



EMPLOYMENT TRIBUNALS

Claimant: Mr M Moody

Respondent: Mr F Morland

Heard at: Bristol **On:** 6 May 2021

Before: Employment Judge Livesey

Representation:

Claimant: Mr McCabe, solicitor (by video – CVP)

Respondent: In person

JUDGMENT having been sent to the parties on 10 May 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:

REASONS

1. The claim

- 1.1 By a Claim Form dated 19 June 2020, the Claimant brought complaints of unfair dismissal, unlawful deductions from wages, breach of contract, a failure to pay a redundancy payment and failure to consult under s. 188 of the Trade Union Labour Relations (Consolidation) Act 1992.
- 1.2 The Claim was originally brought against the Respondent and Row Farm Nursery Ltd but the claim against the Company was struck out on 5 October 2020, there having been no legal entity against which that claim could have been served since it had been dissolved in November 2016.
- 1.3 The complaint under s. 188 was withdrawn on 7 October 2020 and dismissed by a Judgment dated 25 November 2020. The complaint of unfair dismissal was then also withdrawn on 15 April 2021 and a further Judgment was entered on 30 April.
- 1.4 That left the complaints of unlawful deductions from wages, breach of contract and a failure to pay a redundancy payment to determine.

2. The evidence

- 2.1 Both the Claimant and Respondent gave oral evidence.
- 2.2 The Claimant produced a bundle of documents (C1) as did the Respondent (R1).
- 2.3 The Claimant and his solicitor appeared by video link (CVP) and the Respondent attended the hearing in person, as he had requested.

3. The issues

- 3.1 The Judge discussed the issues in the case with the parties before the hearing commenced.
- 3.2 In relation to the claim for a redundancy payment, the Respondent accepted that one was owed, but the dispute centred upon the length of the Claimant's employment. The Respondent's case was that the Claimant had been employed by Road Farm Nursery Ltd but alleged that there had been a break in continuity prior to his employment by the Respondent on 26 January 2017, a break of approximately 12 weeks. The Respondent alleged that any redundancy payment should have been calculated on the basis that the Claimant had been employed from January 2017 only.
- 3.3 In relation to the notice pay claim, again the Respondent accepted that a payment was owed, but denied its calculation on the same basis.
- 3.4 The Judge took time to explain the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') to the Respondent who indicated that he had not been aware of them.
- 3.5 The claim for unlawful deductions from wages concerned a different issue. The Claimant had had the usual deductions for tax and national insurance made from his wages but, at the end of his employment, he discovered that HMRC had received no such payments from the Respondent. The Respondent accepted that he had not paid HMRC and that he was liable for the sum and that deductions from the Claimant's wages had been made for that purpose. He explained that he had not understood how to make payment to HMRC, which was surprising to the Judge as he had worked as an accountant. Nevertheless, on the basis of the Respondent's acceptance of liability and his undertaking to make the tax and national insurance payments on the Claimant's behalf, Mr McCabe was content to withdraw the complaint. Paragraph 3 of the Judgment reflected the position.

4. The facts

- 4.1 The following facts were found on a balance of probabilities. Factual findings were restricted to matters which were relevant to a determination of the remaining issues. Any page references cited in these Reasons are two pages within the hearing bundle C1 unless otherwise indicated and have been quoted in square brackets.
- 4.2 The Claimant was employed from 14 July 1975 at a small plant shop and nursery in Chapmanslade, Westbury, Wiltshire. He had a contract of employment dated 16 June 1975 and a further statement of terms and conditions dated 10 February 1984, both interesting historical artefacts [26-7], which named Row Farm Nursery Ltd as his employer. At that time, the Nursery was run by Mr Roger Morland, the Respondent's father. He had established it on land that he had bought as a smallholding after the war in 1946. He developed it into a plant nursery comprising an 8 acre plot with small shop and garden centre.
- 4.3 Roger Morland retired in or around 1990. From 1998, the Claimant was the only person working at the Nursery, with the Respondent overseeing the business. From 2010, the Claimant began to feel that the business was being wound down and he had little custom day to day.

Change of employer

- 4.4 In approximately May 2016, the Respondent was disqualified from being a director of Row Farm Nursery Ltd by the Cardiff and Vale of Glamorgan Magistrates Court for two years as a result of a failure to file accounts at Companies House. On 1 November 2016, the Company was dissolved by the

Registrar of Companies.

