EMPLOYMENT TRIBUNALS

Claimant: **Mr Timothy Richard**

Respondent: **J Stimler Ltd**

Heard at: **East London Hearing Centre**

Before: **Employment Judge Peter Wilkinson**

On: **16th January 2022**

Representation

Claimant: **Adam Griffiths, Counsel**

Respondent: **Smaira Younis, Litigation Consultant, Peninsula**

JUDGMENT

1. The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.

2. The Claimant's claim that the Respondent made unlawful deductions of wages from his pay is well founded. The Respondent unlawfully reduced the Claimant's salary from April to October 2020 resulting in an underpayment of £6,831.33.

3. The Respondent failed to provide the Claimant with a written statement of his particulars of employment and the Tribunal has awarded a sum equal to 2 weeks wages (capped at £544 per week) in respect of that failure.

4. The total award to the Claimant, set out in the attached schedule, is £59,414.84.

5. The Judge apologises to the parties for the delay in promulgating this Judgment, which has arisen as a result of illness.

REASONS

1. The Claimant was employed by the Respondent from 3rd May 2013 until 30th October 2020 when he was notified of his redundancy by email. At the point of redundancy, he was principally employed in a sales role, although he gave evidence (in part disputed) of much wider involvement in company activities.

2. The Respondent carries on business as a wholesaler of fabric to UK clothing manufacturers. It is a long-established family company and a number of the employees are members of the Stimler Family.

3. It is agreed that the Respondent did not consider any other employee for redundancy and that the Claimant was selected from a pool of which he was the only member.

4. The Claimant has brought the following claims:

   4.1. A claim of unfair dismissal under Part X of the Employment Rights Act 1996; and

   4.2. A claim for unlawful deduction from wages.

   4.3. Failure to provide written particulars of employment.

5. The case was listed for one day via CVP on 20th August 2021, when I heard evidence from Mr Martin Simler and Mr Steven Stimler for the Respondent and from the Claimant. Evidence finished at approximately 5:00pm and the case was listed for a further day on 16th February 2022 to deal with submissions, Judgment and remedies if appropriate.

6. The Tribunal had the benefit of written and oral submissions on behalf of both parties.

7. Judgment was handed down at 15:00 and the schedule of loss in the light of that Judgment was agreed with input from the representatives for both parties.

Unfair dismissal

8. The Claimant claims unfair dismissal and the respondent relies on redundancy as a reason for the dismissal

9. It is for the respondent to persuade the tribunal that the reason for dismissal was redundancy

10. If I the respondent satisfies me as to the reason, then I must consider whether dismissal for that reason was fair, having regard to equity and the substantial merits of the case.

Reason for dismissal

11. I heard evidence from the respondent's witnesses of a severe downturn in trade in the pandemic. This is hardly a surprise, given the impact of the pandemic on retail sales, and thus presumably on demand from manufacturers of fashion clothing. I heard evidence that the respondent made use of the furlough scheme.

12. I do not intend to go behind that evidence and I accept that there was economic pressure on the respondent and that there was a decision to cut costs, by reducing the wage bill.

13. I have seen no evidence to suggest that there was any other reason for the dismissal of the claimant and I accept that this the reason for dismissal was redundancy. In saying that, I do not necessarily see how a reduction in costs on that basis falls only on sales. A reduction in sales must also lead to a reduction in fabric sourcing, in cutting, in shipping and in general administration. This may be relevant to selection, dealt with later in this judgment.

14. Having accepted that the reason for dismissal was redundancy, I must go on to consider whether the dismissal was fair in all the circumstances.

15. The classic statement as to reasonableness in a redundancy case is to be found in the case of Polkey v AE Dayton Services Ltd [1998] AC344 at 364:

> *in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.*

16. The essence of the Claimant's position on that guidance is this:

    i. There was no proper consultation
    ii. The selection for the redundancy was not fair
    iii. The employer did not take such steps as were reasonable to minimise redundancy by redeployment within his own organisation.

<u>Consultation</u>

17. I was referred to the British Coal judgment of Glidewell LJ, citing Hodgson J in Bryant, setting out the test for fair consultation in 4 points:

    a) Consultation when the proposals are still at a formative stage
    b) Adequate information on which to respond
    c) Adequate time in which to respond
    d) Conscientious consideration of the response to consultation.

I consider these four points in turn:

Formative stage:

18. The first 'consultation' appears to be by telephone on 22nd September 2020.

    18.1. The claimant is told that his position, as salesman is at risk of redundancy.

    18.2. It is suggested that the Claimant put forward suggested alternatives to be discussed at the next meeting.

    18.3. He is told that the next meeting will take place on 29th October, in a week

    18.4. The purpose of this meeting is said to be to understand why his job is at risk and for him to suggest alternatives to protect his employment

    18.5. It is made clear to the claimant in that meeting that he is the only person being considered for redundancy

    18.6. At the second meeting on 29/10, it is made clear that the decision has been taken to make the Claimant redundant unless he can come up with proposals. The respondent says the downturn in sales is going to be permanent so that neither furlough nor reduced wages is appropriate, despite the government scheme

    18.7. Alternatives like exploring the children's clothes market are dismissed out of hand despite the respondent apparently already being in the process of exploring markets for jewellery and for modest clothing.

    18.8. The final consultation meeting invitation was sent out on 8th October and contained an express warning of redundancy

    18.9. I do not consider that the original consultation was entered into at a formative stage. It is perfectly clear that the respondent had decided the claimant would be made redundant if he did not provide acceptable alternatives.

Adequate information:

19. Despite the fact that the Respondent was seeking for the Claimant to provide alternatives rather than exploring them themselves, they failed to provide him with sales figures and were not forthcoming in providing financial information which would have enabled the Claimant to respond to their contention that his position was no longer viable. I do not consider there was adequate information to which to respond.

Adequate time:

20. The time pressure is almost palpable in the consultation notes. Martin Stimler told the Claimant on 6th October to 'get your thinking cap on". On 8th October, he was sent a letter warning of his possible termination for redundancy. On 21st

October he attended a further consultation, which appears to have been positively hostile. On 23rd October he was dismissed.

20.1. I have seen no evidence whatsoever justifying that kind of haste. I do not consider that there was adequate time to respond.

Conscientious consideration of the response:

21. It is only necessary to read the consultation notes to appreciate that nothing the claimant put forward was the subject of conscientious consideration.

21.1 There is no evidence that there was any proper consideration of the suggestions put forward by the claimant at all.

Conclusion on Bryant:

22. I do not believe that there was proper consultation, in compliance with the Bryant test.

CRITERIA FOR SELECTION

23. The starting point, as set out in the skeleton argument of the Claimant, is the oft-cited judgment of the EAT in Eaton Ltd v King [1995] 1 IRLR 75, to the effect that an employer is required to have set up a good system for selection and needs to administer that system fairly.

23.1. In *Williams v Compair Maxam Ltd* [1982] ICR 156, the Employment Appeal Tribunal engaged in heavy criticism of the use of subjective criteria for redundancy selection and set out that "unless some objective criteria are included, it is impossible to demonstrate to any employee [like the applicant who is not on good terms with the person making the selection] that the choice was not determined by personal likes and dislikes alone: we would also have thought that it was extremely difficult for an employment tribunal to be satisfied on the point.

23.2. I have seen no evidence at all that the respondent had set up any system, let alone a good system, for selection, well administered or otherwise.

23.3. Although there was no evidence before me of personal animosity, the Claimant clearly considered that his being selected had everything to do with protecting family and close family connections, rather than being objectively justified.

23.4. Having not set up any system to which I could be referred, the respondent sought to justify putting the claimant in a pool of one, by demonstrating that all the other employees involved in the same area of endeavour as the claimant, that is to say, all the employees whose primary function was in sales, had other roles or skills, which so differentiated their positions from the claimant that there was no possibility of their being considered for redundancy.

23.5. I do not accept that this can be right. I shall deal with the reasons for that in some detail:

23.6. The Claimant identifies 3 other employees who he says should have been in the pool. As I noted earlier, I am not entirely clear that there was a justification for limiting the pool to sales people, but even setting that aside and considering the people identified by the Claimant, there are a number of obvious issues.

23.7. The individuals identified by the Claimant are as follows:

i. Andrew Stimler
ii. Ross Shapero
iii. Josh Burns

Andrew Stimler:

24. Andrew Stimler is the son of Martin Stimler, Managing Director of the Respondent company. Andrew Stimler joined the family business in 2018 and it appears to be agreed that he was trained in his sales role at least in part by the respondent. It is clear that sales formed a substantial part of his role.

24.1. It is said that Andrew Stimler had other skills, some of which, such as assisting in the family property business, seem to be entirely unrelated to the core business of J Stimler Ltd.

24.2. It was said that Andrew Stimler was involved in procuring PPE, presumably during the pandemic. He was also involved in a business involving jewellery and accessories, which I understand was not a success, and in an endeavour to expand the clothing business into the sale of modest clothing.

