



EMPLOYMENT TRIBUNALS

Claimant: Mr A Storrie
Respondent: BHE Agricultural Contractors Ltd
Heard at: Hull (by video)
On: 20 June 2024
Before: Employment Judge Miller

Representation

Claimant: Mr D Storrie (claimant's brother)
Respondent: Mr S Dunn (director)

JUDGMENT having been sent to the parties on **21 June 2024** 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

Findings of fact

1. The claimant was employed by the respondent as a general farm worker from 24 July 2012 until his dismissal on 7 September 2023 with effect on 6 October 2023.
2. The claimant undertook Early Conciliation from 14 October 2023 to 30 October 2023 and submitted a claim for unfair dismissal, notice pay and holiday pay on 30 October 2023. That claim was rejected due to a problem with the Early Conciliation Certificate and then accepted from 27 November 2023.
3. I make the following findings of fact.
4. The respondent operates a farm. The claimant took on responsibility for livestock at the respondent in around 2016 including responsibility for half the lambing. This moved to him in its entirety in 2020.
5. There have been problems with the lambing of one kind or another every year since then. The claimant had appraisals with the respondent each year.

6. In 2020 the appraisal records that the lambing had been very poor, sheep not fed, mixed up mothering. This meant that the lambs had been separated from their mothers.
7. In 2022 the appraisal describes that a lot of ewes and lambs had been lost.
8. In 2023 it says “sheep absolute nightmare things have to change”. There was not much detail about the problems with the sheep but the appraisal records that the sheep are losing money.
9. The respondent was aware that the claimant was struggling to manage the sheep because Mr Dunn took the decision to reduce the size of the flock after 2020 to help the claimant cope.
10. After the appraisal in July 23, the claimant was given a warning – it is called a verbal warning but was followed up in writing. It says

“On the 22nd of November 2022 your annual appraisal was held whereby certain areas of your work were discussed and not up to company standard. These included,

The sheep and I expressed how disappointed I was with the sheep husbandry given and went into detail about the changes needed.

Vet and meds are not up to date and the storage of medication is not acceptable.

The tidiness of the yard, I commented how the yard needed to be kept tidy and I was ashamed with the state of it.

I gave you the opportunity to deal with these problems but sadly that has not happened”.
11. The claimant was not given any specific support or training, but the size of the flock was reduced. The claimant and Mr Dunn agreed that the claimant did have a great deal of experience looking after sheep and there were no concerns with any of the claimant's other work – looking after the cattle and managing the respondent's storage container business, although the respondent had raised some concerns about the tidiness of the yard.
12. Mr Dunn conducted the claimant's appraisals and they were noted by Ms Rutter.
13. On 15 August 2023 the sheep were moved from another of the respondent's sites at Studford Farm where Ms Rutter was looking after the sheep to Lambshill Farm where the claimant worked.
14. I find, on the balance of probabilities, that the sheep were in a reasonably healthy condition before being moved from Studford Farm, albeit that one sheep had some maggots.
15. The sheep were then under the care of the claimant.

16. During this period while under the care of the claimant, I find that the sheep became unwell – they suffered with maggot infestations which resulted in a number of the sheep dying and some becoming very unwell.
17. I find that the claimant was not regularly inspecting the sheep at this time – he was busy with other tasks including leading the hay. He did not raise the state of the sheep with Mr Dunn directly although he did discuss with Ms Rutter about getting some treatment for the sheep.
18. I find that Mr Dunn and Ms Rutter were unaware of the poor state of the sheep at that time. Ms Rutter did not appreciate the state the sheep were in when the claimant was talking about getting treatment.
19. I find that the claimant did take some steps to arrange treatment for the sheep but that he was unsuccessful in doing so. I find that Mr Dunn did not prevent the claimant from undertaking the treatment, but if he was reticent about it because of the cost, it was because he was unaware just how bad the sheep were.
20. On 24 August, Ms Rutter attended at Lambshill Farm for some routine work on the sheep and saw that they were in a very poor condition. There were some dead sheep that the claimant had not removed and some that were infested with maggots and suffering with other problems.
21. Ms Rutter told Mr Dunn about them and he made a decision to obtain treatment in the form of a sheep shower. Mr Dunn was angry with the claimant and they exchanged angry words.
22. The next day, the claimant went on a pre booked holiday and in his absence Mr Dunn treated the sheep over 2 or 3 days.
23. Mr Dunn resolved at that time, while the claimant was off, to dismiss the claimant.
24. The claimant returned from leave and on 6 September Mr Dunn attended Lambshill Farm and told the claimant
“my sheep can’t take any more Andy,. We will have to call it a day”.
25. Mr Dunn gave the claimant 4 weeks’ notice throughout which time the claimant continued to work for the respondent.
26. The claimant was not offered the right to appeal the decision to dismiss him.
27. The claimant lived in tied accommodation so he worked until 6 October 2023 and left and moved out on that date.
28. The respondent offered the claimant alternative work in other parts of his farm on, he says, similar wages. I find that the claimant’s decision to refuse the work was reasonable in light of the way Mr Dunn had dismissed him.

