

JERSEY / JUDGMENT

Jersey Gems v McMurray

[2021] JRC 194 (22 July 2021)

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judgment

the deputy bailiff: 1. On 9 th July 2021, I allowed the appeal in this case and I now give my reasons for so doing.

Background

2. The Respondent was employed by the Appellant from 14 th July 2020 to 25 th August 2020 as a social media and sales assistant at the Appellant's shop. 3. The Respondent issued her claim form on the date it was received by the Tribunal on th September 2020. Her main complaint was unpaid wages. In fact, the entirety of her unpaid wages were, by coincidence, paid by the Appellant to the Respondent that day. 4. The Tribunal was not informed of this and the Appellant, believing that the payment of the wages was sufficient to deal with the Respondent's claim, took no action when she received an email from the Tribunal Service on 28 th September 2020. 5. Accordingly, she failed to reply to the claim and did not complete the Response Form within twenty-one days or at all, i.e. by 19 th October 2020. The hearings before the Deputy Chairman 6. The matter came before the Deputy Chairman (Advocate Ian Jones) of the Tribunal on 26 th October 2020. The Deputy Chairman only had the claim form in front of him and was not aware that the wages had been paid. In a short judgment, (*Cheyenne McMurry v Chenny Aouane Jersey Gems* [2020] TRE 168A) he decided that he could make a determination and issued judgment in favour of the Respondent awarding her damages in relation to failure to pay wages in the sum of £565.76; damages equivalent to one day of salary being £80.82 in relation to accrued holiday; damages equivalent to one day of salary being £80.82 in relation to the August bank holiday, compensation equivalent to four weeks of salary (the statutory maximum) in the sum of £1,414.20 on account of the failure to provide 'itemised pay statements' and compensation equivalent to four weeks salary (again, the statutory maximum) in the sum of £1,414.20 for a ' failure to provide employment terms' , giving a total of £3,555.80. 7. In respect of the maximum awards for both these heads of claim, the Deputy Chairman said "In both cases I have decided to award the maximum amount. In my view, if an employer fails to discharge its obligations to employees pursuant to the Employment (Jersey) Law 2003 and then fails to respond to a claim, validly brought, there is no reason to exercise my discretion other than in favour of the disenfranchised

employee." 8. Upon receipt of this finding which came, she says, as a surprise to the Appellant, she applied for a reconsideration by email dated 30 th October 2020. In her request for reconsideration, the Appellant said that she had paid the Respondent all her wages and that the Respondent was aware that pay day was the 26 of each month. Accordingly, she was paid on time. The Appellant said that the Respondent had received terms of employment by email and on 13 th July 2020 other terms were discussed and given to her on the first day of work 14 th July 2020; that she had received payslips; that the Respondent's wage payments included 4% rolled up holiday pay, and that in fact the Respondent was employed by another entity, Jersey Gems KC Limited. 9. The Respondent said 'I didn't formally respond to the Claim Form by completing the Response Form as I genuinely it was not necessary as matters had been resolved'. She enclosed a screen shot proving the payments of wages, the terms of employment email sent to the Respondent, and the evidence that the Respondent was paid 'rolled up' holiday pay at the rate of 4%. It is understood that in the case of zero hour contracts, it is permissible for employers to add an additional 4% to the hourly rate of pay to represent the holiday allowance that they might otherwise have been entitled to had they not been working pursuant to such contractual arrangements. 10. The Appellant's request for reconsideration was determined by the Deputy Chairman, Advocate Jones, on 13 th January 2021 (Cheyenne McMurray v Chenny Aouane Jersey Gems

