

JERSEY / JUDGMENT

Mr D Richard Waters v R. Le B. Limited

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Jersey Employment Tribunal This award, (subject to the right of appeal to the Royal Court, as set out in the Law) is legally binding and is the final decision of the Tribunal. Each party, if applicable, is responsible for establishing their liabilities with regard to Social Security and Income Tax payments. Case Number: 0901-010/07 Applicant: Mr D Richard Waters Respondent: R. Le B. Limited Case Summary: Unfair dismissal by way of selection for redundancy; provision of written statement of terms; provision of pay statement Hearing on 4th October 2007 Before: Mrs Nicola Santos-Costa, Deputy Chairman, Mrs Sue Armes, and Mr Samuel Le Breton, Panel Members Representation: For Applicant: Mr Waters represented himself For Respondent: Mr Richard Le Boutillier, director Witnesses: None The

Facts

Mr Waters was employed as a herdsman by the Respondent for Woodlands Farm ('the Farm') between 1st June 2005 and 18th November 2006. Mr Le Boutillier was concerned that the Farm was not as profitable as it could be and during August and September 2006 he met Mr John Jackson, the Dairy Husbandry Advisor of the Planning and Environment Department of the States of Jersey ('Mr Jackson'). Mr Le Boutillier prepared a Dairy Industry Costing Scheme report which was discussed with Mr Jackson at these meetings. Mr Jackson also advised Mr Le Boutillier in a letter sent in December 2006 that, 'In the variable costs the high price of purchased feeds was identified in our discussion which we agreed was the result of an excess number of replacement heifers being reared. The vet and medicines cost was also on the high side, again related to the number of young stock. The cost of dairy sundries was also high which you were to investigate to identify the reasons. With relation to the fixed costs the major concern was the high cost of paid labour which coupled with a high contract hire cost was the major worry to the future of the business. With the above being identified we discovered various options to reduce the above costs including the number of farm staff and/or doing without a dedicated herdsman/manager. The overall performance of your business is currently below the industry average at an EBITDA of 1.7% and improvements in efficiency and performance are urgently required to bring your results up to the top 25% with an EBITDA % of 31.4%. The future viability of your business depends on the above improvements being implemented'. Mr Le Boutillier considered Mr Jackson's advice carefully and decided that Mr Waters' position as herdsman could not be sustained by the Farm. Mr Waters' position came with a 2 bedroomed cottage on the Farm, which together with his salary made a financial package of approximately £35,000 p.a. Mr Le Boutillier informed the Tribunal that the average EBITDA of dairy farms in Jersey is 8%. At this time the Respondent employed 5 other employees apart from Mr & Mrs Le Boutillier and Mr Waters,

being all Polish workers and all working for minimum wage. These employees were accommodated in bedsits around the Farm the rental for which formed part of their remuneration. One of these workers, identified here as RG, worked as an assistant to Mr Waters but she also had broad skills which were used around the farm. It was acknowledged by both parties that RG is a hard worker. Mr Le Boutillier described her as 'an excellent employee'. It was agreed that Mr Waters is an experienced herdsman and had taught RG her skills in relation to the cows on the Farm. RG had been employed by the Respondent since April 2004. The other workers on the Farm in September 2006 were a couple who undertook cleaning and mechanical jobs on the Farm, a builder who was building a new milking parlour and a woman who helped with the cows and also served in the Farm's shop. Following Mr Jackson's advice Mr Le Boutillier was seriously considering operating the Farm without a herdsman in order to save costs. He envisaged the herdsman's role being split between RG and himself, perhaps with support from another worker on the Farm. He was aware that the opening of the new milking parlour would allow the cows to be milked and processed in a more efficient manner than that presently operated. Unfortunately, on the 17th September 2006 Mr Waters suffered a serious injury to his hand whilst at work which resulted in the amputation of his right index finger. Mr Waters was in hospital for about 2 weeks leaving his partner and their very young baby at home. It was acknowledged by both parties that this was a very difficult time for Mr Waters and his family. On the 4th October 2006, just after Mr Waters' release from hospital, Mr Le Boutillier visited Mr Waters at home and informed him that he was thinking of changing the way in which the farm was run, in particular dispensing with a herdsman and milking the cows himself with the help of RG, and perhaps another worker. Mr Le Boutillier said in evidence that he discussed Mr Jackson's advice with Mr Waters, but Mr Waters' denied that such a discussion took place. At the end of the meeting on the 4th October 2006 Mr Le Boutillier said he would leave Mr Waters to think about his position and come back to him in a week or so for his decision. Mr Waters told the Tribunal that at the end of the meeting he was unclear whether he was being sacked or had been made redundant and the conversation was very unsettling and unsatisfactory. However Mr Le Boutillier had offered to give 4 weeks sick pay to Mr Waters. On the 16th October 2006 Mr Le Boutillier and Mr Waters met again to discuss the situation and Mr Le Boutillier confirmed that Mr Waters was being made redundant because the Farm no longer required a herdsman. Mr Le Boutillier invited Mr Waters to apply for the post of 'Farm Manager/Tractor Driver' which was being advertised but this was declined by Mr Waters. It was openly acknowledged by both parties at the hearing that this post was not for Mr Waters as he is an 'animal person' and not a tractor driver/mechanic, these are two quite different roles on a farm and Mr Le Boutillier did not expect Mr Waters to be attracted to it or indeed ever apply for it. Mr Le Boutillier told the Tribunal that he had mentioned the tractor driver position with Mr Waters, on JACS advice, in order to cover the redeployment angle of the redundancy process. Mr Waters was also quite clear that he was not a manager and that the management of the Farm remained firmly with Mr & Mrs Le Boutillier. At their meeting the parties discussed Mr Waters' house on the Farm and Mr Le Boutillier said Mr Waters could stay there at a reduced rent; Mr Waters said he could not afford this and an arrangement was made that Mr Waters would leave immediately (which he was happy to do in the circumstances) and be paid to the end of November 2006 together with all accrued holiday

