



EMPLOYMENT TRIBUNALS

Claimant: Mr R Stagg

Respondent: F G Smith and Son

Heard at: Bristol (via CVP video hearing) On: 5th December 2024

Before: Employment Judge P Cadney

Representation:

Claimant: Mr D Sherbourne (Solicitor)

Respondent: Mr D Jones (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The effective date of termination of the claimant's engagement by the respondent was 4th December 2023;
- ii) The claimants claims of:
 - a) Unfair dismissal;
 - b) Wrongful dismissal (notice pay);
 - c) Unlawful Deduction from wages;
 - d) Failure to provide written terms of employment

Are dismissed as having been presented out of time.

Directions

- i) The parties are directed to notify the tribunal within 14 days:
 - a) Whether a hearing in respect of the claimants claim for unpaid holiday pay is required; and if so
 - b) To provide an agreed estimate for the hearing and draft directions for approval by the tribunal.

Reasons

1. By a claim form submitted on 21st March 2024 the claimant brings claims of:

- i) Unfair Dismissal;
- ii) Wrongful Dismissal (notice pay)
- iii) Unlawful Deduction from wages;
- iv) Unpaid holiday pay;
- v) Failure to provide a written contract of employment.

2. The ACAS EC certificate contains the dates of 15th and 19th March 2024 as dates A and B.

3. The case has been listed for today's preliminary hearing to determine:

- i) Was the claim presented in time (i.e. what was the effective date of termination)? If not was it reasonably practicable to present the claim within the time limit? If not was it presented within a reasonable period?
- ii) If the claim is to proceed there will also be a case management discussion.

Summary

4. The respondent contends that the claimant was dismissed with immediate effect on 4th December 2023. If correct the primary limitation period would expire on 3rd March 2024, and the claimant would not get the benefit of any ACAS EC extension as the early conciliation was only entered into after the expiry of the primary limitation period. If this is correct most of the claims have been submitted out of time, and the tribunal would have to consider whether to extend time on the basis of whether it was reasonably practicable for the claims to have been presented in time, and if not whether they were presented within a reasonable time thereafter. The claimant submits that he was not dismissed on 4th December 2024, but was given notice of dismissal, and that the effective date of termination of the contract was 4th January 2024 if he was given one month's notice, or 1st January 2024 if he was given four weeks' notice and that the claims were on either basis, all presented within time.

5. Holiday Pay - The respondent accepts that the exception to this is the claim for holiday pay (indeed this was pointed out by the respondent's counsel) which is at least arguably in time irrespective of the effective date

of termination, as time would begin to run from the point at which it should have been paid, which is the next payroll run.

6. Reasonable Practicability – The claimant no longer relies on the question of reasonable practicability; but accepts that if the tribunal concludes that the effective date of termination is 4th December 2023 then the claims (except for holiday pay) will have been submitted out of time and must be dismissed.

7. Employment Status – In addition to the dispute as to the effective date of termination there is a dispute as to the claimants employment status. The claimant contends that he has been employed by the respondent for some forty two years; the respondent that he always was and remained a genuinely self-employed independent contractor.

8. The resolution of that issue would require evidence as to, and conclusions drawn as to:

- i) Whether the claimant's engagement was initially as an employee or a self-employed contractor;
- ii) If initially he was a self-employed contractor did the contractual relationship become an employment relationship; and so when?
- iii) Alternatively , if the claimant was not at any point an employee of the respondent did he become a worker, and if so when.

9. The question was canvassed as to whether it might be possible to resolve those issues in today's hearing, but in my judgment there was simply insufficient evidence before the tribunal to allow it to make any findings as to those issues; and I confined myself to the determination of the issue in respect of which the hearing was listed.

10. The claimant submits that he was not dismissed on 4th December 2024 but was given notice of dismissal, and that the effective date of termination of the contract was 4th January 2024 if he was given one month's notice, or 1st January 2024 if he was given four weeks' notice and that the claims were on either basis, all presented within time.

Evidence

11. The tribunal has witness statements from, and has heard evidence from the claimant; and on behalf of the respondent from Rebecca Miles, and Deborah Wilkins.

12. The respondent's evidence is that the claimant attended a meeting with Ms Miles and Ms Wilkins on 4th December 2023. Ms Miles read from a prepared script which expressly stated that the contractual relationship was being ended with immediate effect. He was handed a letter during the meeting. He later sent Ms Wilkins a text acknowledging his dismissal. On 7th December he responded to the letter. On 20th December 2023 he

signed a copy of the letter and acknowledged his self-employed status and agreed a financial settlement. He was paid the agreed sum the following day.

13. The claimant's position is that he understood from the read script and the letter that he was being dismissed, but that he was being given one month's notice which he was not required to work, rather than being immediately dismissed. He contends that even if that interpretation is wrong, that at best both the oral communication and letter were contradictory and ambiguous.

