



# THE EMPLOYMENT TRIBUNAL

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**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mrs D Love**

**M.B.Farm Produce Limited**

**Held at Croydon (By video)**

**On 19 July 2023**

**BEFORE: Employment Judge Siddall**

## **Representation**

**For the Claimant: In person**

**For the Respondent: Mr N Brown, Director**

## **JUDGMENT**

The decision of the tribunal is that:

1. The claim for unfair dismissal is well founded and it succeeds.
2. The claim for a statutory redundancy payment does not succeed and is dismissed.
3. The Claimant is awarded a total sum of £7209.50.
4. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply to this award.
5. The amount of the prescribed element is £5389.50.
6. The dates of the period to which the prescribed element is attributable is 29 October 2022 to 19 July 2023.
7. The amount by which the monetary award exceeds the prescribed element is £1820.

## WRITTEN REASONS FOLLOWING A REQUEST BY THE RESPONDENT

1. The Claimant was employed by the Respondent from 14 November 2015. She was made redundant on 29 October 2022.
2. The Claimant claims that she was entitled to a statutory redundancy payment and that she was unfairly dismissed.
3. I heard evidence from the Claimant, from her daughter and from Miss Trudy Powley (a former employee of the Respondent). For the Respondent we heard from Mr Brown who is the owner of the company, his wife Mrs Jackie Brown and from Mrs Clare Wragg.
4. The facts I have found and the conclusions I have drawn from them are as follows:
5. The Claimant and Miss Powley worked at the Respondent's farm shop in Faversham. The Respondent also had a shop at Stockbury.
6. It is not in dispute that the Respondent never issued the Claimant with written terms of employment.
7. In the Autumn of 2022 Mr Brown decided that he was going to close the Faversham shop as it was not making money.
8. On 22 September 2022 Mr Brown wrote to the Claimant to inform her that he was closing the shop and that she was at risk of redundancy. He advised her that there was an alternative role at Stockbury. He set out her redundancy entitlements 'if it is necessary to make you redundant'. The Claimant was invited to attend a meeting the following day.
9. Miss Powley received a letter in similar terms.
10. The role at Stockbury was to be the same as the role at Faversham on the same terms and conditions.
11. Both Miss Powley and the Claimant met Mr Brown the following day, 23 September 2022.
12. Miss Powley's evidence is that Mr Brown discussed the role at Stockbury with her. She was used to walking to work at Faversham and would have to use public transport to get to Stockbury which would take her one and a half hours each way. It was agreed between Miss Powley and Mr Brown that the job was not suitable for her.
13. Miss Powley received a statutory redundancy payment.
14. Mr Brown also discussed the alternative role with the Claimant. She was worried about driving to an unfamiliar place.
15. The Respondent wrote to the Claimant on 23 September 2022 confirming that she had been selected for redundancy. She was

- offered the role at Stockbury starting on 31 October 2022. She was told that she would be entitled to a trial period.
16. The letter warned the Claimant that if she decided not to accept the offer and a tribunal considered this unreasonable, she would lose her right to a statutory redundancy payment.
  17. If the offer was not accepted, the Claimant's job would end on 29 October 2022.
  18. The Claimant was asked to indicate in writing whether or not she wanted to accept the role in Stockbury.
  19. Mr Brown says and I accept that the Claimant was a good worker and that he was keen for her to move to the other shop and continue working for the business.
  20. On 30 September 2022 Mr Brown followed up his earlier letter with a second letter in which he detailed the Claimant's concerns about travelling to Stockbury.
  21. The Claimant had expressed a concern about driving to Stockbury in the snow and Mr Brown confirmed she would not be expected to travel if this would be too risky. He confirmed that he would pay her reasonable mileage and fuel expenses. He pointed out that the drive to Faversham was a greater distance and a longer commute. He asked her to confirm whether she would accept the offer.
  22. The Claimant replied in a letter dated 4 October 2022 stating that she was not a confident driver and that the only journey she did, in thirty years of driving, was her journey to Faversham. She stated that she wished to accept a redundancy payment.
  23. In an undated reply, the Respondent expressed the view that the offer of work at Stockbury was suitable and that the Claimant was acting unreasonably in refusing it. As a result, she would not receive a statutory redundancy payment.
  24. At some point after this, the Claimant asked Mr Brown in a Whatsapp message if she could have a meeting with him. Mr Brown met with her on 18 October. The Claimant did not want to the meeting recorded but Mr Brown arranged for a note-taker to be present.
  25. The notes record that the Claimant and Mr Brown discussed how the trial period would work. At the end of the meeting, the Claimant is recorded as saying: 'will consider original offer with genuine interest. Needs points clarified and consider to give a go'.
  26. Mr Brown agreed to go away and get answers to some of the questions the Claimant had raised about her entitlements, and respond to her.