pay. Evidence was heard from both parties that the position of Farm Manager/Tractor driver was created by Mr Le Boutillier in order to attract an experienced tractor driver from another farm as the Farm needed to cut down on its tractor contractor costs. It was acknowledged that this was not in fact a management position. The Tribunal was informed that this post remains unfulfilled to date. Evidence was also heard that the Farm advertised for 'Milking Staff' in the JEP on 14th December 2006 over 4 nights. Mr Le Boutillier said this was to cover for staff no longer available to the Farm and that the skills to milk a cow are not comparable to those of a herdsman: any member of staff can be taught to milk a cow in a very short time. Mr Waters acknowledged that this was true but pointed out that a herdsman, whilst milking cows, is also checking on their health and well-being, which milking staff cannot do. This was agreed by Mr le Boutillier who said he now performed those functions himself. Evidence was heard from Mr Waters that he and Mrs Le Boutillier had fallen out over the high percentage of calves kept by the Farm. Mr Waters said that these calves are very costly to maintain as acknowledged by Mr Jackson's letter. Mr Waters told the Tribunal that Mr le Boutillier mentioned these arguments when he visited him on 4th October 2006. However Mr Waters acknowledged that Mr & Mrs Le Boutillier managed the Farm alone. On leaving the Farm and following further extensive treatment to his right hand Mr Waters lodged a complaint of unfair dismissal by the Respondent with the Tribunal. Mr Waters also complained that he had not received a written statement of terms in accordance with article 3 of the Employment (Jersey) Law 2003, ('the Law') or a statement of his pay for the duration of his employment as required by article 51 of the Law. The Tribunal has looked at these complaints in turn. Unfair Dismissal The Law Article 64 of the Employment (Jersey) Law 2003 ('the Law') requires an employer to show the reason for the dismissal when fairness or unfairness of that dismissal is being considered. Some reasons are considered potentially fair reasons and these are set out in Article 64 (2). Redundancy is a potentially fair reason for dismissal. In any event an employer is required by virtue of article 64