[2020] TRE 168B). He recorded that he had been asked to reconsider his original judgment ' in the interests of justice' . I note that the Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016 does not set out the procedure for or test applicable to circumstances where a party seeks reconsideration of an order. 11. At paragraph 8, the Deputy Chairman said: "8. I have every sympathy for the Respondent and I of course have no reason to disbelieve her. That said, the Tribunal has strict rules which I am required to follow and apply. In this case the Respondent was required to present a response and failed to do so. It is not a difficult or complicated exercise to complete a response form. I also note that the Respondent could have quite easily contacted the Claimant and confirmed the position vis-à-vis wages etc. which would likely have prompted the Claimant to contact the Tribunal and at the least modify her claim. It seems to me clear that the Respondent is the architect of her own misfortune. 9. As to the unpaid wages, it seems clear to me from the evidence that I have seen that the Respondent has paid wages to the Claimant. To my mind, that does not mean that the judgment in this regard needs to be reconsidered. Rather, the Claimant is simply not permitted to recover any monies over and above those to which she is entitled." 12. The Deputy Chairman went on to say that he had seen no evidence that the Respondent was provided with itemised pay statements, but in relation to employment terms, he said: "11. As to the question of employment terms, I have been presented with evidence that the Respondent did in fact provide the Claimant with employment terms the day before she commenced her employment. Notwithstanding the comments made above in paragraph 10 it seems to me that the rough justice of this situation requires that I take this evidence into account. My reasoning is

that the employment terms were sent to the Claimant via email. In other words, this is not only evidence that the terms were in the possession of the Respondent at the relevant time but also in the possession of the Claimant. 12. In my view, given that both parties are litigants in person, and taking into account the prevailing socio-economic conditions which I am not unsympathetic to, I am prepared to allow this part of the application for a reconsideration. It strikes me the correct balance here is that the Claimant should not receive compensation in relation to a claim she was not provided with employment terms when she evidently was - notwithstanding the Respondent's default in relation to the failure to provide a response." 13. In a judgment dated 15 th February, Cheyenne McMurray v Chenny Aouane Jersey Gems

- [2020] TRE 168C, Dr Moran, Chairman, gave the Appellant leave to appeal the Reconsideration Judgment pursuant to which the Appellant was liable to pay the Respondent the adjusted figure of £2,141.60 (the original sum awarded less the four weeks salary originally ordered to be paid on account of the failure to provide details of the employment terms). The legal principles 14. Article 94 of the Employment (Jersey) Law ("the Law") states that a person aggrieved by a decision of the Tribunal may, on a question of law only, appeal to the Royal Court - in the first instance seeking leave to appeal from the Tribunal. Questions of law arise (Raducan v Pizza Express Limited
- [2020] JRC 253) where: (i) The Tribunal has misdirected itself in law or misunderstood the law or misapplied the law; or (ii) There is no evidence to support a particular conclusion of finding of facts; (iii) The decision was either perverse in that it was one which no reasonable Tribunal, directing itself properly in the law, could have reached or alternatively was one which was obviously wrong; or (iv) An incorrect procedure had been adopted by the Tribunal. 15. Apparently the guidelines for Challenging a Decision, which are extra-statutory, say that a party who has failed to provide a response and is making an application to set aside a judgment must 'show good reason' why the Tribunal's judgment should be varied or revoked. 16. In Bespoke Treasury Services Limited v Docherty
- [2020] JRC 214 , Commissioner Clyde-Smith set aside a judgment in default of a response in its entirety and referred the matter back to the Tribunal for further consideration. The appropriate test for the Tribunal to consider when invited to reconsider an earlier judgment was not analysed in detail in that case. In this case, Dr Moran notes that the discretion that the Tribunal has to set aside, either in whole or in part, a decision made in the absence of a response is akin to the discretion which lies in the Royal Court to set aside a default judgment under Royal Court Rule 11/2 . 17. As the Chairman rightly says, the central requirement is for the Royal Court to do justice between the parties on an application to set aside a judgment in default, and in Smillie v State Street (Jersey) Limited
- [2019] TRE 177, Mrs Westmacott, Deputy Chairman, said: "51. First, I must consider the overriding objective under Article 2 of the Procedure Order ("Overriding Objective"), which provides that the Tribunal must deal with cases fairly and justly in a way which is proportionate to the issues and in order to avoid unnecessary formality and to seek

flexibility in the proceedings before it, but also in order to avoid delay so far as compatible with proper consideration of the issues and to save expense. 52. I also considered the case of *Strata Surveys Limited v Flaherty and Company Limited*

[1994] JLR 69 ("*Strata v Flaherty*"), where the Court of Appeal was considering an application by Strata to set aside a default judgment. *Strata v Flaherty* has recently been referred to by the Tribunal when granting an extension of time to file a response in the case of *Darren Stower v La Mare Vineyards Limited* [2019] TRE 126. 53. The Court of Appeal in *Strata v Flaherty* held that the default judgment should be set aside and referred to five specific considerations that were made in coming to this decision: "(1) Strata has a reasonably arguable defence to the claim; (2) the default arose through no fault of Strata but solely through the error of their lawyer; (3) there was no delay by Strata before applying to set aside the default judgment;