27. It was Mr Brown's evidence that after the Claimant had stated that she did not want to take the job at Stockbury, he made some enquiries by word of mouth and found someone who was interested in taking the job at Stockbury. He had made an offer to this person but had not heard back from them. Therefore as at the date of the meeting on 18 October 2022 the job remained unfilled. Mr Brown did not tell the Claimant any of this at the meeting.
28. In a further undated letter Mr Brown wrote to the Claimant. He expressed surprise that she had wanted to revisit the question of the trial period. He stated that the company considered that the Claimant had unreasonably declined the offer of a suitable alternative role and because of that, she was not entitled to a redundancy payment. Her last day of employment would be the 29 October 2022. He stated that the Respondent had made alternative arrangements to fill the role.
29. The Claimant wrote to Mr Brown on 28 October 2022 questioning the Respondent's decision as (she stated) she had agreed to undergo the trial period for the new role. Mr Brown agrees that he never replied to this letter.
30. I have noted that in their witness statements, the Claimant and Mrs Brown both make rather unpleasant allegations against each other relating to how each of them behaved after the decision had been taken to close the Faversham shop. I have not considered these in any great detail as none of the matters alleged appear to have any relevance to the question of liability in relation to the claims before me today. Nor is there any evidence to suggest that Mr Brown took them into account before confirming the Claimant's dismissal. The fact that the allegations have been made is however relevant to the question of remedy which I deal with below.

## **Decision**

### **31. Statutory redundancy payment**

32. Under section 141 of the Employment Rights Act, an employee who is made redundant can lose their entitlement to a redundancy payment if their employer makes them an offer of alternative employment that is suitable for them, and they unreasonably refuse it.
33. The offer of a role at Stockbury was in a different place to the Claimant's usual place of work. Aside from that, I have heard

- nothing to suggest that the job was any different. Her pay would remain exactly the same. The commute was the same or shorter in terms of distance and the Respondent offered to meet the Claimant's travelling expenses. I find that the role offered was suitable.
34. I then consider whether the Claimant refused the offer unreasonably.
35. The Claimant explained that she had not learned to drive until she was in her 30's. She was an anxious driver and the drive to Faversham was the only driving she ever did. If she went anywhere else, her daughters would normally collect her. She was very concerned about driving to Stockbury.
36. I accept that the Claimant had genuine anxiety about commuting to a new place of work. Although she had been prescribed medication during the redundancy process however, she had not had treatment for anxiety in the past. I am sure that she would have been very worried about driving to Stockbury for the first time, but she would have been able to try that out during the trial period. I note also that during the meeting on 18 October 2022 her brother had offered to assist her in finding a good route so that she could overcome her concerns. In all other respects, the job would be exactly the same. I also note that Mr Brown had agreed to be flexible about hours and he offered to pay the Claimant's mileage. In all these circumstances I find that her refusal, as set out in her letter dated 4 October 2022, was unreasonable.
37. I have carefully considered the fact that after first telling Mr Brown she did not want the job, the Claimant later had a change of heart. She sought a meeting with Mr Brown and clearly told him that she was giving genuine consideration to at least completing the trial period. I have considered whether this cancelled out the initial refusal of the job offer, such that the Claimant would have a right to a redundancy payment?
38. Section 141 does not cater for the situation where an employee changes their mind and nor have I been able to find any case-law on this issue. Applying the words of the statute, the right to a payment is lost if a suitable position has been offered and it has been unreasonably refused.
39. I find that in this case an offer of suitable alternative employment had been made. It was unreasonably refused on 4 October 2022. Although the Claimant later reflected on the situation and sought to change her decision, I cannot see anything that leads me to the view that the right to a redundancy payment is then restored.

