EMPLOYMENT TRIBUNALS

Claimant: **Miss R Felton**

Respondent: **Meadow Farm Limited**

Heard at: **Bristol (by video)** **On: 12 August 2021**

Before: **Employment Judge C H O'Rourke**

Representation
Claimant: **Mr G Felton – Claimant's father**
Respondent: **Mr L Bronze - counsel**

JUDGMENT having been given to the parties on 12 August 2021 and written reasons having been requested, within fourteen days, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was employed by the Respondent, on its dairy farm, as a Herdswoman. The start date of her employment is in dispute and hence also her length of service, being alternatively just over two years, or approximately twenty-one months. Her EDT is also in dispute, but it was in or about April 2020. As a consequence, she bring claims of unfair dismissal, failure to pay a redundancy payment, unlawful deductions from wages, arrears of holiday pay, breach of contract in respect of notice and failure to provide terms and conditions of employment, compliant with s.1 of the Employment Rights Act 1996 ('ERA').

2. The issues in respect of these claims, as discussed at the outset of the Hearing, are as follows:

    a. Unfair Dismissal

        i. Did the Claimant have two years' service and thus does the Tribunal have jurisdiction to hear her claim? The Claimant contends that she does, whereas the Respondent states that she was self-employed for the first four or five months of her time

working at the farm, only becoming an employee in August 2018 and does not therefore have the requisite service.

ii. If the Tribunal does have jurisdiction, then has the Respondent shown the reason for dismissal, which it states was redundancy? The Claimant contended that this was not a genuine redundancy situation, as two other workers were retained. The Respondent answers this point by stating that these workers were self-employed contractors, whose services the farm could dispense with, as and when, whereas the Claimant was the only employee and due to COVID pressures, they needed flexibility.

iii. The Respondent accepts that there was a failure by them to provide adequate warning and consultation.

iv. There was no requirement for a pool for selection, as the Claimant was in a 'pool of one', being the only employee.

v. It was accepted by the Claimant that there was no suitable alternative employment available on the farm.

vi. If it found that the Claimant was unfairly dismissed, the Respondent would rely on the Polkey principle to argue that if proper warning and consultation had taken place, then dismissal was still inevitable, perhaps a week later.

b. Redundancy Payment. It is the case that this would be payable, if the Claimant had two years' service.

c. Breach of Contract in respect of notice and unlawful deduction from wages for the period 21 April to 4 May 2020. The Claimant contended that she was summarily dismissed, with an entitlement to pay in lieu of notice, which was not paid, which notice would also cover the period of alleged arrears of pay. The Respondent contends that she effectively resigned, with the Respondent waiving the requirement for her to work a week's notice.

d. Holiday Pay. The Respondent accepted that the Claimant was due arrears of holiday pay of £83.87, whereas the Claimant contended that she was due considerably more arrears of holiday pay, going back to the start of her employment. I deal with this claim briefly. The burden of proof is on the Claimant in this respect and she failed to provide any documentary evidence, or even understandable explanation, showing how the calculations in her schedule of loss had been arrived at. While Mr Felton said that he had sought to obtain such documentation from the Respondent and it had not been provided, he could, however, if he felt the Respondent was not complying with its duty of disclosure, have applied to the Tribunal for a specific disclosure order, but did not. In any event, it was clear from both parties' evidence that in fact no holiday was sought, or taken by the Claimant, by arrangement between her and her employer, with her salary being enhanced, in lieu of holiday, accordingly. It is entirely contrary to the Working Time Regulations to enter into such

an arrangement, as the whole point of the statutory holiday entitlement is that it be taken and if not taken in the relevant year, lost. I therefore consider that this claim seeks to enforce a right running contrary to legislation and accordingly, for both this reason and the lack of evidence provided, I don't consider it further and this claim is dismissed, less the above-stated agreed arrears of £83.87.

e. Failure to Provide Terms and Conditions of Employment. It is self-evident that terms and conditions were provided to the Claimant in August 2018 and therefore, subject to s.38 Employment Act 2002, as she had that document, having subsequently signed a copy, at the point that she brought this claim, she can bring no complaint under s.38.

The Law

3. Mr Bronze referred me to the case of **MITIE v Ibrahim [2010] UKEAT 0067**, as to a dismissal on notice requiring the inclusion of an ascertainable date as to the effective date of termination, which he states the letter of dismissal did not.

The Facts

4. I heard evidence from the Claimant and Mr Glenn Felton and on behalf of the Respondent, from Mr Timothy Knapman, a director in the company that owns the farm, the other co-director being his wife.

5. Start Date of Employment. I find that the Claimant was not an employee from 28 April 2018 (not gaining that status until 10 August that year) and that therefore she did not have two years' service and accordingly that the Tribunal does not have jurisdiction to hear either her claim of unfair dismissal, or for a redundancy payment. I find this, for the following reasons:

   a. The Claimant was clearly initially engaged by the Respondent as a self-employed contractor, to carry out milking. She submitted invoices for her work [example B1], for 'relief milking', at a set charge of £50 per 'p.m. milking' and £60 for 'a.m. milking', with no breakdown of hourly rate.

   b. Mr Knapman said (and I believed him) that at that point he and his wife were filling up holes in the milking rota, due to an employee having been injured. They used multiple persons to fill this role, under the same arrangement. He stressed that his wife informed the Claimant as to what gaps they had in the rota and the Claimant, after consideration (as she did similar work for several other farms), then told his wife what shifts she was willing to do. He said that as far as he was aware, the Claimant never cancelled her commitments to the other farms and said that she had no obligation to accept the shifts his wife offered. The Claimant denied this, stating that she had fixed shifts, but she accepted that in this period at no point did she suffer any sanction for failing to accept a shift. She also accepted that she worked, on the same basis, for other farms, similarly invoicing them. I prefer Mr Knapman's evidence on this issue and conclude, therefore that there was no mutuality of obligation between her and the Respondent.