- (4) to have acted reasonably in treating such reason as sufficient reason for dismissal and to have acted in accordance with equity and the substantial merits of the case. Articles 64 (1) (2) and (4) are set out as follows: 64 General (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it shall be for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal; and (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (2) A reason shall fall within this paragraph if it – (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do; (b) relates to the conduct of the employee; (c) is that the employee was redundant; or (d) is that the employee could not continue to work in the position which he held without contravention, (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment. (3) (4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall – (a) depend 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 (b) be determined in accordance with equity and the substantial merits of the case. (5) Article 64 (5) refers to situations which are considered by the Law to be automatically unfair dismissals, and they do not apply in this case. Article 2 (1) of the Law defines Redundancy as follows: Redundancy (1) For the purposes of this Law an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to – (a) the fact that his employer has ceased or intends to cease – (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business – (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish. The Tribunal heard evidence from Mr Le Boutillier as set out in paragraph 2 above that the Farm was not profitable and having taken advice from Mr Jackson, the States of Jersey advisor to the dairy industry, one of the options was to forgo the services of a herdsman. Mr Waters felt strongly that Mr Le Boutillier should consider culling a large percentage of his calves to save costs but this was a management decision that Mr Le Boutillier did not wish to take. In the absence of clearly erroneous or vexatious decisions it is not the Tribunal's function to comment upon such considerations. By applying Article 2(1) of the Law to Mr Le Boutillier's decision it is clear that Mr Water's dismissal, 'is attributable to the fact that the requirements of [the Farm] for employees to carry out the work of a particular kind [here, herdsman] have ceased.' Accordingly the Tribunal finds that Mr Waters was made redundant. As stated in paragraph 18 above, redundancy is a potentially fair reason for dismissal. Accordingly the Tribunal has considered whether the Respondent acted reasonably or not in treating redundancy as being a sufficient reason for dismissal and by looking at the equity and substantial merits of the case. The Tribunal are going to follow the views of the Deputy Bailiff in *Voisin v Brown* [2007] JRC47 para 28, where he states as follows; 'Where ... an employer declares an employee redundant and fails to warn or consult him in accordance with the procedural requirements summarised by Lord Bridge (in *Polkey v A.E. Dayton Services Ltd* [1988] AC 344) and adopted in [*Goguelin v Stuart Banks (Carpenters & Builders) Limited* 2006 JET], it is not open to the Tribunal to hold without more ado that, as a result of such failure, the dismissal was unfair. Nor is it permissible for the members of the Tribunal to ask themselves whether they consider that the failure to warn or consult in the particular circumstances was wrong and to conclude therefore that the dismissal was unfair. To hold such a dismissal to be unfair on such a basis is to fail to adopt the band of reasonableness test and would be an error of law... The Tribunal must therefore concentrate not on whether the employer's decision or the procedure adopted by him was wrong but on whether it was so wrong as to fall outside the band of reasonable actions on the part of a reasonable employer.' To summarise, this Tribunal has considered each of these aspects in looking at the facts of this case –

- (i) The extent of consultation with the employees (ii) The amount of warning of redundancy given (iii) The establishment of fair criteria for selection of employees for redundancy (iv) The exploration of alternatives to redundancy (v) Bearing in mind the size and administrative resources of the Respondent's business, whether the actions of the Respondent were those of a reasonable employer acting within the band of reasonable responses to the situation presented to it. The Tribunal has considered each of these points in turn in the context of this case. The Tribunal's Decision. The issues of warning and consultation. The Tribunal is satisfied that at the meeting held on 4th October 2006, Mr Le Boutillier did warn Mr Waters' of the likely redundancy of his position as Herdsman. This warning was not perfect by any means, not least by its timing; being only a few days after Mr Waters came out of hospital following a traumatic and by all accounts extremely painful series of operations. However the unfortunate confusion in Mr Waters' mind as to whether he was sacked or being made redundant, does indicate that Mr Le Boutillier did get his message across: that the position of herdsman at the Farm was in jeopardy. The purpose of consultation in a redundancy process is two fold. First it allows an employee a fair opportunity to explain any factors which lead to his selection for dismissal and of which the employer may not be aware. The Tribunal heard evidence that there had been some discussion by the parties along these lines: Mr Water's made his views about the cost of the preservation of such large numbers of calves very clear and he had also voiced his opinion about the lack of 'herdsman' skills held by RG. Both views were listened to by Mr Le Boutillier, but he was not swayed from his plan. The second point of consultation is to give an employee an opportunity to consider other vacancies within the operation. The Tribunal heard evidence about the 'Farm Manager/Tractor Driver' position but it was patently clear and accepted by the parties that this was not suitable for Mr Waters in any way, or indeed ever meant for him. However there does not appear to have been a discussion about whether Mr Water's would have been willing to accept another job on the Farm as performed by one of the Polish workers. On questioning by the Tribunal, Mr Le Boutillier said that such position would only have paid minimum wage and would have meant Mr Waters moving into a bed-sit, as opposed to his two bed roomed cottage, and as Mr Waters was a family man he did not think he would have been interested. Mr Waters countered that the accommodation at the Farm was a big issue for him and whilst he would have been insulted to have been offered RG's job, he might have accepted it if he could have kept his house. Mr Le Boutillier pointed out that the cottage has a financial value to the Respondent, indeed it was now being let commercially, and furthermore RG was one of the, 'best employee's they'd ever had' and he was loathe to let her go. Also RG had started a year before Mr Waters. The Tribunal has concluded that keeping Mr Waters in the cottage, even at minimum wage, would have been more expensive to the Respondent than continuing to employ RG on her existing terms notwithstanding any potential claim by RG under the Law for unfair dismissal, and this does not seem unreasonable. However it is also clear to the Tribunal that the parties never had a full and frank discussion of the various ways in which Mr Water's redundancy from employment at the Farm could have been avoided. As the Tribunal has said before, these conversations or periods of consultation do not have to have