29. The respondent and the claimant both complain about the state of the tied house that the claimant was living in – that is not something I can consider because it is not in the jurisdiction of the Employment Tribunal.
30. The claimant earned £625 per week (gross) while working at the respondent. He paid £385 per month towards the cost of his house and bills. He was entitled to 5.6 weeks per year holiday and worked 7 days per week.
31. I find that the claimant took 8 days holiday in 2023. The holiday year runs from 1 January to 31 December. There is no right to carry holidays over. The claimant agreed that he had never asked Mr Dunn for holidays, he arranged them himself. Mr Dunn had never refused any holidays.
32. Since the end of his employment, the claimant has worked and earned a total of £4041.18. He is starting full time work on the national minimum wage shortly in about a week.

Law

Unfair dismissal

33. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by their employer. Section 98 of the Employment Rights Act 1996 says that it is for the respondent to show the reason for the dismissal and that, as far as is relevant in this case, it is for a reason falling in subsection 2 of Section 98. One of those reasons is that the dismissal related to the conduct of the employee. When deciding what the reason for the claimant's dismissal was, I have to think about the set of facts known by the respondent or believed by the respondent at the time. The question for the Tribunal is what was the genuine reason for the decision to dismiss, in the mind of the dismissing manager. It is a very low bar.
34. Questions as to the reasonableness of that belief are addressed in the second part of the test.
35. Section 98 (4) of the employment rights act says that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
36. (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
37. (b) shall be determined in accordance with equity and the substantial merits of the case.
38. In terms of reasonableness, *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303, provides valuable and regularly used guidelines:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained

a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further”.

39. It is settled law that the tribunal must not substitute its own decision as to whether the decision of the employer to dismiss the employee was fair, but must decide whether the actions of the employer in dismissing the employee were within the range of reasonable responses of a reasonable employer.
40. The ACAS code sets out some guidance about a fair process for dismissals. In broad terms, the employee should be informed of the problem, there should be an investigation and then the employee should have the right to make representations before being dismissed.
41. They should be offered an appeal.
42. If overall the procedure is unfair, I must find that the dismissal was unfair unless it was so obvious that no reasonable employer would have felt the need for a dismissal.

Notice pay

43. An employee is entitled to notice of their dismissal The period of notice is the greater of that set out in their contract or in accordance with section 86 Of the Employment Rights Act 1996. That says that an employee is entitled to one weeks' notice for each complete year of their employment to a maximum of 12 weeks.
44. An employer is entitled to dismiss if the employee is in repudiatory breach of contract. That is to say, their conduct is so bad that they are treated as having abandoned the contract. This is often referred to as gross misconduct.
45. It is for me to decide if the claimant actually had committed gross misconduct on the basis of all the evidence before me. It is not a matter of the reasonable belief of the employer.

Holiday pay

46. An employee is entitled to be paid in lieu of untaken holiday on termination of employment. In the final year of employment, leave accrues on a pro rata

basis as a proportion of the elapsed holiday year. Only holiday accruing in the last leave year is payable, unless the employee been prevented from taking holiday in previous years.

Conclusions

Unfair dismissal

47. In my judgment, the real reason for the claimant's dismissal was conduct – that was what Mr Dunn genuinely believed on the basis of the facts before him. It is clear from conversation on 6 September 2023 that reason was the state of the sheep and that Mr Dunn believed that the claimant was responsible for that. Conduct is a potentially fair reason within section 98 Employment Rights act 1996.
48. In respect of the reasonableness of the decision to dismiss the claimant, there was no procedure at all. No investigation, no opportunity for the claimant to put his side. There were matters of disagreement between the claimant and Mr Dunn about culpability for the state of the sheep – what steps the claimant had or ought to have taken and other potential mitigations. Mr Dunn cannot reasonably have believes that the claimant was guilty of conduct justifying his dismissal because he had not considered all the relevant facts, only the state of the sheep.
49. I reject the respondent's suggestion that the claimant had the opportunity to make representations during his notice period. It was too late by then, the claimant had already been dismissed. In any event, there was no invitation to the claimant to submit an appeal and no indication at all that it would be treated fairly even if he had.
50. In my judgment, no reasonable employer would dismiss someone in this way without even hearing the other side of the story. The acts of Mr Dunn in dismissing the claimant in the way he did were outside the band of reasonable responses of a reasonable employer.
51. In my view, however, the claimant having now been given an opportunity to explain his position, had there been a proper investigation and proper consideration, there is a 70 % chance that the claimant would have been dismissed had there been an investigation and dismissal meeting. He had had a warning, although not specifically about this, and the impact of the claimant's actions on the sheep and the respondent's business was significant. The claimant did offer some explanations and there were clearly matters that could have been improved in terms of communications and expectations from the respondent, but both parties acknowledged the claimant's knowledge and experience.
52. Any compensatory award will therefore be reduced by 70%.

