EMPLOYMENT TRIBUNALS

Claimant: **Mr Mark Brady**

Respondent: **Geoff Bennett and Ann Bennett t/a Three Horseshoes**

Heard at: **Birmingham** **On: 30 January 2017**

Before: **Employment Judge Self**

Representation

Claimant: **In person**

Respondent: **Mr J Hallett (Solicitor)**

JUDGMENT

1. The Claimant was wrongfully dismissed and shall be paid £472.64 in relation to that Claim.
2. It is declared that the Claimant was unfairly dismissed and shall be paid a compensatory award of £2592.68.
3. Recoupment applies in this case from the information before the Tribunal and the necessary information is set out at paragraph 36 below.
4. THE RESPONDENT SHALL PAY £1,200 TO THE CLAIMANT IN RESPECT OF THE FEES INCURRED BY THE CLAIMANT IN BRINGING THE CLAIM.

WRITTEN REASONS

1. The Claimant brings claims for compensation arising from his alleged unfair and wrongful dismissal. The Respondent denies those claims in their entirety.

2. I have considered the witness statements lodged by the Claimant and Mr Bennett as amplified by their oral testimony. I have also considered such documents as I have been taken to in the bundle. Finally I have considered the Respondent's closing submissions. The Claimant indicated that he had told me in evidence all he wished to and accordingly he did not make submissions despite being offered the opportunity.

3. The Claimant was employed on 3 December 2013 as the Head Chef at the Three Horseshoes pub in Princethorpe, near Rugby. It is a family run pub and restaurant which also offers bed and breakfast. The employers and Respondent in this case are Mr Geoff Bennett and his wife Ann Bennett who trade as The Three Horseshoes and have a joint and several personal liability in the event of the Claimant being successful and

securing some compensation. I have amended the name of the Respondent so as to reflect the true position.

4. The Respondent is a small business entity limited to the running of this one pub. At the material time apart from the Claimant there was a Junior Chef called Toby who following the Claimant's dismissal took time off sick and subsequently left in November 2016. There was one other employee who undertook cleaning and some general duties around the pub. Apart from that the Respondent employed casual staff on an ad hoc / zero hours basis and agency staff for the kitchen to cover absence of the employed chefs for whatever reason.

5. I think it appropriate note that Mr Bennett when giving his evidence had absolutely no criticism whatsoever about the Claimant's culinary skills nor the way he undertook his job. I was given no evidence from which to believe that there was any ulterior and /or hidden motive to dismiss the Claimant.

6. Mr Bennett gave evidence as to the state of the business at the material time. This was relevant in the context of the Respondent asserting that the potentially fair reason for dismissal was either redundancy or some other substantial reason which was explained as being a business reorganisation.

7. He had owned the business with his wife since 2010 and told me that there had been modest growth over the first three years, a plateau in the fourth and then a decline. I have not seen any profit figures but I have seen the turnover figures for the past two years which between 2015/16 and 2016/17 show a decline of just over 12%. I accept that this does not precisely show the situation as at August 2016 compared to the previous year but on the evidence I have and upon the evidence tendered by Mr Bennett I accept that there has been a decline in revenue over the past three years that needed to be addressed in some way.

8. I am satisfied in respect of the evidence given by Mr Bennett as to the closure of other pubs in the vicinity and also general trends that have been well publicised in the media as to the problems pubs are having generally. I also accept (and it was not seriously challenged) that the Respondents did look carefully at other areas where costs could be saved but whilst there were some areas where costs could be controlled the possibilities to do so were limited. I also accept that to a limited extent steps were made vis a vis promotion of the business in order to try and get a greater level of throughput. There was evidence that the average spend per head had gone up but it was the number of heads that was proving a problem.

