



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr R Krzyzanowski

AND

Respondent

Bryger Farms Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

8 August 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, assisted by Polish Interpreter

For the Respondent: Mr T McCardle, Solicitor

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed and the respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £340.00; and
2. The Recoupment Regulations do not apply; and
3. The respondent is ordered to pay the claimant the gross sum of £340.00 in respect of accrued but unpaid holiday pay; and
4. The respondent is ordered to pay the claimant compensation for unlawful deduction from wages in the agreed sum of £1,473.33; and
5. The respondent is also ordered to pay the claimant two weeks' pay in the sum of £680.00 in respect of its failure to issue a written statement of particulars of employment.

REASONS

1. In this case the claimant Mr Ryszard Krzyzanowski, who was dismissed by reason of redundancy, claims that he has been unfairly dismissed. He also brings claims for unlawful deduction from wages, for accrued but unpaid holiday pay, and in respect of the

- respondent's failure to issue him with a written statement of the particulars of his employment. The respondent contends that the reason for the dismissal was redundancy, that the dismissal was fair, and (save for the notice pay claim) denies the claims.
2. I have heard from the claimant, and I have heard from Sam Kelly on behalf of the respondent.
 3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
 4. The respondent limited company runs a dairy farm of both cows and goats. Mr Brian Hill is the proprietor of the respondent company and is assisted by his son Mr James Hill, and a farm manager Mr Sam Kelly from whom I have heard. The claimant was employed as a goat milker and general farmhand from 1 February 2013 until his dismissal by reason of redundancy on 30 November 2016. He worked a 40 hour week and was paid at the rate of £8.50 per hour gross. His normal gross weekly pay was therefore £340.00 per week. His average monthly take-home pay was about £1,473.00.
 5. The claimant was employed under the terms of the Agricultural Wages Order 2012 ("the AWO"). However, he was not provided with any written confirmation of the same. Article 45 of the AWO states: "The annual leave year for all workers is the period of 12 months starting on 1 October and ending on 30 September." Article 47 provides that accrued annual leave on the termination of employment is to be calculated at the rate of 1/52 of the specified holiday entitlement for each completed week of service, and that that figure is to be rounded up or down to a whole day. The claimant was entitled to 31 days annual leave. Article 48(3) of the AWO provides: "A worker shall not be entitled to carry forward from one leave year to the next following leave year any untaken annual leave entitlement under this Order, unless otherwise agreed with their employer."
 6. The respondent employed three members of staff, being a manager for each of the cow herd and the goat herd, and the claimant. In early 2016 the respondent had a herd of almost 900 goats. Following testing of the herd for TB the respondent was ordered compulsorily to slaughter its entire herd over a period of months. The first such compulsory notice was issued on 26 July 2016 for the slaughter of approximately one third of the respondent's herd. It was hoped at that stage that only part of the herd would need to be destroyed. The claimant was informed of this development. Unfortunately a subsequent notice was served on the respondent in early September 2016, requiring the slaughter of a further third of the herd.
 7. Shortly after the issue of this second notice of slaughter, the claimant began a period of certified sickness absence which lasted from 15 September to 21 November 2016. He was paid statutory sick pay during this period.
 8. The respondent then received a final notice to cull the remaining third of the herd. The respondent then wrote to the claimant by letter dated 28 October 2016 advising him that his position was redundant and giving notice to terminate his employment to expire on 30 November 2016. The claimant was advised that he had been selected because his principal role was as a goat milker and there were no goats left to milk. The respondent informed the claimant that it had considered alternative employment but there were no suitable alternative positions. The respondent informed the claimant that he had the right to appeal against that decision.
 9. The claimant responded by letter dated 14 November 2016 and stated: "It was very pleasant to work here, but I fully understand the reason of my redundancy..." The claimant declined to appeal.
 10. At the time of his dismissal the claimant had not asked the respondent, and the respondent had not agreed, to carry over any unused holiday entitlement from the holiday year ending on 30 September 2016. From the start of the next holiday year on 1 October 2016, until the date of his dismissal on 30 November 2016, the claimant had accrued one sixth or 5.16 days of his annual holiday entitlement of 31 days, which is rounded down to