- (4) serious injustice would be done to Strata if they were not to be allowed to defend the action and to have the claim and their defences heard at trial; and
- (5) the Plaintiff will suffer no injustice if the default Judgment is set aside". 54. The considerations in *Strata v Flaherty* have been relied upon in a number of more recent judgments of the Royal Court, including *Watson v Ronez*

[2004] JRC 130 . In *Watson v Ronez* the Royal Court applied the considerations defined in *Strata v Flaherty* and it also addressed the question of what was required to determine whether there was a reasonably arguable defence to the claim in more detail. In answer to this question the Deputy Bailiff at the time stated as follows: "12. We find it impossible to lay down any guidelines as to exactly what is required in any particular case. Much will depend on the circumstances. ... 13. As against that, the onus undoubtedly lies on a defendant. He has allowed a judgment to be taken against him. He must satisfy the court that his defence is sufficiently meritorious that the court should exercise a discretion in his favour to set aside the judgment against him. In most cases we think a defendant would be well advised to go beyond merely exhibiting a draft answer. He should swear an affidavit, setting out and explaining, in simple terms, the essential nature of the defendant's case in language which is easily understood, rather than relying upon a pleading with its technical but sometimes rather uninformative language of non admissions and denials. 14. We must determine whether, in this particular case, the Defendant has satisfied us that it has an arguable defence which carries some degree of conviction. We think that the Defendant could and indeed should have been rather more forthcoming about the nature of its defence. But, on balance, we conclude that sufficient emerges from the draft answer to enable us to say that there is a defence which justifies being heard." 55. *Strata v Flaherty* was also looked at in the case of *Randalls Properties Limited & Ors v Rozel Bay Hotel & Ors*

- [2005] JRC 106 ("Randalls v Rozel Bay"). While the court considered all of the factors referred to in *Strata v Flaherty*, the Deputy Bailiff noted as follows: "12. ... We remind ourselves that at the end of the day the Court must act in the interests of justice; it must not be hidebound by lists of factors to come to a conclusion that it does not consider to be in accordance with the interest of justice."" 18. In *Randalls Properties Limited v Rozel Bay Hotel Limited*
- [2005] JLR Note 33, the Royal Court held (Birt, Deputy Bailiff, presiding) on an application to set aside a judgment in default that: "When determining whether or not to set aside a default judgment, the Court should consider: (a) whether the defendant has a reasonably arguable defence; (b) whether the default giving rise to the judgment arose through the fault of the defendants or his advocates; (c) whether the defendant's application to set aside the judgment was delayed; (d) whether serious injustice would be done to the defendant if he were not allowed to defend the action and (e) whether the plaintiffs would suffer injustice if the default judgment were set aside..... A default judgment so in any event be set aside if it would be in the interests of justice to do so." 19. In my view, this is the appropriate test for the Tribunal to adopt in facts such as these. 20. The failure of the Deputy Chairman to adopt this test is itself an error of Law, and had he applied this test then he would have undoubtedly set aside the judgment he had entered in favour of the Respondent on 26 th October 2020. Evidence and findings 21. In the circumstances, in order to save time and costs to both parties, neither of whom were represented, but in the case of the Appellant was liable to pay a not insignificant Court fee, and having regard to the fact that neither party had hitherto given evidence (normally the Royal Court would not be prepared to hear any live evidence on appeals where leave can only be given on a point of law), I heard evidence on oath from both the Appellant and the Respondent and determined the case in the Royal Court without remitting it back to the Tribunal. 22. My findings are as follows. 23. First, the Appellant and Respondent both, throughout these proceedings, have acted in good faith and were both witnesses of truth. Unhappily, differences arose as a consequence of the termination of the employment relationship. The Appellant was unhappy about the Respondent leaving her employment sooner than she had anticipated, and the Respondent felt in those circumstances that the Appellant had lost confidence in her. However, it is clear that the Appellant trusted the Respondent to carry out her duties independently and to a high standard and the Respondent did so throughout the time of her employment. 24. As to the particular elements of the Respondent's claim as contained in her claim form (which she completed following advice from JACS who were provided with an incomplete picture - no criticism of the Respondent or JACS is made; it is simply an observation of what occurred), the relevant findings are as follows. 25. After the Respondent was interviewed, the Appellant sent an email to the Respondent on 13 th July 2020 setting out her job title, the basic details of the job, the fact that it was a zero hour contract, the rate of pay, and the dress code. The email was signed off electronically 'Chen Aouane Jersey Gems'. It can be seen that this email provided some, but not all, of the employment particulars required under Article 3 of the Law. 26. The Appellant says that she provided the Respondent with other particulars required by

