



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mr J Matthews and Others AND

Respondents

Bolitho School Penzance Limited
(In Creditors' Voluntary Liquidation) (1)
Secretary of State for BIS (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 25 May 2017

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr P Gregory
Mrs S Richards

Representation

For the ATL Claimants: Mr J Mitchell of Counsel
For the NASUWT Claimants: Mr B Amunwa of Counsel
For the First Respondent: Written Representations
For the Second Respondent: Written Representations

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The complaint that the respondent failed to comply with a requirement of section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded.

2. The tribunal makes a protective award in respect of Mr S Jaggard; Mrs M Adams; Mrs C Wordsworth; Mr J Matthews; Mrs E Austin; Mr G Randall; Mrs J Nicholes; Mr K Smith; Ms V Thomas; Mrs E Proctor; Mrs S Tolomio; Miss E Rivas Ruiz; Mrs M Pender; Mrs F Bone; Mrs A Kearey; and Mrs E McIntosh who were all employees of the respondent at its premises at Penzance and who were dismissed as redundant on 16 August 2016 and orders the respondent to pay those employees remuneration for the protected period of 90 days beginning on 16 August 2016.

3. The claimants succeed in their claims for breach of contract and the first respondent is ordered to pay the following claimants the following amounts, together with a pro rata share of the tribunal hearing fees pursuant to Rule 75(1)(b): Mr S Jaggard £2,496.89 plus fees of £800.00; Mrs M Adams £2,634.70 plus fees of £800.00; Mrs C Wordsworth £2,202.23 plus fees of £800.00; Mr J Matthews £2,202.23 plus fees of £311.54; Mrs E Austin £12,503.97 plus fees of £311.54; Mr G Randall £15,386.33 plus fees of £311.54; Mrs J Nicholes £807.51 plus fees of £311.54; Mr K Smith £8,407.34 plus fees of £311.54; Ms V Thomas £945.13 plus fees of £311.54; Mrs E Proctor £1,647.62 plus fees of £311.54; Mrs S Tolomio £2,609.61 plus fees of £311.54; Miss E Rivas Ruiz £1,498.83 plus fees of £311.54; Mrs M Pender £7,290.24 plus fees of £311.54; Mrs F Bone £1,714.79 plus fees of £311.54; Mrs A Kearey £359.38 plus fees of £311.54; and Mrs E Keen (nee McIntosh) £2,303.01 plus fees of £311.54.

4. The claimants' claims for unlawful deduction from wages are dismissed on withdrawal by the claimants.

REASONS

1. This is a claim for a protective award brought on an individual basis by two groups of employees who were members respectively of the ATL and NASUWT independent trade unions. They also bring claims for breach of contract, and there are now no separate claims in respect of any further unlawful deductions, which are withdrawn.
2. For the avoidance of doubt the claimants and their tribunal reference numbers are as follows. The ATL members are Mr S Jaggard 1400189/2017; Mrs M Adams 1400190/2017 and Mrs C Wordsworth 1400191/2017. Mr Jaggard and Mrs Adams were employed as teachers and Mrs Wordsworth was employed as a cook.
3. The NASUWT members are: Mr J Matthews 1400188/2017; Mrs E Austin 1400250/2017; Mr G Randall 1400251/2017; Mrs J Nicholes 1400252/2017; Mr K Smith 1400253/2017; Ms V Thomas 1400254/2017; Mrs E Proctor 1400255/2017; Mrs S Tolomio 1400256/2017; Miss E Rivas Ruiz 1400257/2017; Mrs M Pender 1400258/2017; Mrs F Bone 1400259/2017; Mrs A Kearey 1400260/2017; and Mrs E Keen (nee McIntosh) 1400261/2017. They were all employed as teachers.
4. We have heard evidence from Mr Jaggard, Mrs Adams, and Mr Matthews. We also accepted a witness statement on behalf of Mrs Wordsworth. The liquidator of the first respondent prepared written representations and submissions which we have considered and accepted. However, the first respondent did not adduce any evidence. It is also worth recording that the first respondent failed to comply with an order for disclosure which had earlier been made. The second respondent did not attend, and again relied on written representations.