successful outcomes, but they must not be shied away from: redundancy is a brutal fact and hard conversations must take place. The Tribunal is concerned by the lack of consultation between Mr Le Boutillier and Mr Waters. The Selection Criteria Mr Le Boutillier claimed that Mr Waters as 'Herdsman' was in a 'pool of one' and accordingly no criteria could be applied to his selection for redundancy against other members of staff at the Farm. The Tribunal has heard this 'pool of one' reference made before. It is a common assumption in small businesses that because no other member of staff has the same title as the particular employee, that they must exist as occupying a unique position in the business. This is an incorrect assumption. The proper starting point is to look behind the employee's title and identify that person's skills, experience and contribution to the business. Then the employer must look at the skills, experience and contribution of other employees within the business with whom such potentially redundant employee can fairly be compared using a sound commonsense approach. If no comparison can reasonably be made only then can it be said that such employee exists in a pool of one and occupies a singular, unique, position in the business. As stated above it was made clear to the Tribunal that Mr Waters was an 'animal' person and had no skills or interest in tractor driving or construction work and this can fairly be said to have been known to each party throughout their relationship. It can also be said that Mr Water's skills and experience as Herdsman set him apart from the other workers on the Farm and this was reflected in his salary and standard of accommodation. However Mr Water's skills were transferable to RG's role although she was far junior to him. So a comparison of skills could have been made here. As stated in paragraph 28 above, it appears that Mr Le Boutillier did make this comparison, perhaps unwittingly, when he concluded that Mr Waters' would not be interested in RG's role and salary package due to his experience and personal circumstances. Whilst this comparison was not aired between the parties, which was wrong – the Tribunal will emphasise again that these difficult conversations must be held – some sort of sifting or selection does seem to have occurred in this case by Mr Le Boutillier. The obligation to consider alternatives The Tribunal always considers it important that alternatives to redundancy are fully discussed and considered by the parties involved. As stated in paragraphs 28 and 30 above, these are difficult discussions but they must take place when someone is about to lose their job. The Tribunal expects an employer to take the lead in these discussions while being receptive to the suggestions from the employee. In this case there appears to have been no discussion about alternatives to Mr Water's redundancy. Mr Le Boutillier had clearly made up his mind that the role of Herdsman had to go by the end of November 2006 and did not consider that RG's role would be attractive to Mr Waters. It was clear also that Mr Le Boutillier did not want to lose RG's services on his farm. On the other hand it was also clear from the evidence heard that by their second meeting on the 16th October 2006, Mr Waters had made up his mind to leave the Farm and start afresh. The Tribunal concludes that there was not the atmosphere or set of circumstances in which this type of constructive discussion by the parties could have arisen. Perhaps if Mr Le Boutillier had approached the subject of Mr Water's redundancy more sensitively following his accident and return home from hospital a more constructive relationship could have been allowed to develop. As it was, Mr Waters had lost faith in Mr Le

