

JERSEY / JUDGMENT

Bespoke Treasury Services Limited v Docherty [2020] JRC 214 (15 October 2020)

[2020] JRC 214

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judgment

the COMMISSIONER: 1. This is an appeal by Bespoke Treasury Services Limited ("Bespoke") against the decision of the Employment and Discrimination Tribunal ("the Tribunal") dated 2 nd March 2020, by which it allowed the claims of Mr Scott Lee Docherty ("Mr Docherty") for unfair dismissal, wrongful dismissal, failure to pay holiday pay and for failure to provide pay slips. 2. The Tribunal ordered Bespoke to pay Mr Docherty £3,175.20 by way of notice pay and £1,789.63 for holiday pay. It convened meetings to determine the awards payable for unfair dismissal and for failure to provide pay slips, which as a result of Covid 19 have yet to take place. 3. Mr Docherty submitted his claim form to the Tribunal on 31 st January 2020 and in summary, it claimed: (i) That his employment started on 2 nd January 2019 and ended on 25th January 2020. (ii) He was told on 4 th October 2019 that he would be losing his job. (iii) He met his employer in a pub on 25 th October 2019 and was told that his role no longer existed and he was being put on 3 months' gardening leave. (iv) He received what the employer believed to be his final monthly salary payment on 18 th December 2019. (v) Having chased the employer, he received a document in writing by e-mail on 30 th December 2019. (vi) Having sought legal advice on 10 th January 2020 he sent a letter to the employer claiming his remaining salary and holiday pay which was outstanding and giving the employer 7 days to reply. (vii) On 16 th January 2020 he had a chat with Bespoke over the letter and on 23 rd January 2020 he received a text asking him to call after 1.0 p.m. He called, but there was no answer. He also texted but as at 31 st January 2020 had had no reply. (viii) The claim form sought £5,846.16 by way of unfair dismissal, £3,175.20 by way of notice pay and £1,789.63 by way of holiday pay, with an explanation as to how those figures were made up. (ix) In terms of unfair dismissal, he said this in his form: "As my notice period of 3 months takes me over the 1 year anniversary of employment starting and my employer did not pay me in lieu of all my notice pay, if I am entitled to unfair dismissal compensation then I claim the following:- £730.77p x 8 weeks = £5,846.16p" (x) In terms of pay slips, he said he had received "roughly 4, provided for the year ". 4. The claim form states in bold type that claimants are not to include any supporting documentation at that stage and therefore documents including the letter from the employer were not submitted with the claim. Mr Docherty explained in his affidavit of 28 th July 2020, sworn in connection with the appeal, that he had taken advice from JACS who had advised him what he should be claiming for and why and assisted in the completion of the form.