14. The relevant parts of the script, and the letter are set out below (my underlining of the passages relied on by the parties) :

Script

SCRIPT NOT TO BE SHARED WITH EMPLOYEE.

Robin,

.....

I have concluded that the essential trust between a business and a self-employed contractor has broken down, and our communication is now so limited that I cannot manage the farm effectively. We cannot control our cow records, and I'm concerned that errors may be made, causing difficulties with our audits and general animal welfare.

Therefore, I have decided to notify you of our intention to cease using your services with immediate effect. (pause briefly).

Whilst as a self-employed contractor, there is no obligation on F G Smith & Son to provide an extended notice period or any form of compensation, the family has agreed that we would like to recognise your long service with us by providing you with four weeks' paid notice. However, we will not expect you to work this notice, giving you most of December, including Christmas, off work.

Subject to several conditions, which we will outline in a letter to you, the family have also agreed to provide a one-off termination payment of £5000 at the end of the notice period. Whilst you are responsible for your tax affairs, this should give you around three months of income, during which you can decide what you wish to do next.

.....

While I'm sure you may have questions, no further explanation of this decision will be provided. *Therefore, your contract with F G Smith & Son ceases immediately, and we do not expect you to be on the farm at any time after this meeting, aside from arranging with Neil Thompson to collect any personal items.*

.....

Letter

This letter informs you that our contract for services from you, terminated on 4 December 2023 following the meeting with Debbie Wilkins and Becky Miles (REAL Success). As outlined in our meeting, the main reason for this action is a breakdown of communication and irretrievable differences of opinion on how our farm should be run.

Before outlining our proposed ex-gratia payments to you, I wish to remind you of the nature of our relationship with you as a self-employed contractor.

.....

- Your relationship with F G Smith & Son is that of an independent contractor of self-employed status
- Nothing in our agreement created or could be deemed to constitute or give rise to a partnership, joint venture, agency or any employment relationship between us.

Contract Termination Payments

Further to our meeting on 4th December, I confirm the following contract termination payments:

a) F G Smith & Son agree to pay a lump sum equivalent to 4 weeks of the agreed number of milkings. This will be paid at the end of four weeks on 29th December 2023. You will not be expected to provide your services during this period.

15. Following the meeting at 11.33 am on 4th December 2023 the claimant sent the following text message to Ms Wilkins : "... my dismissal was not by mutual consent .." on which the respondent relies on as demonstrating that he understood that he had been dismissed.

16. Law – The parties are not essentially in dispute as to the applicable law (the following extract is taken from IDS Handbook 3 – Chapter 10 which is an accurate summary of the law and includes consideration of all the authorities relied on by both parties):

The test as to whether ostensibly ambiguous words amount to a dismissal is an objective one:

- All the surrounding circumstances must be considered;*
- If the words are still ambiguous, the employment tribunal should ask itself how a reasonable employer or employee would have understood them in the circumstances.*

Any ambiguity is likely to be construed against the person seeking to rely on it — Graham Group plc v Garratt EAT 161/97.

When considering all the circumstances, tribunals will look at events both preceding and subsequent to the incident in question and take account of the nature of the workplace in which the misunderstanding arose. For example, in Futty v D and D Brekkes Ltd 1974 IRLR 130, ET, F was a fish-filleter, and his foreman, fed up with F's banter, said, 'If you do not like the job, fuck off.' F claimed this was a dismissal and found himself another job. The company saw it differently: it thought F would come back when over his 'huff' and denied dismissing him. With other fish-filleters' help the tribunal interpreted the words used, not in isolation, but against a background of the fish dock and found the words were not a dismissal but a 'general exhortation to get on with the job'.

The same objective test applies when the ambiguity occurs in correspondence between employer and employee. Where an employee has received an ambiguous letter, the EAT has said that the interpretation 'should not be a technical one but should reflect what an ordinary, reasonable employee... would understand by the words used'. It added that 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter' — Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT. In Meaker v Cyxtera Technology UK Ltd 2023 IRLR 365, EAT, for example, the EAT held that an employment tribunal had correctly construed a letter sent by an employer to an employee who was no longer able to carry out his manual labour role as a letter of dismissal. Although the letter was headed 'without prejudice', incorrectly stated that termination of employment was by mutual agreement and included a draft settlement agreement, it clearly communicated to the employee that the employer was unilaterally terminating his employment on an identified date, and there was a clear demarcation between the part of the letter dealing with the termination of employment and the part setting out the proposed settlement agreement. Furthermore, the dismissal letter did not come wholly out of the blue.