24.3. There appears to be no cogent reason given why, if there was to be an expansion into PPE, the claimant could not have been involved just as much as Andrew Stimler.

24.4. In any event, I have reached the conclusion that Andrew Stimler should have been included in the pool for consideration. In a structured, objective points based appraisal, it may be that the pleaded additional skills and perhaps contacts, might have seen him score more highly than the Claimant, but such a system was never applied and, as pointed

out in *Compair Maxam*, it is not for the tribunal to speculate what would have happened had objective criteria been identified and applied. I can find no justification for excluding Andrew Stimler from the pool.

Ross Shapiro:

25. There is a complication in respect of Ross Shapiro. The respondent appears to accept that a substantial part of his role was in selling their products. He however was not directly employed by the respondent, instead being employed by his own limited company.

    25.1. The evidence in respect of Ross Shapiro was that he was free to offer his company's services to other clients, but that he did not do so.

    25.2. Mr Shaprio took over in his business from his father, Mr David Shapiro, who had himself worked in the same manner with Steven Simler's father, Mr Jack Simler. Ross Shapiro was thus a close family friend, who it appears offered his services through his company only to the Stimler family business, as his father did before him.

    25.3. The approach to Ross Shapiro was as a result wholly removed from objectivity. As Martin Stimler said: "Without the involvement of Ross Shapiro, I am unsure if we would still have a viable business"

    25.4. The respondent argues that Ross Shapiro should be considered a worker for the purposes of this exercise and it is easy to see that this might be a reasonable conclusion.

    25.5. I have nonetheless formed the view that Ross Shapiro should be considered to be an independent contractor and that it would not be possible to find that he should have been included in consideration for redundancy.

    25.6. Under a separate head however, I do consider that there is a reasonable argument that the respondent should have considered whether they could have reduced their reliance on the services of Mr Shapiro's company in order to avoid making the claimant redundant.

Josh Burns:

26. There is a dispute as to the date on which Josh Burns was employed. The Claimant believes he was employed after the redundancy, in November 2020. Martin Stimler gave evidence on oath that he was employed in July 2020. Despite this, there appears to eb a contract in the bundle showing that Josh Burns was employed on the 7th of September. I am troubled by this apparent inconsistency but am not convinced that anything turns on it.

    26.1. The Claimant believes Josh Burns was employed in a sales role. The Respondent's position is that he was employed to allow the respondent

to ‘push into a new sector”. Martin Stimler suggested that this was an opportunity to leapfrog into the market for blouse fabric, an area in which the respondent had had little success historically.

26.2. It appears to be clear from the evidence of Martin Stimler that Josh Burns was employed to source and sell blouse fabric and that he was a member of the workforce for at least a number of months before the redundancy arose.

26.3. It is not clear to me whether Josh Burns should have been included in the pool or not. What is very clear to me is that the respondent never gave any thought to the question.

Conclusion on selection

27. Although there has been much focus on who should properly have been in the pool for consideration for redundancy, I am not of the view that this is the definitive question.

27.1. The question with which I am concerned is rather that set out in *Eaton v King* and in *Compair Maxam,* that is, to paraphrase, whether the respondent had set up a good system for selection and had administered it fairly, and whether there were objective criteria which could satisfy the tribunal that this decision was made on an objective basis, rather than on the basis of protecting the employment of family and close business partners in a time of economic crisis.

27.2. I do not consider that there was any such system and I do not consider that there were any objective criteria justifying the selection of the claimant for redundancy.

27.3. Insofar as this is a ‘pool’ issue, I can see no reason for not including at Least Andrew Stimler and probably Josh Burns in any pool, and then applying suitable objective criteria to determine who to select for redundancy. Applying an objective measure to who was most valuable to the business must always be preferable to simply stating, as the respondent does, that they know all of the employees and understand their roles, so are at liberty to determine that only the claimant should even be considered for redundancy. This is precisely the kind of subjective approach so roundly condemned in *Compair Maxam*.

Redeployment / minimising redundancy

28. It is striking that in all the consultation meeting with the claimant, the respondent was unable to put forward a single suggestion other than redundancy and instead put the onus on the claimant. It is equally striking that the claimant’s proposals were not met with a promise to consider them or an option for them to be trialled but were universally dismissed without further consideration.

28.1. I have already noted that there was an obvious option to reduce reliance on Ross Shapiro and to re-allocate any overlap to the claimant. I have no knowledge of course of whether this is possible, but it is clear that it was never considered.

