

JERSEY / JUDGMENT

Mr A Gallacher v Mr R Brown

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Summary – Unfair dismissal | Period of continuous employment 128/2012 Jersey Employment Tribunal 28 May 2013 Before : Deputy Chairman Advocate C R Davies Panel Members Mr Ian Carr and Mr Paddy Kirwan Between Mr A Gallacher Applicant And Mr R Brown Respondent For the Applicant: The Applicant represented himself For the Respondent: The Respondent represented himself Employment (Jersey) Law 2003 Notification of the tribunal's decision 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 the Deputy Chairman: Case Summary 1. The Applicant worked for the Respondent as a window cleaner. The Form JET1 was issued on 13 September 2012 and the main issue for this final Hearing was the Applicant's claim for unfair dismissal. The Respondent submitted his Form JET2 on 24 September 2012. The Respondent's case was that the Applicant had simply failed to turn up for work on 22 June

2012. The Applicant argued that he was incapable of work due to sickness or injury. When the Applicant did eventually try to come back to work some 17 days later on 8th July the Respondent declined to take him back into the role that he had left but did give the Applicant two weeks paid work. The Respondent's case was that the Applicant had (in June) terminated his own employment by not turning up to work, and the offer of an additional two weeks work –although described as “notice” in the JET2 - was to be treated separately. 2. Although the issue did not appear on the face of either the JET1 or the JET2 forms, at a Case Management Meeting which took place on 22 April 2013 it became clear that the Tribunal would have to explore the facts of the case and determine whether there had in fact been a break in the continuous employment of the Applicant for the purposes of Article 57 of the Employment (Jersey) Law 2003 (the Law) between the 22nd June and 8th July. If the employment had been terminated and the employee was then re-engaged for a fixed term of just two weeks, we had to decide whether the application fell foul of Article 73 of the Law. If so, that would determine the unfair dismissal application. 3. For reasons set out in this Judgment, the Employment Tribunal finds for the Respondent and dismisses the Applicant's claim for unfair dismissal. 4. At the hearing the Applicant raised additional complaints that he had not been provided with a contract of employment or holiday pay. These claims were rejected by the Tribunal. The Evidence 5. The parties helpfully provided us with a bundle of documents which included witness statements. The Applicant also provided us with a discharge summary from the hospital which was dated 10th May 2012 and a bank statement. The Respondent provided us with his own telephone records, ITIS returns and the contract of employment. The Tribunal heard evidence on oath from the

Applicant, the Respondent and also from AB (the Respondent's wife) and SB (an employee).

6. The Applicant told us that he had been unwell in May 2012 and had required hospital treatment; the employer was aware of this illness. The problem then flared up and he had texted the Respondent on Thursday 21 June to tell him that he would not be able to work the following day. The Applicant produced no evidence of this text. On 2nd July he had called at the Respondent's house and spoke to AB, his evidence was that he explained to AB that he was unwell, that he was going back to the hospital and would not be able to work. He accepted that AB had asked him to come back later to speak to the Respondent. He did not do so because he was too sore to walk. He told us that he did attend the hospital and was told to rest. To his mind, he had told his employer via AB enough for them to determine that he would not be able to attend work for a time.

7. However, upon questioning the Applicant admitted to us that he had not been signed off work as unfit in June or early July. We had no medical evidence from either the hospital or a general practitioner to support the Applicant's case that he was unfit to work during this period.

8. The Applicant told us that on Monday 9 July 2012 he visited his employer's home and asked if he was to restart work on Monday 9 July. His employer replied, "No". The Applicant acknowledges that he replied, "Fine" and left the house. He stated that the Respondent then followed him and told him he had two weeks' work, giving no reason why. The Applicant then worked from 9 to 20 July. The Applicant had no recollection of a visit to his employer's home on 5th July 9. The Applicant also complained that he had only received a written statement of employment particulars nine months after his employment had been terminated (by Order of this Tribunal) and that this document was dated 8 May 2013. He stated that he had never received paid holidays and he disputed that his hourly rate included rolled up holiday pay. The Applicant had worked for the Respondent since January 2008 but had not queried this until 2 or 3 years into the employment when he had been told that he could have paid holiday but a lower hourly rate; the Applicant had continued to work as before.