Article 3 the following day by way of a manuscript note (the 'carbon' of which she provided to me) dealing with the rolled up holiday pay, when the pay day would be, and certain other provisions including identifying the employer (although the manuscript document is not express on this point) as 'Jersey Gems KC Limited'. The Respondent says she did not receive this document. 27. It is not necessary for me to make a finding in relation to this issue. As I have said, I regarded both witnesses as truthful. 28. The Appellant runs a small business and only ever employs one full-time or two part-time staff and accepts that her paperwork, in terms of the statement of terms of the contract, was wanting in this regard and that it would have been better for all the contractual terms to be provided in one document at the outset, clearly identifying the employer and signed off by the employer (neither which occurred). The Appellant says that to require her to pay the statutory maximum of four weeks compensation in these circumstances was excessive, particularly having regard to the fact that the Respondent only worked for the Appellant for six weeks. 29. In those circumstances, I ordered that the Appellant pay the Respondent two weeks pay owing to the failure to provide a statement of terms of employment which fully complied with Article 3 of the Law. 30. As regards the itemised pay statement required by Article 51 of the Law, the Respondent's case is that she did not receive such a document until she received a final payslip on 30 th September 2020. This payslip, which also, as I drew to the Appellant's attention, identified the employer as 'Jersey Gems' and did not mention the limited company, did set out the precise terms of the rate of pay, the hours worked, the total owed, a gross figure; increased that total by reference to holiday pay at 4% and then subtracted social security providing a net figure for the month of July, the first half of August (after which the Respondent was paid for the first time) and the second half of August (for which she was paid on 25 th September 2020). 31. In respect of the first payslip, on any view, the Appellant paid the Respondent her first salary payment on 17 th August 2020. This was earlier than the scheduled pay day on 26 th August 2020 because the Respondent said that she was in financial difficulty. The Appellant says that she gave the Respondent a hand written payslip setting out the particulars required by Article 51, i.e. the gross amount of wages, any deductions and the net wages. From the 'carbon', I can see the hours worked (the Respondent provided the Appellant with a note of her hours worked which the Appellant always accepted), the additional 4% rolled up holiday pay, and the deduction for social security leaving a net amount. The payment made on 17 th August 2020 was in respect of the Respondent's hours worked up to 16 th August 2020. The Respondent said she did not receive a payslip until she received the payslip on 30 th September 2020. 32. The Respondent agreed that she knew she was due to be paid at the end of the month, and that the Appellant had agreed to bring the date upon which she had been paid forward for August. 33. The Respondent said she had not read the payslip she received on 30 th September 2020, but accepted she had received it that day. She also accepted that she was paid on 25 th September 2020 but that she did not know that she had been paid when she lodged her claim form on that day or that the funds only arrived in her account later on that day, she thought that her mother had told the Tribunal she had been paid but obviously that message did not get through to the Deputy Chairman before