5. In order to qualify to make a claim for unfair dismissal the employee must have been continuously employed for not less than 52 weeks and this pursuant to Article 73 of the Employment (Jersey) Law 2003 ("the Employment Law") and the Employment (Qualifying Period) (Jersey) Order 2014 . 6. On 3 rd February 2020, the Tribunal wrote to Bespoke, enclosing a copy of the claim form and requiring a response by 24 th February 2020, being the period of 21 days required by Article 8(1) of the Employment and Discrimination Tribunal (Procedure) Order 2016 ("the Procedure Order"). 7. In his affidavit of 19 th August 2020, Mr Wesley Forster, one of the two directors of Bespoke, confirmed that although the claim form had been delivered in error to Bespoke's landlords, he did receive it on or around 7 th February 2020. 8. The letter from the Tribunal contained the following statement in bold: "IMPORTANT DOCUMENT PLEASE NOTE THAT IF YOU FAIL TO RESPOND TO THIS NOTIFICATION WITHIN THE APPROPRIATE TIME LIMIT THIS CLAIM WILL BE CONSIDERED WITHOUT YOUR PARTICIPATION AND A MONETARY JUDGMENT MAY BE MADE AGAINST YOU." 9. The claim was considered by Mr M Salter, Deputy Chairman, on 2 nd March 2020. In his written judgment of that date ("the Judgment"), he recited Article 12 of the Procedure Order, which is in the following terms: "12 Effect of non-presentation or rejection of response, or case not contested (1) This Article applies if - (a) no response has been presented on the expiry of the time limit in Article 8. (b) (c) (2) The Chairman or a Deputy Chairman must decide whether on the available material (which may include further information which the parties are required to provide), a determination can properly be made of the claim, or part of it and if so the Chairman or Deputy Chairman must issue a judgment accordingly, otherwise, a hearing must be fixed before a single tribunal member. (3) The respondent is entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, is entitled to participate in any hearing only to the extent permitted by the Chairman or Deputy Chairman." 10. Noting that no response had been presented on the expiry of the time limit under Article 8, he decided without elaboration that a determination on liability in the matter could properly be made on the available material. He therefore granted Mr Docherty what was in effect judgment by default and made the orders I have set out above. 11. Having been informed by Mr Docherty of the order of the Tribunal of 2 nd March 2020 to pay a total of £4,964.83 (being the notice and holiday pay), Mr Forster wrote to the Tribunal on 30 th March 2020 in the following terms, in summary: (i) The letter from the Tribunal of 3 rd February 2020 had not found its way to them for a number of weeks. As mentioned above, he had since clarified that it was in fact received on 7 th February 2020. (ii) Mr Docherty had met with him and his co-director Mr Kevin Moore on a number of occasions and each time he confirmed that he would agree to a settlement and cancel his claim. (iii) He and Mr Moore had met with Mr Docherty explaining that the employment relationship was not working, and they wished him to leave on good terms and so would like to give him notice. It was agreed that he would be paid 3 months' notice and could leave immediately. Mr Docherty left the office on the 15 th October 2020 after collecting his things and deleting his e-mails. He was taken for a farewell drink. (iv) Mr Docherty had taken his full holiday entitlement in 2019 and had been receiving his pay slips which were sent directly from Bespoke's accountants to him by e-mail. (v) He made no reference to the letter of termination which was not attached. 12. The Tribunal treated the e-mail of 30 th March 2020 as an application by Bespoke for leave to appeal the Judgment and that

application was considered and refused by Mrs H Westmacott, Deputy Chairman of the Tribunal, on 9 th April 2020. Noting that an appeal under Article 94(1) of the Employment Law was on a question of law only, she correctly set out the test to be applied as established in *Voisin v Brown*