- 4.5 The Claimant maintained that he was never informed or even knew of the dissolution of the Company. The Respondent stated in evidence that he had informed of the Claimant that the Company no longer existed. The Claimant's evidence was preferred on that issue. The Respondent did not give his evidence consistently or clearly, the Claimant's account was straightforward and forthright and the lack of documentation around that time containing important information for the Claimant as an employee stood against the Respondent.
- 4.6 The Respondent accepted that he was the Claimant's employer after Row Farm Nursery Ltd's dissolution on 1 November 2016, as set out in the Response ([17] & [28]).
- 4.7 For all material purposes, nothing changed at the Nursery; the branding was the same, the nature and method of the payment of the Claimant's wages remained the same (cash in an envelope through his front door with a covering payslip).
- 4.8 When Mr Roger Morland subsequently died, the land upon which the Nursery was sited, which the Company had leased from him personally as the landowner, was left to his late wife. The Respondent stated that he believed that he is currently at least a part owner of it now.

March 2020

- 4.9 On 22 March 2020, the Claimant received a letter which contained two days' pay (for his work on the 19th and 20th), a statement that he was being "*laid off with immediate effect*" and best wishes for the future [29]. The respondent accepted that that was a termination letter. After such a long time working for the family, the method of the Claimant's termination seemed unduly callous despite the circumstances (the start of the first Covid-19 lockdown). The Respondent did not consider that a face to face discussion or, at the very least, a telephone call, might have been more appropriate.
- 4.10 On 24 April, the Claimant wrote to the Respondent to advise him of his continued right to pay for all of his time at the Nursery [31]. He did not receive a reply to that letter. Upon making further enquiries, it was only then that the Claimant discovered that Row Farm Nursery Ltd had been dissolved in 2016.

Tax and NI

- 4.11 The Claimant's wage slips showed that tax and national insurance had been deducted by the Respondent [34-6]. In October 2020, however, HMRC informed the Claimant that no PAYE had been received between 2016 and 2020 [33]. As stated above, this was not disputed by the Respondent.

5. Conclusions

- 5.1 The key issue in this case was whether the Claimant had maintained continuity of employment between the Company and the Respondent in 2016. A determination of that issue resolved the remaining disputes around the calculation of the Claimant's redundancy payment and notice pay.

Change of employer and TUPE

- 5.2 There was a transfer of an undertaking from the Limited Company to the Respondent as a sole trader within the meaning of regulation 3 (1)(a) of TUPE; there was a transfer of an economic entity which retained its identity at that time. The premises, the stock, the sole employee and the goodwill transferred from the Company to the Respondent. The economic entity constituted an organised grouping of resources for the purposes of regulation 3 (2) and the economic activity continued to be pursued at the same location. There was no suggestion that the Company had been insolvent within the meaning of regulation 8.

5.3 It did not matter that the Claimant was not told about the transfer, although it would certainly have been both polite and in accordance with good industrial practice if the Respondent had done so. It did not matter that there was no agreement between the Company and the Respondent for the, or any, transfer. If the circumstances considered by the Regulations were in existence, the Regulations applied without more. It did not matter that the Respondent was not aware that there had been a transfer; he was not aware of the Regulations or their effect.

Breach of contract

5.4 The Respondent accepted that the Claimant had been dismissed without notice. He attempted to argue that he had been dismissed in 2016 upon the Company's dissolution and had worked his notice, for which he was paid. That argument failed; there had been no dismissal at that point, either orally or in writing. The Claimant had not been issued with a P45. Further and in any event, the Respondent accepted that he did not have any authority to have dismissed the Claimant because he had not been permitted to act for or on behalf of the Company as a result of his disqualification. The Claimant was therefore entitled to the payment of notice as calculated in the Schedule of Loss [37].

5.5 There was, however, a dispute over the net pay figure of £287.63 claimed. The Judge's calculation produced a figure of £287.38 on the basis of the Claimant's payslips [34-6]. The award was therefore $£287.38 \times 12 = \mathbf{£3,448.56}$.

Redundancy payment

5.6 As a consequence of the findings set out above, the Claimant was also entitled to a redundancy payment calculated in accordance with the Schedule of Loss [37]. The gross pay figure was not in dispute; **£9,440.00**.

**Employment Judge Livesey
Date: 25 May 2021**

Reasons sent to the Parties: 16 June 2021

FOR THE TRIBUNAL OFFICE