Boutillier who in turn made no overt effort to retain Mr Waters's skills on the Farm. The reasonable response taking into account the size and resources of the business of the Farm. The Tribunal has asked itself was the Respondent's decision to make Mr Waters redundant, the reasonable response of a reasonable employer. The Respondent is personified by Mr & Mrs Le Boutillier and it is their actions which determine the reasonable response of the employer in this case. Mr Le Boutillier informed the Tribunal that he had taken advice from the States of Jersey, Dairy Husbandry Advisor on the profitable management of the Farm. The Tribunal saw evidence that one aspect of this advice was to dispense with the cost of a Herdsman. Mr Le Boutillier informed the Tribunal that he had taken regular advice from JACS on the proper process of Mr Waters' redundancy. These are the actions of a careful, prudent manager. Clearly no decisions were made rashly. The Tribunal accepts the evidence of Mr Le Boutillier that he could not afford to keep a herdsman and that the decision to keep young calves in the herd was for him alone. From the evidence heard the Tribunal is satisfied that the Farm had a small, pared down staff and each member had a particular role to perform. The Tribunal draws no conclusions from Mr Le Boutillier's evidence that RG was a cheap, efficient employee on the Farm but accepts that Mr Le Boutillier clearly recognised that RG had been continuously employed for longer than Mr Waters and that her skills could be used to assist him when he undertook a more active role with the cattle on the Farm. It is clear from the evidence heard that Mr Le Boutillier has taken on the vast majority of the Herdsman's duties himself and the RG has taken on specific duties only sometimes supported in the most simple work by another farm worker. The Tribunal is satisfied that the role of 'Herdsman' at the Farm no longer exists. The Tribunal is critical of the failure of Mr Le Boutillier to consult with Mr Waters about the redundancy and his failure to explore alternatives to redundancy with Mr Waters. However the Tribunal can see that there was no reasonable prospect of alternative employment for Mr Waters on the Farm and it was clear from Mr Le Boutillier's evidence that he had weighed up the alternatives, even if he did not express his thoughts to Mr Waters and encourage a discussion of the situation. The Tribunal is satisfied that for business reasons the Herdsman position was going to be made redundant at the end of November 2006 regardless of Mr Water's accident and that his subsequent disability had no bearing on Mr Le Boutillier's decision. The unfortunate timing of Mr Waters' redundancy (being so close to his accident) meant that it was almost inevitable that a spirit of cooperation in this matter would not exist for Mr Waters. However the Tribunal recognises the fact that the Respondent employed a very small staff and that as a business it was operated on unsophisticated lines: more time was spent in operating the Farm efficiently than in creating administrative resources and this is not unexpected in the circumstances.

Conclusion

The process of Mr Waters' redundancy was not perfect which basically stemmed from a lack of communication between Mr Le Boutillier towards Mr Waters. However Mr Le Boutillier's actions were necessitated by his desire to make the Farm profitable; his actions were not motivated by

spiteful or vexatious reasons. The Tribunal recognises that the Farm is a small family business trying to stay afloat in the difficult circumstances of the dairy industry in Jersey. It is clear to the Tribunal that there simply was no alternative position for Mr Waters at the Farm and Mr Le Boutillier endeavoured to act fairly. This is a difficult decision, not least because of Mr Waters' injuries and subsequent suffering, but in all the circumstances of this case the Tribunal does not find that Mr Le Boutillier acted outside the band of reasonable responses by a reasonable employer to the need to make Mr Waters' position redundant or in the subsequent process. Accordingly the Tribunal finds that Mr Waters was not unfairly dismissed. Failure to provide a written statement of terms of employment Mr Le Boutillier admitted to the Tribunal that he had failed to provide a written statement of terms of employment (in other words, a contract of employment) for Mr Waters in accordance with article 3 of the Law. Article 9 of the Law states that this is an offence punishable by a fine not exceeding £5,000 (being level 4 on the Standard Scale) in accordance with the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993. The Tribunal hereby fines the Respondent the sum of £250.00 for failing to comply with Article 3 of the Law. Failure to provide a Pay Statement The Respondent admitted not providing a written itemised pay statement at all to Mr Waters throughout his employment. Article 51 of the Law states that an employee has the right to receive a written itemised pay statement at or before the time his wages are paid to him. By Article 55 of the Law, a breach of Article 51 is an offence punishable by a fine not exceeding £5,000 (being level 4 on the Standard Scale) in accordance with the Criminal Justice (Standard Scale of Fines) (Jersey) Law 1993. The Tribunal hereby fines the Respondent the sum of £250.00 for failing to comply with Article 51 of the Law. Schedule of Fines

1. Failure to provide a written statement (Article 3 of the Law) £250.00
2. Failure to provide an itemised pay statement (Article 51 of the Law) £250.00 Total Fines £500.00 Tribunal Note: These fines are levied in respect of offences that occurred during 2006. Signed: Dated: Mrs N Santos-Costa, Deputy Chairman.

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