## Unfair Dismissal

40. Under section 98(2) of the Employment Rights Act 1996 I must first decide whether the Respondent had a potentially fair reason for dismissal, and if so whether the Respondent acted reasonably in all the circumstances in deciding to dismiss the Claimant (98(4)).
41. The Claimant has not challenged the genuine nature of the Respondent's decision to close the Faversham shop on grounds of costs, and I find that this gave rise to a redundancy situation for all the staff employed there.
42. I go on to consider the question of the reasonableness of the Respondent's decision. In a redundancy situation, it is usually expected that an employer should warn employees that they are at risk of redundancy; consult with them; and carry out a fair selection process. The employer should also 'seek to see whether instead of dismissing an employee he could offer him alternative employment'.
43. The Respondent appears to have taken some legal advice about how to conduct a fair redundancy process. All staff were warned that they were at risk of redundancy. They were invited to a consultation meeting. There was no need for a selection process as all staff at the shop were at risk of redundancy. The possibility of alternative employment, however, was discussed with each of them.
44. The letter of 23 September 2022 sets out the Claimant's right to a redundancy payment and the circumstances in which she could lose that payment. She was given the chance to consider the role. She was advised that if she did not accept the role her position would be made redundant with effect from 29 October 2022. The Respondent cannot be criticised for the process followed up to this point.
45. When the Respondent learned that the Claimant was refusing the role, they wrote to her to confirm that she would not receive a redundancy payment. It seems clear that this, and the loss of another job opportunity, led the Claimant to reflect upon her situation. She sought a meeting with Mr Brown which he agreed to. In that meeting she clearly indicates that she is prepared to consider taking the job on a trial basis. During this meeting Mr Brown said nothing about having already contacted someone else.
46. I also place weight on two other factors: first, the fact that Mr Brown agrees that as at the date of the meeting on 18 October

- 2022 the vacant post remained unfilled. Second, his evidence was that he considered the Claimant to be a good and reliable employee, and that he was keen for her to move across to the Stockbury shop.
47. I have considered the case of **Maguire v London Borough of Brent** EAT 0094/13 which confirms that the ‘the time to consider the reasonableness of a dismissal is the time the dismissal occurred’ (paragraph 24). The EAT went on to hold that it was wrong not to consider an employee who was working out their notice period for a vacancy that had been described as ‘under review’. In this case, the Claimant had been informed on 23 September 2022 that her job would end on 29 October 2022. As at the date of the meeting on 18 October 2022, she was still in her notice period. I accept that prior to that meeting she had indicated that she did not want the job at Stockbury and so the Respondent had started to look elsewhere. After being told however that as a result she would not receive a statutory redundancy payment, the Claimant had quite understandably reflected on her situation. I find that on the 18 October she indicated a clear willingness to take the job at Stockbury on a trial basis. Moreover, Mr Brown did not say anything to her to suggest that this opportunity was now closed to her, and that someone else might be interested in it. In fact he stated that he would go away to obtain answers to her questions about how the trial period would work. He was aware that the job was still available and previously had wanted the Claimant to fill it.
48. It is not the job of the tribunal to substitute their own decision for that made by an employer. The tribunal must decide instead if the decision to dismiss fell within the range of reasonable responses to the information available to them. In this case, as at 18 October 2022 the Respondent had an unfilled vacancy at the Stockbury shop which they had been keen for the Claimant to take. She was a long-serving employee with 7 years’ service. Mr Brown considered that she had performed her job well. She was at risk of losing her job due to redundancy in circumstances where she would not receive a redundancy payment. In all these circumstances I find it was not reasonable for the Respondent to refuse to allow the Claimant to commence the trial period, and to confirm to her that her dismissal on grounds of redundancy would take effect on 29 October 2022.
49. I therefore find that the dismissal was unfair.