- five days. The claimant had not taken any of these days as holiday, and his accrued holiday entitlement as at the date of his dismissal was therefore five days.
11. The claimant's statutory notice entitlement was three weeks. The claimant was effectively given four weeks' notice of termination of employment. He was paid statutory sick pay during some of his notice period until 21 November 2016 when he returned to work. He was paid at his normal weekly rate from 21 November 2016 to 30 November 2016. The parties have now agreed that there was a wrongful deduction from the claimant's pay and that the claimant should be compensated one month's pay of £1473.33.
 12. The claimant was also paid his full statutory notice entitlement on the termination of his employment.
 13. Having established the above facts, I now apply the law.
 14. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
 15. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or 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"
 16. I have considered section 98 (4) of the Act which provides "... 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".
 17. Under section 88(1)(b) of the Act where an employee is incapable of work because of sickness or injury during his period of statutory notice the employer is liable to pay the employee a sum not less than the amount of remuneration for normal working hours.
 18. Under section 38 of the Employment Act 2002, if the employer was in breach of his duty to give a written statement of initial employment particulars and the employment tribunal finds in favour of the employee or makes an award to the employee, then the tribunal must increase the award by an amount equal to two weeks' pay, and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks' pay instead.
 19. I have considered the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
 20. In my judgment there was clearly a redundancy situation which had arisen when the respondent's goat herd had to be slaughtered. The requirements of the respondent's business for the claimant to carry out work of a particular kind for which he was employed, namely milking and supervising the goats, had ceased or diminished. His dismissal was attributable to that redundancy. I accept the respondent's evidence that in the circumstances there was no suitable alternative employment which could have been given to the claimant.
 21. However, the respondent failed to consult with the claimant about his impending redundancy. The claimant has never raised any complaint or assertion of unfairness about his dismissal with the exception of this failure to consult. I do not accept the respondent's contention that consultation was necessarily utterly useless, and that this case was a paradigm example of the exceptional type of case envisaged by Lord Mackay in Polkey that there was no need to consult. There might have been the possibility of alternative work, and it would have been good industrial practice to have discussed this over a consultation period with the claimant. Nonetheless it seems from the claimant's response to his invitation to appeal that he fully understood the position. Effectively the

- claimant only missed out on a short consultation period which in my judgment could only have effectively extended his employment by about one week.
22. Accordingly I conclude that it was not fair and reasonable in all the circumstances of this case (even bearing in mind the size and administrative resources of the respondent) for the respondent to have dismissed the claimant in the way that it did without any consultation, and for that reason I find that the claimant was unfairly dismissed. By way of compensation he is not entitled to a basic award because he has already received his full statutory redundancy payment. With regard to the compensatory award this is limited to one week's pay being the lost consultation period. The claimant earned £340.00 per week, and the respondent is therefore ordered to pay the claimant compensation for unfair dismissal in the sum of £340.00.
 23. The respondent is also ordered to pay the claimant the sum of £340.00 in respect of his five days' accrued but unpaid holiday entitlement.
 24. In addition, the parties have agreed compensation in the sum of £1473.33 for the wrongful deduction from wages during the claimant's notice period.
 25. Finally, the respondent failed in its duty to provide the claimant with a written statement of the particulars of his employment. Although the terms of his employment were set out in writing by way of the Agricultural Wages Order, this was not confirmed in a letter to the claimant. Applying section 38 of the Employment Act 2002 the respondent is ordered to pay the claimant the sum of £680.00 being two weeks' pay. There is no reason to suggest that it would be just and equitable to make the higher award of four weeks' pay.
 26. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case
 27. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 12; a concise identification of the relevant law is at paragraphs 14 to 19; how that law has been applied to those findings in order to decide the issues is at paragraphs 20 to 21; and how the amount of the financial award has been calculated is at paragraphs 22 to 25.

Employment Judge N J Roper
Dated 8 August 2017

Judgment sent to Parties on
23 August 2017