the hearing at the end of October. 34. Importantly, the Respondent said that if she had known she had been paid on 25 th September 2020, or if she had been paid before that date, then she would have never made the claim to the Tribunal at all. 35. As to the conflict of evidence in relation to the receipt of the payslip on 17 th August 2020, I do not think I need to resolve it. On any view, the payslip, the carbon of which I have seen, was prepared. The Appellant's record keeping was, in many respects, meticulous and the Appellant showed me the entirety of her WhatsApp exchanges with the Respondent which showed that, throughout this period, both women treated the other with fairness and courtesy. 36. I was initially concerned that the payslip dated 30 th September 2020 might have been created by the Appellant in response to the claim form she received on 28 th September, but that was not the case. The payment of wages was made on 25 th September and the reason for the delay in providing the payslip was because there was an exchange by WhatsApp, concluding on 30 th September 2020, as to whether or not the Respondent had or had not worked on 26 th August. The Respondent thought that she may have done and the Appellant said that if there was any evidence that she had done so then she would pay the Respondent, but the Appellant believed that the Respondent's last working day was 25 th August 2020. Ultimately, the Respondent confirmed that was the case, allowing the Appellant to issue the payslip. 37. In the circumstances, even if there was a failure to provide an itemised payslip for the first set of wages, a full itemised pay statement covering all wages received by the Respondent was later provided, and accordingly I do not think it is appropriate in any event to require the Appellant to pay the Respondent compensation pursuant to Article 54 of the Law. 38. As to the award made in relation to bank holiday, the Respondent agreed that she had not worked a bank holiday and accordingly there should not have been an award of one day of salary. 39. As to the one day salary awarded in respect of accrued holiday, the Respondent accepted that the 4% rolled up pay added to her wages meant that she was not entitled to the same. 40. The Respondent was also content to accept that the Appellant's calculation as to her net monthly salary was correct, and not the slightly higher shown in her claim form. Accordingly, her net weekly salary was £279.26.

Conclusion

41. Having regard to the approach set out by the Royal Court in *Randalls v Rozel* , the Appellant had, on the facts in this case, not merely a reasonably arguable defence, but in fact a complete defence to many of the awards made against her; the reason for her default, although not acceptable, i.e. that she did not read the claim form in full and thought the claim was merely for wages, is at least comprehensible; her application to set aside was made promptly; serious injustice would be done to the Appellant if she were not allowed to contest the claims made against her, and the Respondent would not suffer serious injustice if the judgment was set aside

- far from it, so far as she was concerned thought the claim she was making was mainly for wages which, on any view, she had been fully paid within hours, at the most, of the claim form being submitted. 42. Accordingly, the judgment made on 26 th October 2020 was set aside in its entirety and the Appellant was ordered to pay the Respondent £558.52 within seven days. 43. The Appellant has said that in the future she will ensure that all contractual terms and itemised pay statements are set out by email. The Respondent is now doing well at the academy of jewellery in Birmingham and hopes to pursue a career in jewellery in due course. Postscript 44. I have agreed that this is published as previous judgments in this case have been published and this decision of the Royal Court on appeal in an employment case. I do think some consideration needs to be given as to whether or not all decisions of the Tribunal need to be published and, if they do, the extent to which, if at all, they can or ought to be anonymised. Jersey is a small jurisdiction and judgments, now that they are widely publicised, remain easily accessible for protracted periods after publication and, indeed, may be available indefinitely. In cases such as this, where both parties have acted in good faith and no adverse findings have been made in respect of either, some consideration ought to be given as to the public interest in identifying both parties - one, an employer of in a very small business and, another, a young woman starting out on her career, or to circumstances where no findings are made or unfounded allegations are advanced of a nature where it would be unnecessary or inappropriate to identify the parties. This was not a point that was argued in this case, but I would invite the Tribunals and Courts considering similar cases to give consideration to this matter. I understand that in the early days of the Tribunal's existence it was thought appropriate to publish some or all of the Tribunal's decisions in order to establish a significant body of case law. That has now been achieved and, indeed, any points of law which arise from a particular decision can, in any event, be reported with the facts, so far as relevant suitably redacted. In the event, as I have said, this is a matter upon which I did not make a ruling but, in my view, requires some further thought.

Authorities *Cheyenne McMurry v Chenny Aouane Jersey Gems*

[2020] TRE 168A. *Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016*.
Cheyenne McMurray v Chenny Aouane Jersey Gems

[2020] TRE 168B *Cheyenne McMurray v Chenny Aouane Jersey Gems*

[2020] TRE 168C *Employment (Jersey) Law 2003. Raducan v Pizza Express Limited*

[2020] JRC 253 . *Bespoke Treasury Services Limited v Docherty*

[2020] JRC 214 . *Royal Court Rule 11/2. Smillie v State Street (Jersey) Limited*

[2019] TRE 177. *Randalls Properties Limited v Rozel Bay Hotel Limited*

[2005] JLR Note 33 . Page Last Updated: 04 Aug 2021 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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