9. Thus it was that in the summer of 2016 the Respondents started to consider their staffing options and in particular whether or not changes could be put in place that would make a material difference to cost but not detrimentally effect the business. Mr Bennett accepts that the Claimant was not involved in these discussions, although that is surprising as the Claimant was responsible for much of the ordering and presumably cost. It was suggested that Mr Bennett had told the Claimant that there was a need for 100 meals per week. The Claimant denied this. The Claimant was an experienced chef and had worked in similar institutions for many years and I believe that he would have understood what the broad picture was i.e. that the business was in a decline but I do not accept that he would have had any inkling that his job may be at risk. To the extent

that it matters I find that the figure of 100 covers per week was probably mentioned at some point but don't accept that it was on anything other than a casual basis and certainly was not something that the Claimant should have taken as being a target or a condition precedent for his future employment nor something that would have led him to believe that his position was at risk.

10. I find that the situation prior to the meeting in August was as follows. The Respondents were becoming increasingly worried about their business. They had made a number of tweaks but believed that something more drastic needed to be done. The Claimant had an idea that business was not at its' peak but had no idea as to the extent of the problems or indeed that there was any risk that they might impact upon him.

11. I am quite satisfied that the sole cause of the Claimant's dismissal was on account of the perceived need to cut costs and/or reorganise the staffing so as to reduce overheads and to try and alleviate the problems that the pub had. I have considered section 139 (1)(b) of the Employment Rights Act 1996 and consider that in this case fewer employees were needed to do the work because of the financial situation and so there was a redundancy situation. Alternatively there was a business reorganisation and I consider that a potentially fair reason for dismissal has been established.

12. It is clear to me that the Respondent had concluded prior to the meeting on 17 August 2016 that the Claimant would need to leave the organisation. In reality there were limited options as there was only 2 staff in the kitchen along with a number of casual staff who worked the bar and other required tasks. There could have been an option for less casual staff to be engaged and for the Respondents to do more themselves possibly and there could have been consideration of the junior chef's position but in reality I find that the only staffing option that was seriously considered was the Claimant's and that was in a black and white fashion i.e. when should he be dismissed. When the Respondent went into that meeting the two options were either that the Claimant went voluntarily or that the Claimant would be made redundant.

13. It follows that as the decisions had been made before any process was undertaken at all that the process was flawed from the start. I accept that the Respondents are a small organisation without a dedicated HR presence but they had access to advice via their Trade Association and also via their solicitor and so even taking into account their size, as I must pursuant to section 98(4) of the ERA 1996, their process fell well below what was required, if indeed it could be called a "process" at all.

14. The Claimant had no notice of the meeting and no warning that redundancy was being contemplated. No notes were taken of the meeting and that default must lie with the Respondents who were the only ones aware of the importance of the meeting. The Claimant's account of the meeting rings true and in questioning much of it was accepted by Mr Bennett. It was accepted that the meeting opened with a comment about whether or not the Claimant would leave voluntarily which I find emphasises the point that the only outcome possible was the Claimant's departure one way or another.

15. The Claimant was a good chef and was also very experienced. I find that when he was employed he was perfectly able to stand his corner with his employers and would not shrink from giving them the position as he saw it. At the meeting there was, in all likelihood, a blunt exchange of views and it concluded with the Claimant stating that he

wanted any further matters relating to the subject in writing. There was no attempt to get from the Claimant alternatives which might eliminate the need for there to be a redundancy because as I have already stated the decision to part company had already been made. The comment in respect of Trip Advisor was made but I do not accept it was meant to be a threat although I understand how in the context of the conversation it may have been perceived in that way.

16. The Claimant returned to work at the end of the meeting. I need to decide whether or not the Claimant was actually given notice at that meeting. He would have been entitled to two weeks. I was told that a chef was on stand- by to come in the event that the Claimant left work and again I see that as further evidence that a decision had been made that the Claimant was to leave. There are no notes of this meeting contrary to established and good HR practice and so I have two versions of events. It is the Respondents responsibility to have the meeting recorded in some way and they failed. I do not criticise the Claimant for not making notes as the meeting was sprung upon him and he was he suggested "gobsmacked" by the turn of events.

17. Mr Bennett told me that he said to the Claimant that if he didn't leave voluntarily then he would have to be made redundant. It was clear the Claimant was not going to go voluntarily and so the ball was back in the Respondent's court. There is no clear indication from Mr Bennett's witness statement that at the meeting of 17 August there was a clear and unequivocal notice of dismissal given, but such an answer was given in answer to questions.

