

JERSEY / JUDGMENT

Carlos Fernandes v Adelino Fernandes Limited

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IN THE EMPLOYMENT AND DISCRIMINATION
TRIBUNAL

IN THE MATTER:	BETWEEN
	CARLOS FERNANDES
	CLAIMANT
	AND
	ADELINO FERNANDES LIMITED
	RESPONDENT
	TRIBUNAL

JUDGMENT

Reference: [2020] TRE 093 Hearing Date: 26 November 2020 Before: Advocate F B Robertson, Deputy Chairman Mrs Z Le Moignan, Panel Member Ms E Harper, Panel Member Appearance: For the Claimant: In Person, assisted by Ms C Alves (Translator) For the Respondent: Mr J McGarry, Resolute; Mr Adelino Fernandes THE DECISION The Claimant's claim for Constructive Unfair Dismissal is rejected. The Respondent shall pay to the Claimant the following sums; (a) Holiday Pay (one week's pay) £714 (b) Compensation for failure to provide Terms of Employment (one week's pay) £714 (c) Additional remuneration (two days' pay) £238 Total award £1,666

REASONS

Introduction

1. By way of a Claim Form presented on 11 June 2020 the Claimant brought the following claims; (a) Constructive Unfair Dismissal (b) Holiday Pay (c) Failure to provide Terms of Employment 2. By way of an undated Response Form the Respondent contended the Claimant resigned without notice and without justification. 3. A Case Management Hearing was held on 24 September 2020. The Case Management Order dated 30 September 2020

noted the following (which was not disputed by the Parties); “10. The Claimant alleges that he was constructively dismissed, that is he terminated his contract of employment on 15 May 2020 in circumstances in which he was entitled to terminate it by reason of the Respondent’s conduct. The Respondent denies the allegation and contends that the Claimant resigned without notice on 15 May 2020.

11. The Claimant claims that the Respondent acted in fundamental breach of contract in regard to the implied terms of the contract relating to mutual trust and confidence in that the Respondent failed to pay wages from the end of March 2020 until a one-off payment of £1,600 on 15 May 2020.
 12. The Respondent contends that the Claimant agreed to take a reduction in pay during the Covid lockdown period in order to receive the co-funding from the States of Jersey. The Respondent applied for the co-funding payment. It received £1,600 on 15 May 2020 which was forwarded to the Claimant that day. The Claimant then resigned without notice”. 4. The Case Management Hearing set this matter down for a final Hearing which took place on 26 November 2020 (“the Hearing”). 5. The Tribunal received witness statements and heard oral evidence under oath from the Claimant and Mr Adelino Fernandes (“Mr Fernandes”) on behalf of the Respondent. 6. During the Hearing it was agreed by the Parties that the Claimant was owed 1 week’s Holiday Pay by the Respondent. 7. When making this Judgment the Tribunal considered all of the evidence both oral and written provided by each of the Parties and made findings of fact as set out below. In this Judgment only the facts that are relevant to the issues to be determined have been summarised. Where there have been factual disputes to resolve the Tribunal has done so on the basis of its assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the oral and written evidence. Other than the witness statements the Tribunal did not receive any written evidence. Material Facts and Evidence 8. Much of the factual background was not in dispute between the Parties. Any material conflicts of evidence are referred to and determined below. 9. It was agreed that the Claimant commenced work with the Respondent as a tiler in
2005. The Claimant and Mr Fernandes (who is the owner of the Respondent company) had been good friends for some considerable time prior to the Claimant commencing employment with the Respondent. The Claimant’s weekly pay before tax was £714. The Claimant was the Respondent’s only employee at all material times. 10. In or about March 2020 the Claimant and the Respondent were aware that the impending Covid-19 pandemic was likely to result in restrictions coming into force in Jersey resulting in certain businesses having to stop working. 11. On 27 March 2020 the manager of the site on which Mr Fernandes and the Claimant were working informed the Respondent that the site would be closing from 30 March 2020. It is common ground that Mr Fernandes informed the Claimant that he would be able to pay him for the following week but would not be able to continue paying the Claimant’s wages throughout the lockdown period. The further evidence of Mr Fernandes was that he could not afford to pay the Claimant anything during the lockdown period but