c. Clearly, the Respondent had a good regard for the standard of the Claimant's work and accordingly, in or about early October 2018, they offered her a contract of employment, on fixed hours and fixed salary. She took advice on this contract from a friend of her father's and while she did not sign a final version until 16 April 2019 [B31], she worked to its terms from 10 August 2018, until the termination of her employment, to include ceasing to work for other farms. That contract specified her start date to be 10 August 2018 and while her advisor may have queried that back in August 2018, or later [there is a handwritten note on an earlier version to that effect – B14], she nonetheless signed the final version, showing that start date. Whether she read the document before doing so, or was perhaps not fully advised is neither here nor there – this term of the contract was clear.

d. Although she denied it, there was clearly a fundamental change in the relationship between her and the Respondent from that point. Her duties expanded considerably, from merely milking relief, to include, for example, repairs and maintenance, fencing and keeping herd records, these and also other functions being the duties of a herdswoman. She was also, from January 2019, given accommodation on the farm, along with her then partner, who also worked on the farm for a time. There was also discussion, in 2019, of her and her partner being offered share options in the farm.

e. I don't regard the issue of 'control', or whose equipment was used, as counter-balancing, in any way, the above findings. Of course, Mrs Knapman would 'control' what was going on in the farm, as somebody would need to, but I don't accept, as asserted by the Claimant, in answer to a question to that effect that Mrs Knapman 'stood over her' (during the period that she was merely a 'relief milker') telling her what to do in any detail. The Claimant was an experienced relief milker and knew what she had to do and when, without detailed control. Similarly, she will obviously have used the farm's milking and other equipment, as she was hardly going to bring her own. Whether she wore her own clothing, or that provided the farm is neither here nor there.

6. Unfair Dismissal and RPT. Having found, therefore that the Claimant did not have the requisite two years' service, the Tribunal has no jurisdiction to consider these claims.

7. Breach of Contract in respect of notice and unlawful deduction from wages. The dispute here centres on the wording of the letter of dismissal, of 21 April 2020 [B32], in which Mr Knapman wrote '*unfortunately due to unforeseen circumstances arising from the coronavirus outbreak Meadow Farm Ltd has come under unsustainable financial pressure and it is with regret we can no longer maintain your position. You are entitled to one month's notice as detailed in your contract but if you feel you are unable to continue, we quite understand and you may leave immediately without penalty.'* The Claimant did not return to work thereafter and texted the Respondent on 24 April [B34], in response to a text from them, which stated '*Hi Ruby could you please send me up to date time sheets in order for me to pay you for April. I assume that you have no intention of working out your notice period, so I'll issue a P60*

unless we hear otherwise'. The Claimant responded, saying she would send the time sheets and stating '*no, don't want to be somewhere where I'm not wanted'*. The Claimant said that she understood the letter and in particular the reference to '*without penalty*', as meaning that the Respondent was offering her pay in lieu of notice, which she was accepting. Mr Knapman said that that was not what was being offered, but instead it was to permit her leave immediately, without working out her notice. He did accept that the letter '*could have been more clear'*. As a general rule, the construction of an employer's letter of dismissal regarding the date of termination should not be a technical one, but should reflect what a reasonable employee's understanding would be in the light of facts known to him or her at the time. If the effect of the dismissal letter is unclear, it should be construed in a way that is most favourable to the employee — **Chapman v Letheby and Christopher Ltd [1981] IRLR 440, EAT**. In **Stapp v Shaftesbury Society [1982] IRLR 326, CA**, Lord Justice Stephenson, when expressly approving the **Chapman** case, stated: '[A] *notice to terminate employment must be construed strictly against the person who gives it, the employer, and if there is any ambiguity it must be resolved in favour of the person who receives it, the employee' (the 'contra proferentem rule'). Further, where the dismissal letter itself is ambiguous, anything that occurs after it has been given is irrelevant. In particular, it is not proper to have recourse to any oral or written correspondence between the parties if this takes place after dismissal, even if the correspondence may shed light on the intention behind the words used in the letter of dismissal.'* — **Minolta (UK) Ltd v Eggleston EAT 331/88**.

8. What is, I consider, unambiguous about the letter is that the Claimant is being dismissed – '*no longer maintain your position'* and that, in the absence of any further explanation, it is on one month's notice from that date, giving an EDT of 21 May 2020. What is considerably less clear is the offer as to notice, as accepted by Mr Knapman and nor applying **Minolta**, can subsequent correspondence after the dismissal be relevant. Applying the principles set out above, any lack of clarity must be construed in the employee's favour, which must, therefore, in this case, be that she was entitled to consider that by not returning to work, she was doing so because she had been offered a month's pay in lieu of notice, thus suffering no '*penalty*' and which recourse was open to the Respondent, as per the terms of her contract of employment.

9. I therefore find that the Respondent is in breach of contract in respect of notice and is ordered to pay the Claimant the agreed sum of £2083.33, in lieu of notice. The Respondent also failed to pay arrears of holiday pay, in the agreed sum of £83.87 and is also ordered to pay that sum.

10. Conclusion. The Claimant's claims of unfair dismissal, failure to pay redundancy payment, arrears of wages and holiday pay fail and are dismissed (less the agreed sum of £83.87). The Respondent is in breach of contract in respect of notice pay and is ordered to pay the Claimant one month's pay in lieu of notice, in the sum of £2083.33.

Employment Judge O'Rourke
Date: 09 September 2021

Reasons sent to the parties: 05 October 2021

FOR THE TRIBUNAL OFFICE