18. I reject that answer for the following reasons. It is an answer that has come late in the day from the Respondents. It is not consistent with the Notice of Appearance which indicates that it was in a letter dated 17 August (actually 18th) that confirmation that the Claimant was redundant was given. Further I do not accept that had the Claimant been made redundant at that meeting he would have simply gone back to work. It should also be noted that the letter referred to above was not sent until 1513 on 24 August and only received on 25 August by the Claimant. That fact is also not referred to in Mr Bennett's statement. Mr Bennett's evidence on this point is inconsistent.

19. The next issue is whether or not Mrs Bennett told the Claimant that he was redundant when she placed him on garden leave / suspended him shortly after on 17 August. There is no mention of that in the Notice of Appearance, nor in Mr Bennett's witness statement. The next correspondence chronologically is the Claimant's letter dated 23 August. In that letter he seeks clarification of what the situation is and reading the letter it would make no sense whatsoever had the Claimant been given notice on 17 August.

20. I find that for all of the above reasons that the Claimant was not given notice on 17 August but in actual fact was given clear and unequivocal notice on 25 August. He was paid until 31 August and as a consequence was paid only 6 days' notice as opposed to two weeks and that shortfall of 8 days will be awarded by way of damages for wrongful dismissal.

21. On the evidence I conclude that the Respondents had the Claimant's letter of 23 August when they sent their letter dated 18 August. I accept it was originally drafted by their solicitor on 18 August or thereabouts but there was an opportunity to amend it

before it was sent on 24 August. There was also an opportunity to consult with the Claimant as the Claimant had requested and that offer was not followed up at all. Once again that is further evidence that the Respondents had closed their minds to any other alternative to the Claimant's dismissal.

22. There were serious procedural flaws in that no process was followed at all and there was a complete absence of any warning or consultation which meant that alternatives could not be considered. No consideration was also given to others who might also be at risk.

23. The Claimant raised an appeal once he had received notice by letter. The Respondent had failed to amend the letter so as to reflect the delayed sending of the letter and so there was exceptionally short notice to appeal. The appeal date was subsequently extended and so I find that no prejudice or unfairness ultimately attaches to that. As the Respondent is a small business I consider it not to be unfair and/or unreasonable for the Bennetts to have heard the appeal taking into account their monetary concerns and the expense an outside HR professional would have cost. On the other hand it did mean that there was no prospect of there being a different outcome on the appeal as the Respondents had set their mind with singular purpose some time previously.

24. The appeal itself was well drafted and raised matters which are wholly consistent with the Claimant's case before this hearing. Some points are better than others. As stated I do not consider that the appeal was dealt with a more open mind than at the first stage and although each point was ostensibly dealt with the outcome was always going to be the same.

25. I do accept however that the Claimant was able to put forward all of the points that he considered relevant to the redundancy issue and to that extent the appeal meeting takes on the mantle of a consultation meeting where an employee has been placed at risk and is given time to come back and set out reasons why the redundancy should not take place. In my view the Claimant placed all his best points before the Respondents at that meeting however I am also satisfied that there were not a lot of options.

26. The Claimant put forward the option of fewer hours and on a lower rate of pay without being specific as to what they were. That should have been explored at the meeting but were not really looked into by the Respondents in any depth to see if it was an either / or situation or whether both could be combined into a workable solution. The possibility of the Claimant going self-employed was also not considered (by either party as it happens) but I do not see that fewer hours could have really worked nor do I accept that the Claimant would have worked for a much lower fee.

27. I have accepted that the Respondents have made out that there was a potentially fair reason for dismissal and so I move onto considering reasonableness pursuant to section 98(4). I have noted above the unfairness of matters leading from the Respondents' closed mind from the outset, the failure to warn and the failure to consult. That part of the process was wholly unfair.

28. The Respondents urged upon me that the appeal remedied matters and so there should be a finding of a fair dismissal. I disagree. Whilst the issues of warning and

consultation were addressed there was little change in the Respondents' mind set which was that the Claimant was bound to go and that was the only thing that could happen. The Respondents paid lip service to due process at a late stage but that didn't make the process fair as a whole. The absence of any proper procedure renders this dismissal unfair.