## Compensation

50. Where a claim for unfair dismissal succeeds, a claimant is usually entitled to a basic award, calculated in the same way as a statutory redundancy payment. Under section 121(b) of the Employment Rights Act 1996, however, the basic award is 2 week's pay where the Claimant is not entitled to a statutory redundancy payment: this amounts to £910 in the Claimant's case.
51. I go on to consider the appropriate amount of the compensatory award. Following the dismissal, the Claimant was out of work for one month. She applied for jobs at Aldi, Asda, Morrisons and Pets at Home but although she had some telephone interviews she was not successful. She had net losses whilst unemployed of £1620.
52. The Claimant obtained temporary work at Dunelm from 28 November 2022. She is only working 16 hours per week as opposed to up to 42 hours a week with the Respondent and her salary is lower. She works additional hours when she can. She now takes home approximately £152 per week as opposed to £405 net per week from the Respondent, a loss of around £253 per week. She is entitled to universal credit.
53. Her losses from 28 November 2022 to date are £8349 in addition to the sum of £1620, a total of £9969.
54. The Claimant has continued to try and get a better paid job and recently applied for a job at Greggs for 30 hours a week which was not successful.
55. It is the Respondent's assertion that even if the Claimant had accepted the job at Stockbury, she would have left at the end of the trial period. I questioned the Claimant about this suggestion while she was giving evidence about the remedy she was seeking. In addition to her anxiety about driving, the Claimant alleged that staff at Stockbury were not speaking to her. Mr Brown denies this but I find that the Claimant's perceptions, whether accurate or not, would be likely to influence her decision about whether to remain with the Respondent. I have also noted that the Claimant and Mr Brown's wife both make complaints in their witness statements about each other's conduct following the commencement of the redundancy process. I find that there was a strong chance (which I put at 50%) that the Claimant would not have worked at the Stockbury shop beyond the 4 week trial period.
56. I therefore award the Claimant a compensatory award of £5389.50 calculated as follows: £9969 reduced by 50% to reflect the chance that she would not have stayed on beyond the end of November in



- any event, which comes to £4984.50. To this figure I add a sum of £405 representing one week's salary to reflect the Claimant's loss of statutory rights.
57. I make no award for future loss. Given the evidence I have heard about the Claimant's concerns about taking the job at Stockbury and how she had been treated, I find that there is a 100% chance that even if she had worked at Stockbury beyond the end of the trial period, she would have sought other employment prior to the date of her tribunal hearing (which took place around eight months after her dismissal). Second her evidence is that she has only applied for one other job since taking the job at Dunelm despite the fact that she is on considerably lower salary. Third, under section 123(1) I must award such sum as I consider to be just and equitable. In this case a genuine redundancy situation had arisen due to the closure of the Faversham shop. The Respondent had made reasonable efforts to carry out a fair redundancy process although they did not act reasonably in relation to the available vacancy at Stockbury. There is however considerable doubt about how long the Claimant would have remained working at the Respondent if not dismissed.
58. Finally I award two week's pay under section 38 of Employment Act 2002 because the Respondent failed to provide the Claimant with written particulars of her terms of employment.
59. The total sum awarded to the Claimant is therefore £7209.50 calculated as follows:
60. A basic award of £910
61. Compensatory Award £5389.50
62. A sum of £910 representing 2 week's wages as no written statement of terms had been issued
63. Total: £7209.50

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Employment Judge Siddall  
Date: 03 August 2023.