[2007] JRC 047 at paragraph 18, namely that the Court has no power to interfere with the Tribunal's decision unless it can be shown: (i) that the Tribunal misdirected itself in law or misunderstood the law or misapplied the law; or (ii) that there was no evidence to support a particular conclusion or finding of facts; or (iii) that the decision was either perverse in that it was one in which no reasonable Tribunal, directing itself properly in the law, could have reached, or alternatively, was one which was obviously wrong . 13. The Deputy Chairman extracted two grounds of appeal from Mr Forster's email, namely the delay in receiving the Tribunal's letter of 3 rd February 2020 (claimed then to be a number of weeks) and the assertion that the claim had been settled. She did not address his assertion that the contract of employment had ended well before the qualifying period. Noting that no settlement agreement or specific details in relation to the alleged delay had, at the time of the Judgment or since, been provided and that Article 12(2) of the Procedure Order compelled the issuing of a judgment if a determination can properly be made on the available material, she determined that none of the three limbs of the test were satisfied. Grounds of appeal 14. Bespoke has now filed evidence in the form of the two affidavits of Mr Forster and Mr Moore and grounds of appeal which are: (i) The Tribunal erred in law in making a finding of unfair dismissal. Mr Docherty had not been employed for not less than 52 weeks. His employment terminated on 17 th October 2019 and he did not return to work after 16 th October 2019. The Tribunal therefore had no jurisdiction to entertain a claim for unfair dismissal. (ii) The Tribunal erred in making a finding of wrongful dismissal. Under the terms of his contract of employment, Mr Docherty was entitled to 3 months' notice on termination of his employment and following the termination of his employment on 17 th October 2019, he was paid 3 months' notice in accordance with his contract to 20 th December 2019. Accordingly, no contractual claim in damages arises. (iii) The Tribunal erred in making a finding that the Respondent was owed holiday pay. Pursuant to the terms of his contract of employment the Respondent was entitled to 28 days holiday for the calendar year ending 31 st December 2019 and he had taken that full entitlement during 2019. A copy of the termination letter dated 17 th October 2019 was attached to the grounds of appeal. 15. At the hearing, Advocate Littler applied for leave to introduce a new ground of appeal relating to the pay slips. There had been no failure to supply pay slips, she said, as these had been issued on 18 th of each month up to and including December 2019. 16. The evidence filed by Mr Forster and Mr Moore can be summarised in this way: (i) They had planned to meet with Mr Docherty on or around 17 th October 2019 to discuss the termination of his employment and had prepared a draft letter of termination. (ii) Mr Docherty was ill, so the meeting did not take place until 25 th October 2019. It was an amicable meeting when Mr Docherty was informed that his contract would be terminated and that he would receive a back dated notice. He could leave immediately and secure another job. (iii) There was a delay in finalising the letter of

termination and that was posted to Mr Docherty at his home address on 5 th November 2019 as they did not have a personal e-mail address for him. The letter was still dated 17 th October 2019 and they accepted with apologies that it should have been dated 25 th October 2019. That letter said this: "I am writing further to your meeting with Kevin Moore (CEO) where you were informed that Bespoke Treasury Services Limited (the "Company") was exercising its right to give you notice of termination of your employment. Your employment will terminate today, Thursday the 17 th of October 2019, and as per the terms of your contract, you will be paid three months. Your last payday will be the 18 th of December 2019. Pay is two weeks in advance and two weeks in arrears. You had used your holiday entitlement for the year. Salary and Expenses Final salary of two weeks will be paid on the 18 th of December 2019. You have no expenses outstanding." (iv) In mid November 2019, Mr Docherty asked whether it was possible for the termination to be treated as a resignation rather than as a termination, which they were prepared to consider, but needed legal advice. (v) A copy of the termination letter was e-mailed to Mr Docherty on 30 th December 2019. (vi) On 10 th January 2020, Mr Docherty e-mailed them saying the final payment in December came as a bit of a shock and attaching this letter: "Sums owed to me I refer to the letter dated 17th October 2019 which I did not receive until it was emailed to me on 30 th December 2019 by Wes. The letter is incorrect for the following reasons: 1. My Contract of Employment states that I am subject to 3 months notice. The letter incorrectly refers to my employment ending 18 th December 2019. I was not given notice on 17 th October 2019. I have a WhatsApp message from 25 th October 2019 inviting me to the pub, which was when you advised me that my job role was being made redundant. My understanding was that I was being made redundant and being placed on gardening leave so I did not need to attend work from that date onwards. 2. If I was not being made redundant but you were intending to terminate my contract then 3 months from the 25 th October 2019 would take me to 25 th January 2020, so this would be when my notice expires. I am therefore entitled to be paid until this date. 3. It is incorrect that I am not due any holiday pay. I am also entitled to holiday up until 25 th January (plus the 10 days owed from my 2019 holiday entitlement). 4. Under Employment Law I should have a payslip for every month I was paid, which I did not receive. I have been advised that I could make a claim the Employment Tribunal for not receiving these sums or payslips. I however want to avoid going down that route and therefore kindly request that you pay me the outstanding sums due to me in the next 7 days and provide me with a revised December 2019 payslip (for tax) and a final payslip for January 2020. I hope we can draw these matters to a close." (vii) There were meetings between the parties on or around 14 th February 2020, in which they say Mr Docherty offered to settle his claim for £4,000. They asked him for a breakdown, but subject to receiving that breakdown, they regarded the case as settled and did not therefore consider it necessary to respond to the Tribunal. (viii) A further request for a breakdown was sent to Mr Docherty on 3 rd March 2020 (the day after the Judgment). 17. It is not in dispute that Mr Docherty's contract of employment permits Bespoke to terminate his employment on the giving of 3 months' notice. The contract also provides that Bespoke reserves the right to make a payment in lieu of notice .