29. I go onto to consider whether a Polkey reduction should apply in this case i.e. whether or not a fair process with proper warning, consultation and an open mind would have still resulted in a dismissal. I have considered whether or not the process was so flawed that it would be impossible for me to engage in the "what if" scenario. Had there not been an appeal then I may well have concluded that that was the case. Having said that the appeal did permit the Claimant every opportunity to put forward alternatives and I do think that what could have been said at the outset was said at the appeal. Accordingly I do consider that an assessment can be made that could lead to a Polkey reduction.

30. I have considered Software 2000 Ltd v Andrews (2007) ICR 825 in which Mr Justice Elias summarised the principles in such cases and I have followed those principles. Having regard to all the evidence I am of the view that had there been a fair procedure it would have taken longer and that it would have concluded on 21 September 2016 (the date when the appeal was concluded) and on that date there would have been a 90% chance that the Claimant would have been dismissed at that point.

31. I am satisfied on the evidence that this is an assessment that I can make based on the evidence before me in that proper consultation and consideration would have taken some time and at the end of it all whilst I am satisfied that it is extremely likely that the Claimant would have been dismissed there is a slim (10% possibility) that another option could have been found).

32. I conclude therefore that the Claimant has been wrongfully and unfairly dismissed and that for the latter the Claimant is entitled to his net losses up to 5 October 2016 and thereafter is entitled to 10% of his net losses thereafter.

33. The damages for wrongful dismissal arise on account of the Claimant only paying six days' notice when they were contractually obliged to pay two weeks. The parties accepted that I should calculate this by multiplying the appropriate weekly sum by 1.14 weeks. There was a dispute between the parties as to how I should calculate the net weekly sum. Having considered the matter and the authority of Laverack v Woods (1967) 1 QB 278 I am satisfied that the correct weekly sum for wrongful dismissal is that due under the contract (£414.60) as opposed to that which the Claimant might have been paid had he remained at work. Accordingly the sum awarded to the Claimant for wrongful dismissal is £472.64.

34. In so far as the unfair dismissal claim is concerned there is no basic award as that sum has already been paid by way of the redundancy payment that was made. Section 123 of the ERA 1996 directs the tribunal to award "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

35. I am satisfied that the Claimant would have continued to work for the same average number of hours moving forwards. Any absence in relation to his Junior Chef Toby would have been covered by agency chefs and so more hours would not have been available. I consider that an appropriate net weekly wage can be derived from looking at the 20 weeks up to 19.8.16 for which I have pay slips. Over that time the Claimant was paid after deductions a total of £10,528.59 which is a weekly sum of £526.43 I am satisfied that the following losses would have been attributable:

a) For the period of notice not paid the Claimant would have received his usual net salary and so should be paid the difference between his salary only and the salary with his overtime which amounts to £600.13 (£526.14 x 1.14) less £472.64 (£414.60 x 1.14) = £127.49.
b) From 9 September until 5 October (3 weeks 5 days) at £526.14 = £1,946.71
c) From 5 October to 12 October (1 week) – 10% of £526.14 = £52.61
d) From 12 October until the date of this hearing (15 weeks 4 days) at the sum of £10.66 per week = £165.87 (Calculated on the basis of old net wage (£526.14) less average weekly wage in new job taken from the 7 pay slips available (£419.51) and then reduced by 90% to reflect Polkey.
e) There will be no future loss awarded.
f) £300 for loss of statutory rights.
g) Total = £2592.68

36. Recoupment applies in this case. The total monetary award in the unfair dismissal case is £2,592.68. The prescribed element is £2,292.68. The period of the prescribed element is from 31 August 2016 until 30 January 2017 and the total monetary award exceeds the prescribed element by £300. I have seen correspondence that the Claimant received Job Seekers Allowance in the sum of £365.51 in a period up to 12 October 2016 and that sum stands to be recouped.

Employment Judge Self

Date: 07 February 2017