5. We have considered the evidence before us, both oral and documentary, and the legal and factual submissions made by and on behalf of the respective parties. We find the following facts proven on the balance of probabilities.
6. The first respondent limited company, which is now in creditors' voluntary liquidation, was the proprietor of an independent school in Penzance in Cornwall which provided education to pupils from nursery age through to the age of 18. The claimants were all employees and who were dismissed by reason of redundancy on 16 August 2016 when the first respondent ceased to trade on that date. The claimants are all members of either the NASUWT or the ATL, although the first respondent has never formally recognised any trade unions.
7. In 2014 the then owners of the first respondent decided that the school was not financially viable, and announced that the school was to close. Negotiations commenced in early 2015 with a view to selling the school. At that time there were 250 pupils, but pupil numbers fell to 41 in September 2015 it seems partly at least as a result of rumours about the prospective sale.
8. The first respondent then made a number of redundancies during 2015. A consultation process had commenced from December 2014. The first respondent suggests that it proposed to dismiss 41 of its 86 employees by reason of redundancy with effect from 10 July 2015 although we have seen no evidence to verify that figure. At that time there was a Staff Consultative Committee which included representatives of the NASUWT and the ATL. Its last meeting took place on 11 June 2015.
9. In June 2015 all of the claimants accepted an agreed offer of alternative employment from 1 September 2015. The terms of that agreement included a provision that the claimants would remain in post until at least the end of the 2015/2016 academic year (that is to say until 31 August 2016). The agreement provided that in the event of redundancy at the end of the 2015/2016 academic year they would receive redundancy pay based on at least the salary received in July 2015 or any higher salary subsequently received. The first respondent then made further redundancies at the end of the 2015 academic year. The claimants were all retained.
10. By March 2016 only 18 students were registered to start at the school in September 2016. At that time the first respondent says that it had 30 employees, although again we have seen no evidence to verify this. On 6 March 2016 the respondent wrote to the claimants inviting them to apply for new posts which were available from September 2016. They were informed that if they did not apply then they would be made redundant on 31 August 2016. The first respondent has claimed in its written submissions that there was a proposal to dismiss only 13 employees and because of this collective consultation was not undertaken. Again we have heard no evidence to verify this number, but what is at least important is

- that the first respondent concedes that there was no collective consultation at this stage
11. Some of the claimants applied for the new employment with effect from September 2016 (referred to as the "New Claimants") and the remaining claimants decided not to do so and to accept redundancy with effect from 31 August 2016 (referred to as the "Redundant Claimants").
 12. For the avoidance of doubt the New Claimants were Mrs Worsdworth, Mr Matthews, Mrs Austin, Mr Randall, Mr Smith, Mrs Tolomio and Mrs Pender. The remaining Redundant Claimants were Mr Jaggard, Mrs Adams, Mrs Nicholes, Ms Thomas, Mrs Proctor, Miss Rivas Ruiz, Mrs Bone, Mrs Kearey, and Mrs Mcintosh
 13. During March 2016 the Redundant Claimants were all invited to individual meetings during which they were informed that they would all be made redundant with effect from 31 August 2016 because they had not applied for the alternative available posts. Subsequently on 5 May 2016 the Redundant Claimants were all given written notice of dismissal by reason of redundancy with effect from 31 August 2016. The first respondent confirmed that in addition to their statutory redundancy pay the claimants would receive a tax free ex gratia sum comprising 20% of their statutory redundancy pay.
 14. With regard to the New Claimants, it was agreed by the first respondent that if they were to be made redundant after 1 September 2016 then their redundancy entitlement would be calculated on the statutory formula only, whereas their existing agreed contractual redundancy terms would be honoured only until 31 August 2016. They are contractual terms were set out in writing on 26 June 2015. Paragraph 8 provided that they were entitled to a contractual redundancy payment which included an enhancement of 20% over and above the statutory redundancy calculation. In addition under paragraph 11 if they were given notice of termination of employment in the summer term (which they eventually were) then the first respondent was required to give a minimum of three months notice to expire at the end of the next term.
 15. On 22 July 2016 the board of directors of the respondent concluded that the first respondent was unable to pay its debts and that it was therefore insolvent. The respondent attempted to seek third-party funding but this was unsuccessful. As a result the respondent ceased to trade on 16 August 2016 and the school was closed. The employment of all the employees, including the claimants, was terminated summarily on 16 August 2016.
 16. The first respondent asserts that at this time the total number of employees employed by the respondent was 30, and that more than 10 of these were already under notice of termination of employment with effect from 31 August 2016. We have seen no evidence to verify these numbers one way or the other, but it is clear at least that the first respondent concedes that more than 20 employees were made redundant summarily on 16 August 2016. What is also clear is that the first respondent