The employee handbook states that any notice " must be given in writing by both parties and is effective on the date given." 18. The only notice given by Bespoke in writing is the termination letter dated 17 th October 2019, but which Bespoke say was posted to him on 5 th November 2019 and he says he only received a copy on 30 th December 2019. 19. I calculate that 52 weeks from the commencement of Mr Docherty's employment on 2 nd January 2019 expires on 31 st December 2020, and therefore for the Tribunal to have jurisdiction to entertain a claim for unfair dismissal, it would have to have been satisfied that Mr Docherty was employed by Bespoke at least until the first week of January 2020. Bespoke says his employment terminated before that date and Mr Docherty says it terminated after that date. 20. In her skeleton argument, Advocate Littler submitted that the following questions had to be addressed in the appeal, namely: (i) Did Mr Docherty qualify for relief under the unfair dismissal jurisdiction pursuant to Article 73 of the Employment Law? (ii) Was Mr Docherty paid 3 months' notice on termination of employment? (iii) Was Mr Docherty paid his holiday pay for the calendar year ending 31 st December 2019? 21. To the extent that these questions raise issues of fact, they ignore the limited basis upon which an appeal lies to the Royal Court, namely on a question of law only. To succeed, Bespoke has to show that at least one of the grounds set out in *Voisin v Brown* summarised above were made out. The legislature intended that issues of fact could not be appealed in order, no doubt, to bring timely finality to the process in the interests of both employer and employee. 22. Bespoke is a very small company with only two employees and it was clear that there was a very friendly relationship between Mr Docherty and the two directors, Mr Forster and Mr Moore. Meetings to discuss his contract invariably took place in a pub and the messages sent by WhatsApp, which were appended to Mr Docherty's affidavit, were all couched in very friendly and familiar terms. There were no notes of meetings and no confirming letters to follow meetings other than the termination letter. 23. Notwithstanding the good relations, on receipt of the claim on or around 5 th February 2020, one can only assume that Mr Forster and Mr Moore read it and appreciated that Mr Docherty was now claiming notice pay to 25 th January 2020 and compensation for unfair dismissal on the basis that his employment had continued until 25 th January 2020. The discussions that then took place over settlement manifestly did not reach any conclusion and there was frankly no excuse for the directors not responding to the Tribunal and thereby taking steps to protect Bespoke's interests. Indeed, the WhatsApp messages show that Mr Docherty warned them on the 19 th February 2020 that the case would be going ahead if they did not settle. As a consequence, judgment was obtained against Bespoke by default, for which Mr Forster and Mr Moore can only blame themselves. There is a strong argument that Bespoke should simply bear the consequences of the inaction of its directors. 24. However, and notwithstanding Bespoke's default, I do not believe that would be a just outcome and I say this because the evidence now belatedly supplied by Bespoke shows that there is a *prima facie* case for arguing that Mr Docherty's employment was terminated before the expiration of 52 weeks, and that accordingly he did not qualify to make a claim for unfair dismissal. Leaving the judgment untouched would now mean the Tribunal going on to consider compensation for unfair