would have to rely on Government support, which was accepted by the Claimant. The Claimant's evidence was that the Respondent's first mention of making an application under the Government's Co-Funding Payroll Scheme ("the Scheme") was in April 2020. The Claimant's evidence as to the discussion in March was "Adelino told me he would pay for the following week but would not be able to continue paying my wages throughout lockdown". 12. Other than a couple of days' work in April 2020 (referred to below) the Claimant did not carry out any work for the Respondent after 27 March 2020. Events in April 2020 13. The evidence of Mr Fernandes was that he contacted his accountant during the first week of April 2020 in relation to making an application for co-funding under the Scheme, but was informed (correctly) that no application could be made until May under the Scheme. 14. The evidence of Mr Fernandes was that later in April 2020 he was contacted by the Claimant who enquired if he had "sorted out the co-funding". Mr Fernandes explained that he had been informed by his accountant that it was not possible to make the application until May. His further evidence was that he informed the Claimant that he (Mr Fernandes) would have to wait for receipt of the co-funding payment from the Government or he would be forced to close the company and make the Claimant redundant. The Claimant indicated that he had heard from a number of his friends that the companies they worked for had already applied for the co-funding. Mr Fernandes explained that this was not possible at that time. 15. Mr Fernandes was able to secure two days' work at a garage site for him and the Claimant on or about 15-16 April 2020. The Claimant and Mr Fernandes talked extensively during the job. At no time according to Mr Fernandes did the Claimant indicate he was unhappy with the situation regarding the Covid Scheme. The Claimant asked when he would be receiving the pay under the Scheme. The evidence of Mr Fernandes was that he reiterated that the Claimant would have to wait until the end of the month which the Claimant accepted replying "if that's the only way; that's fine". The evidence of the Claimant was that Mr Fernandes indicated that he would be making a claim under the Scheme and would pay the Claimant £1600 when he received it from the Government. 16. There was further evidence given in relation to additional payment for the two days' work. The Claimant claimed that Mr Fernandes indicated he would retain any monies due for Social Security contributions. Mr Fernandes' evidence was that he informed the Claimant he would be able to pay him (less Social Security contributions) once he received payment from the garage owner. Mr Fernandes received payment from the garage owner after the Claimant had resigned. Events in May 2020 17. Mr Fernandes applied for the co-funding on 5 May 2020 as that was the first date he could obtain an appointment with his accountant. In the application he sought payment in relation to a reduced monthly salary of £2000 (the maximum under the Scheme), and received 80% of this sum (£1600) on 18 May 2020, which sum he immediately transferred to the Claimant that day. It was put to Mr Fernandes by the Tribunal that under the terms of the scheme he should have paid the Claimant £2000 at the end of April and reclaimed the £1600 by way of refund in May. Mr Fernandes indicated that he had relied upon the advice of his accountant in relation to the scheme. The Tribunal did not find this evidence entirely satisfactory. The further evidence of Mr Fernandes was however, as indicated above, that

he had informed the Claimant that he could not afford to pay him during lockdown but that it was agreed with the Claimant that Mr Fernandes would pay him £1600 once he received it from the Government. 18. The evidence of Mr Fernandes was that the following day (19 May) he received a phone call from the Claimant. The Claimant informed Mr Fernandes that he was resigning with immediate effect and asked where he should return the van used by him for his work. Mr Fernandes asked why he was resigning and if there was anything he could do but the Claimant put the phone down. Mr Fernandes did not get the opportunity to explain that the £1600 had been transferred to the Claimant the previous day. 19. The evidence of the Claimant was that in the weeks following the work on 15/16 April 2020 a number of people informed him that they were already receiving payments from their employers as a result of these employers receiving assistance from the Government under the Scheme. This caused resentment to the Claimant. The Claimant then telephoned Mr Fernandes on 19 May, indicating that he wished to resign and requesting where he should return his work van. The Claimant's evidence was that he became more and more unhappy with the situation and felt he should have been paid at the end of the month (April). He accepted that he had not sought to contact Mr Fernandes after 15/16 April 2020 until he called him on 19 May to resign. In his written statement he indicated that it was only after he had resigned that he saw he had been paid the £1600. In his oral evidence at the Hearing however, he indicated that he saw from checking his balance via a cashpoint on 18 May that he had been paid. He indicated he nevertheless decided to resign because "of the way Mr Fernandes had treated him". Written Statement of Terms 20. The Claimant's evidence was that the Respondent had never provided or offered to provide a written contract. The evidence of Mr Fernandes was that he offered to provide a written contract on a few occasions but that the Claimant had indicated he didn't require one. Findings of Fact 21. In relation to the relevant disputed or uncertain facts the Tribunal finds as follows; (a) The parties agreed that during the lockdown period the Respondent would pay the reduced amount of £1600 per month to the Claimant once it received payment from the Jersey States; (b) Mr Fernandes informed the Claimant (correctly) that he could not make the application until May 2020 which was accepted by the Claimant; (c) There was a further agreement that the Respondent would pay the Claimant for the two days' work in April 2020 once the Respondent had received payment from the garage owner; (d) The Claimant received the £1600 on 18 May 2020 and was aware of this receipt on that day. He resigned without notice the following day; The Law (a) Constructive Dismissal 22. Article 62 Employment (Jersey) Law 2003 ("EJL") sets out the circumstances in which an employee is dismissed including the following, which is commonly known as constructive dismissal: "62 Circumstances in which an employee is dismissed