- subsequently entered into creditors' voluntary liquidation on 14 September 2016.
17. Having found the above facts we now apply the law.
 18. The relevant law is in the Trade Union and Labour Relations (Consultation) Act 1992 ("TULRCA").
 19. Section 188(1) of TULRCA provides as follows: "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals". S188(1A) provides that "The consultation shall begin in good time and in any event – (a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect.
 20. S 188(2): provides that; "The consultation shall include consultation about ways of – (a) avoiding the dismissals, (b) reducing the numbers of employees to be dismissed, and (c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives."
 21. Section 188(3) provides that: In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.
 22. Section 188(4) provides: "For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives – (a) the reasons for his proposals, (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant, (c) the total number of employees of any such description employed by the employer at the establishment in question, (d) the proposed method of selecting the employees who may be dismissed, (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which any dismissals are to take effect, (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with the obligation imposed by or by virtue of any enactment) to employees who may be dismissed, (g) the number of agency workers working temporarily for and under the supervision and direction of the employer, (h) the parts of the employer's undertaking in which those agency workers are working, and (i) the type of work are those agency workers are carrying out."
 23. Section 188(5) provides: "That information shall be given to each of the appropriate representatives by being delivered to them, or sent by post to an address notified by them to the employer, or in the case of representatives of a trade union sent by post to the union at the address of its head or main office."

24. Section 188(7) provides that if in any case there are special circumstances which render it not reasonably practicable for the employer to comply with any of the above requirements, then the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.
25. Under section 189(1)(d) where an employer has failed to comply with any of the above requirements a complaint may be presented by any of the affected employees where there are no trade union representatives or other employee representatives.
26. The claimants' claims for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claims were outstanding on the termination of employment.
27. In this case the first respondent contends that a protective award should not be payable for two reasons: first that the proposal to dismiss was not formulated until 16 August 2016 or in the alternative until 22 July 2016 (and by implication at which stage they were fewer than 20 employees subject to that proposal); and that there were special circumstances under section 188(7). We deal with each of these issues in turn.
28. The first respondent asserts that the duty to consult only arises at the point at which the employer has formulated proposals for redundancy as opposed to simply contemplating the possibility (see for instance E Ivor Hughes Educational Foundation v Morris [2015] IRLR 696. It is said to follow from this that there was a proposal to dismiss in March 2016 and no collective consultation was undertaken because the proposal was to dismiss fewer than 20 employees. When the fortunes of the first respondent changed on 22 July 2016 and it became clear that the first respondent was insolvent, only then was there a proposal to dismiss the remaining employees. Again it is alleged that they were fewer in number than 20 and there was therefore no duty to consult collectively.
29. We reject this argument for two reasons. As at July or August 2016 there had been no previous collective consultation in March 2016 and so section 188(3) cannot be said to exclude the Redundant Claimants and any other employees who were already under notice of dismissal from the requirement to consult collectively. When the proposal to dismiss was made either in July or August 2016, even though the New Claimants and any other employees hoping to work on after September 2016 may have numbered fewer than 20, the first respondent clearly now contemplated at that stage that more than 20 employees would be made redundant within 90 days.
30. In any event, there was clearly a second proposal to dismiss over and above the earlier decision to dismiss the Redundant Claimants and possibly others who were under notice of termination with effect from 31 August 2016. The second proposal to dismiss was to dismiss all employees immediately on 16 August 2016 because of the insolvency.