28.2. I do note however that the decision in Polkey places a positive burden on the employer to take such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation and that he will normally not act reasonably unless he does so. I have been presented with absolutely no evidence of the respondent in this case taking any such steps.

28.3. Given all of the above, I have concluded that the reason for dismissal was redundancy but that the respondent's dismissal of the claimant for redundancy was not fair in all the circumstances of the case and did not fall within the band or range of reasonable responses

Deduction from wages

29. It was agreed that the Claimant's normal wage was £65,000 per annum, gross.

29.1. It was agreed that from April 2020 to September 2020 inclusive, the Claimant was paid £3,500 per month gross and in October 2020 he was paid £2,500 gross.

29.2. The Respondent and the Claimant both pointed out a letter from Martin Stimler, for the Respondent, to the Claimant, dated 05/04/20 confirming that he had agreed to be paid only 80% of his salary whilst he was designated by the company as a 'furloughed worker'.

29.3. It was the Claimant's case that he understood he had agreed to be paid 80% of his salary, that is £4,333.33 per month gross.

29.4. It was the Respondent's case that the letter should be read as an agreement to pay 80% of salary subject to a maximum of £2,500 per month, that being what the company received from the Government, as set out elsewhere in the letter.

29.5. The starting point is the contract between the parties. That provided that the salary to be paid was £65,000 per annum, or £4,333.33 per month. Any variation to that provision must be by agreement, if the variation is not to constitute a breach of contract.

29.6. On a strict reading of the letter to the Claimant, it is clear that he is told that he is taken to have agreed a reduction in his wage to 80% of his wage whilst he is a furloughed worker. He is told that if he does not agree that change he is to contact Martin Stimler directly as a matter of urgency.

29.7. It seems to me that the Claimant is entitled to rely on the terms set out in the letter. What was communicated to him was that he was taken to have agreed a reduction in his wages to 80% of his normal wage. Absent any other provision, that is what he was entitled to.

29.8. It is agreed that the difference between 80% of his normal wage and what he was actually paid for the relevant period amounts to £6,833.31.

29.9. I have therefore found that the Respondent has unlawfully deducted that sum in wages from the monies paid to the Claimant by way of salary.

Employment Judge Wilkinson
Dated: 28th July 2022

IN THE EMPLOYMENT TRIBUNALS
CASE NO: 3200641/2021

BETWEEN

Timothy Richard
AND
J Stimler Ltd

SCHEDULE OF LOSS

1. Details

Date of birth of claimant	17/03/1982
Date started employment	03/06/2013
Effective Date of Termination	30/10/2020
Period of continuous service (years)	7
Age at Effective Date of Termination	38

Date new equivalent job started or expected to start	16/02/2022
Remedy hearing date	16/02/2022
Date by which employer should no longer be liable	28/02/2022
Statutory notice period (weeks)	7
Net weekly pay at EDT	855.43
Gross weekly pay at EDT	1,249.85
Gross annual pay at EDT	65,000.00

2. Basic award

Basic award Number of qualifying weeks (7) x Gross weekly pay (538.00)	3,766.00
Less redundancy pay already awarded (total amount awarded 8,750.00)	-3,766.00
Total basic award	**0.00**

3. Compensatory award (immediate loss)

Loss of net earnings Number of weeks (67.7) x Net weekly pay (855.43)		57,912.61
Plus loss of statutory rights		500.00
Plus udw		6,831.33
Plus smt		1,088.00
Less sums obtained, or should have been obtained, through mitigation		-1,933.10
Earnings	1,933.10	
benefits (30/10/2020 to 30/04/2021)	1,933.10	
Total compensation (immediate loss)		**64,398.84**

4. Adjustments to total compensatory award

Compensatory award before adjustments	**64,398.84**
Total adjustments to the compensatory award	**0.00**
Compensatory award after adjustments	**64,398.84**

5. Enhanced redundancy in excess of basic award

Total	**4,984.00**

6. Summary totals

Basic award	0.00
Compensation award including statutory rights	59,414.84
Total	**59,414.84**

7. Grossing up

Tax free allowance (Â£30,000 - any redundancy pay)	21,250.00
Basic + additional awards	0.00
Balance of tax free allowance	21,250.00
Compensatory award + wrongful dismissal	59,414.84
Figure to be grossed up	38,164.84

GROSSED UP TOTAL	**59,414.84**
AFTER COMPENSATION CAP OF Â£65,000.00 (GROSS ANNUAL PAY)	**59,414.84**