dismissal, knowing that an issue which goes to the root of the Tribunal's jurisdiction to order compensation at all is unaddressed. 25. It is not for this Court on an appeal to determine when the contract of employment ended and the just outcome, in my view, is for the matter to be referred back to the Tribunal, so that it can determine when the contract of employment of Mr Docherty did in fact end, and therefore whether the Tribunal does or does not have jurisdiction to award compensation for unfair dismissal. 26. The Judgment was made under Article 12(2) of the Employment Law (set out above) which provides that the Chairman or Deputy Chairman must decide whether on the available material a determination can properly be made of the claim, or part of it. A question that arises is whether the Deputy Chairman was in a position properly to make a determination on jurisdiction on the material then before him, namely the information contained within the claim form. 27. Working exclusively from the claim form it provided the following information from the claimant in relation to when the contract ended: (i) The employment started on 2 nd January 2019 and ended on 25 th January 2020, a few weeks after the 52-week deadline. (ii) 3 months' notice had been given by the employer on 25 th October 2019 well before the 52-week deadline expired. (iii) The employer thought that the payment made on th December 2019 was the last payment due, from which one would deduce that from the employer's perspective, the employment ended at least then and therefore before the expiry of the 52-week period. (iv) Mr Docherty had received a document from the employer setting out the terms of the termination of his contract on 30 th December 2019 which was as yet unseen. (v) The claimant himself asked whether he was entitled to unfair dismissal compensation as he had not been paid all of his pay in lieu of notice. 28. In my view, the information contained in the claim form raised a doubt as to when the contract ended which needed to be addressed before judgment could be given. In fact, the Deputy Chairman makes no reference to the qualifying period at all in the Judgment, nor indeed does the Deputy Chairman when refusing leave. Further information was needed and, in particular, the termination letter from the Bespoke, which would have made it clear that it had purported to terminate the contract of employment and make a payment in lieu of notice well before the expiry of the 52-week deadline. 29. The issue of the jurisdiction of the Tribunal to entertain this claim for unfair dismissal is fundamental. It was an issue that arose on the face of the claim form and it has not been addressed. Furthermore, it is an issue that could not properly be determined without further information, in particular without sight of the termination letter. In my view the Tribunal cannot proceed further with an assessment of the compensation for unfair dismissal without the issue of its jurisdiction being addressed. This part of the judgment should therefore be set aside, and the issue referred back to the Tribunal. 30. The Tribunal did unquestionably have jurisdiction over the claim for wrongful dismissal (Article 86 of the Employment Law), which could, in theory, be left intact, but the decision of the Tribunal on when the contract of employment did in fact end could well impact upon the amount of pay that is outstanding, which might differ from the amount ordered under the Judgment. It is in the interests of justice, therefore, that this part of the judgment is also set aside so that the Tribunal can determine the notice pay claim having

first made a finding as to the actual date of termination of the contract of employment. I will therefore set aside that part of the judgment as well. 31. Turning to the judgment in relation to payslips, the claim form made reference to "roughly 4" being provided for the year without identifying which payslips. The particulars referred to payslips during the period of garden leave, but that begs the question of when the contract of employment was terminated. Bespoke says it was terminated with a payment in lieu of notice and Mr Docherty says he was put on garden leave for 3 months. Accordingly, that part of the judgment must also be set aside so that the Tribunal can first determine when the contract of employment terminated and secondly, to what extent, if any, payslips were not provided. 32. Finally, the same point arises in relation to holidays taken. That is dependent upon the finding of the Tribunal as to when the contract of employment ended. There seems to be a complete conflict of evidence between the parties on this for the year 2019 and I gained the impression that there is very little documentary evidence to assist in resolving the matter one way or the other. In any event, this part of the judgment must also be set aside for the same reasons. 33. The end result is the entirety of the Judgment is set aside and the matter referred back to the Tribunal. Authorities Employment (Jersey) Law 2003 Employment (Qualifying Period) (Jersey) Order 2014 Employment and Discrimination Tribunal (Procedure) Order 2016 *Voisin v Brown*

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Prepared on 22 October 2026 · Esheria