- (1) For the purposes of the Part an employee is dismissed by his or her employer if...
- (c) the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct". 23. It is well established under case law that the conditions which must be met to prove constructive dismissal are: (1) the employer must be

in breach of either an express or an implied contractual term; (2) the breach must be fundamental, amounting to a repudiatory breach; (3) the employee must resign, at least in part, in response to the breach; and (4) the employee must not have waived the breach and affirmed the contract. The Breach 24. In order for the breach to be sufficient for the employee to treat the contract as being discharged the employer's conduct must amount to a significant breach going to the heart of the contract or show that the employer no longer intends to be bound by one or more of the essential terms of the contract. (*Gibb v JAAR* [2018] TRE 135 and *Western Excavating (ECC) v Sharpe* [1978] ICR 221). 25. It is also well established that a term of 'mutual trust and confidence' is to be implied into all contracts of employment and there is a two-stage test for determining whether there has been a breach of this implied term (*Maclagan v States Employment Board* JET 79/15 and *Malik v BCCI* [1997] UKHL 23). The test requires that the Tribunal is satisfied that: (1) there was conduct which destroyed or seriously damaged the trust between employer and employee; and (2) the employer's conduct was done without reasonable and proper cause. 26. If the employer acts in an unreasonable way there may be a breach of mutual trust and confidence if the test in *Western Excavating* is satisfied, but mere unreasonable behaviour is not enough. The behaviour must be 'seriously unreasonable' or sufficiently serious' so as to amount to a breach that enables the employee to treat the contract as being discharged. 27. Any breach of this implied term is a fundamental breach amounting to a repudiation, which necessarily goes to the root of the contract and allows the employee to resign and claim constructive dismissal (*Maclagan and Morrow v Safeway Stores Ltd* [2002] IRLR 9, EAT). However, if the employer's conduct is not sufficiently serious then there is no breach of the implied term. (b) Failure to provide Terms of Employment 28. Article 8(b) EJL grants a discretion to the Tribunal to pay compensation to the employee of an amount not exceeding 4 weeks' pay in relation to a failure to provide Terms of Employment.

Conclusion

Constructive Unfair Dismissal 29. The Tribunal finds on the evidence that there was no breach of contract, repudiatory or otherwise, on the part of the Respondent. As indicated above, there was an agreed variation to the contract that the Claimant would be paid £1600 per month during the lockdown period once the Respondent had received payment from the Government. The Respondent received monies on 18 May 2020 from the Government and paid the £1600 to the Claimant on that day. Having received the monies the Claimant resigned without notice the following day. By reason of the above, the Claimant was not constructively dismissed. Written Statement of Terms 30. The Respondent's failure in this regard represents a breach of a basic employment right. To award no compensation would undermine the purpose of the Law in this regard. The Tribunal notes the Respondent's evidence that it offered to prepare a written contract of employment but that the Claimant indicated he did not require one. The Claimant does not accept the Respondent's evidence in this regard. Even if the Respondent's evidence were to be preferred on this part, the fact remains that a failure to provide Written Terms is a breach of a basic employment right as indicated above. In the circumstances the Tribunal considers that it

should exercise its discretion and order the Respondent to pay the Claimant compensation for its failure in this regard. That compensation should be one week's pay. Additional matters 31. As indicated above the Claimant is also entitled by agreement between the parties to be remunerated for the two days' work in April 2020. There was no evidence as to the amount of his remuneration save that the Claimant's weekly pay was £714 for 42 hours each week. On the assumption of a 6 day week, the Claimant's daily remuneration was £119. Two days' remuneration is thus £238.00. Advocate F B Robertson, Deputy Chairman Date: 4 February 2021

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