Compensation for unfair dismissal

Basic award

53. The basic award is calculated in same way as a statutory redundancy payment – 1.5 weeks' pay for each year the claimant worked when aged 40 or more plus 1 week for each year worked below that age. Wages are capped at £643 per week. The claimant was aged 46 at the effective date of termination (his dismissal).
54. The basic award is therefore £8437.50
55. I can reduce basic award if consider that the claimant contributed to dismissal and it is just and equitable to do so. In my view, the claimant did contribute to his dismissal by his conduct. However, he was not given an opportunity to explain or defend himself and was all but summarily dismissed after 11 years and made homeless. It is not just and equitable therefore to reduce basic award and I award **£8437.50**

Compensatory award

56. The compensatory award is the losses flowing from the dismissal less any income the claimant has obtained. The claimant has an obligation to mitigate his losses.
57. The claimant's losses are loss of wages and pension contributions, loss of statutory rights and the loss of the value of his tied rented accommodation of £925 per month. This value is calculated as the cost of replacing the accommodation and I accept the claimant's assertion that £300 covers the cost of utilities.
58. The claimant has found full time work from next week.
59. Period of loss is therefore from 6 October 23 – 30 June 2024 – this is 38 weeks.
60. Losses are net losses. Doing best I can, the claimant's take home pay was £509 per week. His losses are therefore £19,342. The claimant earned £4041 in that period. This amount is below the Tax Threshold so constitutes his net income for the period.
61. The claimant's net loss earnings is therefore £15,301.
62. The claimant also experienced a loss of employer pension contributions of £15.15 per week, which comes to £575.70
63. The value of the loss of the accommodation is £900 per month. This is equivalent to £207 per week for 38 weeks, which is £7,866
64. I award compensation for loss of statutory rights of £500
65. This gives a total losses of £24,242.70
66. However there was a 70% chance that the claimant would have been dismissed fairly had a fair procedure been followed. In my judgment, the claimant also contributed to his dismissal by not dealing with the sheep problems quickly enough. I set the contribution at 50%.

67. I also find that there was a wholesale failure to comply with the Acas code of practice on disciplinary and grievance procedures and I apply an increase of 25% under section 207A Trade Union and Labour Relations (Consolidation) Act 1992. (1818.20 when applied in order)
68. Applying the adjustments of 70% reduction for the likelihood the claimant would have been dismissed if a fair process had been followed, 50% reduction for contributory fault and 25% Acas uplift gives a total compensatory award of **£4545.51**

Notice pay

69. I have to decide if the claimant actually committed gross misconduct – a repudiatory breach of contract. In my view, there is clear evidence that the claimant committed misconduct by leaving the dead sheep in the farm yard and not prioritising the welfare of the sheep. However, there is also evidence that the claimant was overworked and his advice was not always considered. The claimant had made some, albeit inadequate, efforts to treat the sheep. This is not evidence, in my view, of the claimant abandoning his contract of employment by his conduct.
70. In those circumstances, the claimant was guilty of misconduct but not gross misconduct. The respondent was potentially entitled to dismiss him (if they did it fairly) but not without notice.
71. The claimant is entitled, under s 86 Employment Rights Act 1996, to 11 weeks' notice. He has had 4 weeks' notice so is entitled to 7 weeks' pay as compensation for breach of contract for failure to give the appropriate notice.
72. This is a gross sum of 7 x £625 plus pension contributions of £15.15 per week. This gives a total compensatory award of **£4481.05**
73. I do not apply a separate Acas uplift to this award.

Holiday pay.

74. The claimant is entitled to 38 days holiday per year. (5.6 weeks x 7 days)
75. By 6 October 2023, 278 days had passed, which is 76% of the year. By this date, the claimant had accrued 28.5 days leave.
76. The claimant had taken 8 days and is therefore entitled to 20.5 days holiday.
77. I adopt the claimant's calculation and convert this to 2.9 weeks
78. The claimant was paid £625 per week so is entitled to £1812.50. pay in lieu of holidays. The claimant has been paid £925 already by way of holiday pay so the respondent must pay **£887.50**

Offset

79. It is not possible for me to offset any alleged damage to the property against this, as the respondent does not have a contractual or other right to make

deductions from the claimant's wages and the respondent has, in any event, not made an employer's breach of contract claim.

Employment Judge Miller

Date: 2 August 2024