17. Ostensible Ambiguity – The respondent's first submission is that there is in fact no ostensible ambiguity. The claimant accepted in evidence that Ms Miles read from the script verbatim as she contended, and it follows that there is no dispute that he was told orally that he was being dismissed with immediate effect; and he accepted he was in a state of shock when he was told that he was being dismissed with immediate effect. He stated that on his return home he had thrown the letter in the bin, but it was retrieved by his wife; and he sent the text the same day, and subsequent emails about the contents of the letter. The first line of the letter repeated that the contract had ended with immediate effect on 4th December 2023. There can be no doubt that the claimant knew both from the meeting and the letter that he had been dismissed, and that he knew he had been dismissed with immediate effect, irrespective of the issue of payment for notice or any notice period. It follows automatically that whatever any ambiguity in respect of notice and notice payments, that the one thing the claimant knew

unambiguously was that he had been dismissed with immediate effect. If this is correct the question of ostensible ambiguity does not arise.

18. The claimant submits that both the script and the letter are necessarily ambiguous. In the extracts from the script for the meeting, as set out above, the claimant accepts that there are references to dismissal with immediate effect; but equally there are references to being given notice, albeit that he is not required to work during the notice period. If the claimant has been dismissed with immediate effect the question of notice, as opposed simply to notice pay, does not arise. However the script explicitly refers to the claimant being given notice and not being expected to work during his notice. That can only mean that he contract was subsisting during the notice period, otherwise there would be no obligation to work from which he could be released. The concept of dismissal with immediate effect, and dismissal on notice are mutually exclusive, but the claimant was told that both apply in this case. Moreover the claimant relies on the evidence of Ms Wilkins and Ms Miles. He accepts that the intention was to dismiss him with immediate effect and to make a payment in lieu of notice, whether any was contractually required or not. However he contends that that is not what he was told. Ms Wilkins in her evidence accepted that the references to notice and not working during the notice period may have “muddied the waters”; and Ms Miles, despite being an HR professional appeared not to understand the distinction, and at different points in her evidence stated both that the claimant was being dismissed with notice, and with immediate effect. The claimant essentially asks rhetorically that if the HR professional acting on the instructions of Ms Wilkins does not understand precisely what the claimant was being told the conclusion that the script and letter were necessarily ambiguous is unavoidable.

19. Surrounding Circumstances / Reasonable Employee – Both parties make similar submissions in respect of the surrounding circumstances and/or reasonable employee test in the event that I hold that the words are ambiguous. The respondent contends that a reasonable employee would necessarily have understood, as the claimant did, that he was being dismissed with immediate effect because that is precisely what he was told. The reasonable employee would have understood that he would be paid for his notice period but was not required to work during it. A reasonable employee without training in employment law could only have understood that he was being dismissed with immediate effect, and that his services were no longer required; but he would receive payment for any notice period. A reasonable employee who was told that he was being dismissed with immediate effect, and being paid for any notice period, could not possibly have understood that he was not being dismissed with immediate effect, but was in fact being given notice of termination in one month/four weeks’ time.

20. The claimant contends that a reasonable employee would have understood he was being given four weeks’ notice, but not that he was being required to work essentially for the same reasons given above.

21. Alternatively the claimant contends that the ambiguity should be construed contra proferentum. If the respondent has made ambiguous and internally contradictory statements as to the claimant's status any ambiguity should be construed in the claimant's favour. If therefore, the script and letter are objectively ambiguous, the interpretation should be the one that most favours the claimant, which is that he was being dismissed with notice.

Conclusions

22. Whilst there are, as set out above, arguments on both sides, in my judgment the script and letter are essentially unambiguous that the claimant is being dismissed with immediate effect for the reasons given by the respondent.

23. If that is incorrect, and both are sufficiently ambiguous to engage the second question set out above, in my judgment the ambiguity only arises if the reasonable employee is assumed to be familiar with some relatively arcane concepts in employment law such as dismissal with notice; dismissal with notice but without a requirement to work during the notice period; and the payment in lieu of notice; and the interaction between any of those and the concept of dismissal with immediate effect. In my judgment a reasonable employee must be taken to be one without that level of understanding of employment law; and the question is what such a reasonable employee would have understood. In my judgment the one fact that the claimant and/or any reasonable employee would have indisputably known from both the script and the letter was that he was being dismissed with immediate effect.

24. It follows whether because of the conclusion that the script and/or letter are sufficiently unambiguous, or because of the conclusion that a reasonable employee would have understood them as providing for dismissal with immediate effect, in my judgment the claimant was dismissed on 4th December 2023.

25. It follows that as the issue of the reasonable practicability of presenting the claim in time is no longer being pursued, that all of his claims, with the exception of the claim for holiday pay, must be dismissed.

26. Further directions are given above in respect of the remaining claim.

Employment Judge Cadney
Dated: 7th December 2024

ORDER SENT TO THE PARTIES ON

13 January 2025

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS