the right to appeal. I consider that following such a process would take between 2 to 3 weeks, and therefore conclude that a payment equivalent to 3 weeks is appropriate in the circumstances.

Section 38 Employment Rights Act 1996 - Failure to provide written particulars.

93. Following concession by the Respondent that they had not provided the Claimants with a written statement of employment particulars I order the Respondent to pay to each Claimant additional compensation equivalent to two weeks' pay. I considered whether it was just and equitable to order the Respondent to pay 4 weeks. Although the Claimants had been employed for long periods and should have been given written terms, I noted the open and frank admission by the Respondent during these proceedings in this respect and therefore do not consider it just and equitable to award the Respondent to pay an additional 4 weeks' pay.

Employment Judge G Cawthray
Dated: 1 March 2022