- More than 20 employees were dismissed with immediate effect. That was a separate proposal to dismiss more than 20 employees within 90 days.
31. In either event the statutory duty to consult collectively arose, and the first respondent acted in breach of that duty.
 32. Secondly, the first respondent argues that there were special circumstances, and refers to The Bakers Union V Clarks of Hove [1978] IRLR 366. In that case the Court of Appeal held that insolvency is not of itself a special circumstance, and any event relied upon must be "something out of the ordinary, and uncommon" for example "where sudden disaster strikes a company making it necessary to close the concern".
 33. In our judgment there are no special circumstances over and above the circumstances of this case which are normal in any liquidation. The first respondent was gradually running out of money and there was no extraordinary or sudden and unforeseeable event. We also note that the dismissals took place just over 90 days after notice of dismissal was given to the Redundant Claimants and others on 5 May 2016 to expire on 31 August 2016. The decision to dismiss all of the claimants on 16 August 2016 appears to be linked with an apparent attempt to exclude the first batch of redundancies from the statutory provisions, and not because of any special circumstances suddenly arising on 16 August 2016.
 34. For these reasons the claimants succeed in their claims for a protective award.
 35. With regard to the claims for breach of contract, and apart from Mrs Wordsworth who was not a teacher, these fall into two categories. The Redundant Claimants were already under notice of dismissal, but the balance of the notice period from 16 August 2016 to 31 August 2016 was not paid, and neither were their pension contributions at 16.48% of gross pay, and they have received their statutory redundancy payments from the Secretary of State, but not the agreed contractual enhancement to the statutory redundancy calculation. Their dismissals were in breach of contract.
 36. With regard to the New Claimants, they were entitled to the same, but were also entitled to contractual notice which as a minimum would have expired at the end of the first term in 2016, namely 31 December 2016. Their dismissals were in breach of contract.
 37. The individual calculations for the breach of contract claims are as follows, and in each case credit has been given for any notice pay, unpaid pay or statutory redundancy pay which has been met by the second respondent. It is also worth recording that the first respondent failed to comply with a clear tribunal order to provide relevant pay details for the claimants, and did not attend to challenge the evidence or schedules of loss submitted by or on behalf of the claimants. The following calculations have been made by the tribunal on the best available information presented to it.
 38. Mrs Wordsworth is the only claimant who was not a teacher. She was entitled to 12 weeks notice pay and was dismissed summarily in breach of

- contract. Her claim for 12 weeks net notice pay is £2,332.92 together with pension contributions on this amount which at 1% of 12 weeks' gross pay is £23.97. She gives credit for £192.72 received from the second respondent. Accordingly the first respondent is ordered to pay Mrs Wordsworth £2,164.17 for breach of contract.
39. We now deal with the Redundant Claimants. The first is Mr Jaggard. His net loss of salary for 15 days was £936.00. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £216.89. He gives credit for £236.50 arrears of pay received from the second respondent. The lost contractual enhanced element of his redundancy pay is £1,580.00. The first respondent is ordered to pay Mr Jaggard the sum of £2,496.89 for breach of contract.
40. The next is Mrs Adams. Her net loss of salary for 15 days was £934.64. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £247.70. She gives credit for £846.84 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £2,299.20. The first respondent is ordered to pay Mrs Adams the sum of £2,634.70 for breach of contract.
41. The next is Ms Thomas. Her net loss of salary for 15 days was £457.08. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £86.76. She gives credit for £449.37 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £850.66. The first respondent is ordered to pay Ms Thomas the sum of £945.13 for breach of contract.
42. The next is Mrs J Nicholes. Her net loss of salary for 15 days was £334.73. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £58.89. She gives credit for £236.48 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £650.37. The first respondent is ordered to pay Mrs Nicholes the sum of £807.51 for breach of contract.
43. The next is Mrs E Proctor. Her net loss of salary for 15 days was £934.74. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £218.52. She gives credit for £846.84 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £1,341.20. The first respondent is ordered to pay Mrs Proctor the sum of £1,647.62 for breach of contract.
44. The next is Mrs F Bone. Her net loss of salary for 15 days was £538.79. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £108.45. She gives credit for £558.34 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £1,625.89. The first respondent is ordered to pay Mrs Bone the sum of £1,714.79 for breach of contract.
45. The next is Miss E Rivas Ruiz. Her net loss of salary for 15 days was £400.05. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £36.21. She gives credit for £197.43 arrears of pay received from the second respondent. The lost contractual enhanced

- element of her redundancy pay is £1,260.00. The first respondent is ordered to pay Miss Rivas Ruiz the sum of £1,498.83 for breach of contract.
46. The next is Mrs A Kearey. Her net loss of salary for 15 days was £371.21. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £100.03. She gives credit for £511.78 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £399.92. The first respondent is ordered to pay Mrs Kearey the sum of £359.38 for breach of contract.
47. The next is Mrs E Keen (nee McIntosh). Her net loss of salary for 15 days was £1,319.72. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £216.89. She did not receive any arrears of pay from the second respondent. The lost contractual enhanced element of her redundancy pay is £766.40. The first respondent is ordered to pay Mrs Keen the sum of £2,303.01 for breach of contract.
48. We now turn to the New Claimants. The first is Mr J Matthews. He does not claim net loss of salary beyond 31 August 2016, which is a net sum of £358. The lost employer's pension contributions for 15 days gross pay at 16.48% amount to £65.07. The lost contractual enhanced element of his redundancy pay is £2,126.76. He gives credit for £347.60 received from the second respondent. The first respondent is ordered to pay Mr Matthews the sum of £2,202.23 for breach of contract.
49. The next is Mrs E Austin. Her net loss of salary to 31 December 2016 was £9,633.94. The lost employer's pension contributions for this period at 16.48% of gross pay amount to £1,631.77. She gives credit for £846.84 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £670.60. The first respondent is ordered to pay Mrs Austin the sum of **£11,089.47** for breach of contract.
50. The next is Mr K Smith. His net loss of salary to 31 December 2016 was £4,952.11. The lost employer's pension contributions for this period at 16.48% of gross pay amount to £1,442.34. He gives credit for £846.84 arrears of pay received from the second respondent. The lost contractual enhanced element of his redundancy pay is £1,609.44. The first respondent is ordered to pay Mr Smith the sum of **£7,157.05** for breach of contract.
51. The next is Mr G Randall. His net loss of salary to 31 December 2016 was £11,885.71. The lost employer's pension contributions for this period at 16.48% of gross pay amount to £1,774.55. He gives credit for £846.84 arrears of pay received from the second respondent. The lost contractual enhanced element of his redundancy pay is £1,034.64. The first respondent is ordered to pay Mr Randall the sum of **£13,848.06** for breach of contract.
52. The next is Mrs M Pender. Her net loss of salary to 31 December 2016 was £5,680.01. The lost employer's pension contributions for this period at 16.48% of gross pay amount to £1,522.43. She gives credit for £846.84 arrears of pay received from the second respondent. She has no claim for

- the lost contractual enhanced element of her redundancy pay. The first respondent is ordered to pay Mrs Pender the sum of **£6,355.60** for breach of contract
53. Finally we turn to Mrs S Tolomio. Her net loss of salary to 31 December 2016 was £965.92. The lost employer's pension contributions for this period at 16.48% of gross pay amount to £761.23. She gives credit for £554.54 arrears of pay received from the second respondent. The lost contractual enhanced element of her redundancy pay is £1,437.00. The first respondent is ordered to pay Mrs Tolomio the sum of £2,609.61 for breach of contract
54. In addition the first respondent is ordered to pay each of the claimants their tribunal issue and hearing fees pursuant to Rule 75(1)(b). Because there were two sets of group claimants, they are each awarded a pro rata share of the fees incurred. For the three ATL claimants there was an issue fee of £500 and a hearing fee of £1,900. One third share of these fees is £800. For the NASUWT claimants, the issue fee was £250 and the collective hearing fee was £3,800. There were 13 of these claimants and their pro rata share is £311.54

Employment Judge N J Roper
Dated 25 May 2017

Judgment sent to Parties on

5 June 2017

<u>Case no.</u>	<u>Claimant</u>
1400188/2017	Mr J Matthews
1400189/2017	Mr S Jaggard
1400190/2017	Mrs M Adams
1400191/2017	Mrs C Wordsworth
1400250/2017	Mrs E Austin
1400251/2017	Mr G Randall
1400252/2017	Mrs J Nicholes
1400253/2017	Mr K Smith
1400254/2017	Ms V Thomas
1400255/2017	Mrs E Proctor
1400256/2017	Miss S Tolomio
1400257/2017	Miss E Rivas Ruiz
1400258/2017	Mrs M Pender
1400259/2017	Mrs F Bone
1400260/2017	Mrs A Kearey
1400261/2017	Mrs E McIntosh