10. The Applicant accepted that he had not made any effort to make contact with his employer or to provide further information about his health. He accepted that his employer had tried to contact him and he had not returned calls. He had not sent any message to his employer after he had been to the hospital. When asked why he did not make more of an effort to keep his employer informed the Applicant could only say that he was "not a 'phone person".
11. The Applicant admitted that he had socialised during the period that he claims to have been unfit to work and had been in the pub on Friday 21st June; he told us that alcohol helped with the pain. He denied that he had worked during this period either for himself or another business.
12. The Respondent's version of events was different. He told us that he sent a text to the Applicant on the evening of 21 June with a start time for the next day and received a text back from him simply stating "no way". Somewhat bemused by this response, the Respondent telephoned him at 7.50pm; the telephone was not answered. The Applicant

admitted that the employer had tried to call him but said that he did not take the calls because it was too late. The Tribunal saw the Respondent's telephone records which indicated that he rang the Applicant no less than 5 times that evening before 8pm.

13. The Tribunal considered the Respondent to be a careful and honest witness. He told us that he did not know why the Applicant had simply stopped turning up for work. He had heard rumours that the Applicant was working elsewhere as well as being seen in the pub. The Applicant had called to see his wife on 26th June, had not given any reason for his absence and was told to come back to see the Respondent. He had not done so.
14. The Respondent told us that the Applicant had appeared in the Respondent's kitchen on Thursday 5 July after a 9 day period of silence. He appeared to have been drinking. The Respondent told us that the Applicant had asked why he had not had a fixed start time for work but was told this was impossible; the work had to be flexible. The Respondent pointed out to him that he had not seen or heard from him for 2 weeks, that he had heard he was working elsewhere and then he had come to the conclusion that he had left his employment leaving the Respondent in "limbo". The Applicant still gave no explanation for his absence, removed his contract of employment from the table, shrugged and stormed out of the house. This was why the copy contract we had was erroneously dated May 2013, the Applicant had taken the original. We accepted that explanation. The Respondent was quite clear that all staff had been given contracts shortly after commencing their employment.
15. The Respondent confirmed that the Applicant had not been paid whilst absent from work between 22 June and 9 July 2012. The Applicant came to the house on 8th July and asked "am I working in the morning". He was told no and left. The Respondent admitted that he then followed the Applicant and offered him two weeks' work or money to help him out. The Respondent's evidence was that there had been a clear break in the employment and that he simply offered the Applicant a couple of weeks' work because he had known him for a very long time. On that Sunday 8th July when he offered those two weeks of work he did not think of the Applicant as still being his employee; he had left his job in breach of contract.
16. Both the Respondent and AB told us that holiday pay was always rolled up into the hourly salary which was paid at a handsome rate of £12 per hour. This was well known to the staff.
17. AB told us that she had indeed been visited by the Applicant on 2 July, she knew that her husband was cross with him for not making contact and she told him so; he asked about his wages. AB told him that he had been paid direct into his bank account for what he was due and she asked him to come back later to speak to her husband. The Tribunal was told that the Applicant, at this point, started going on about his hours and start time. He did not tell her that he was ill and nor did he come back later.
18. On 5 July, she confirmed the meeting that the Respondent had described to us; she had left the two of them to discuss it as it was nothing to do with her. She also thought the Applicant had been drinking.

19. AB then told us that she had herself seen the Applicant working during this period when he was meant to be unwell. He had been working at a property across the road. AB confirmed that she had told the Respondent at the time. The Applicant denied this but did not ask any questions of AB.
20. We then heard evidence from SB. He confirmed that he had received a contract of employment early on following his engagement and that he fully understood that he received rolled-up holiday pay. SB told us that he had also seen the Applicant working elsewhere when he was meant to be working for the Respondent. He could be clear in his mind that it was during this period because ordinarily the Applicant would have been driving him about his own work; but that day the Respondent had to drive him. He had told the Respondent about this incident.
21. The Respondent, AB and SB all struck us as reliable witnesses who were very careful to say what they knew to be accurate. We find the following: (i) We find that the Applicant was not incapable of working between 22nd June and 8th July and had in fact worked on at least two occasions during this period; (ii) We find that the Applicant at no time communicated to his employer any reason for his absence from work or its likely duration; (iii) We find that the Applicant was during his employment in receipt of “rolled up” holiday pay and that he received an employment contract in accordance with the Law; (iv) We find that there was a meeting on 5th July which was as described by the Respondent and his wife;
(v) We find that the Respondent acted reasonably in concluding that the Applicant had walked away from his job when he refused to work on 22nd June and then failed to give a reason or take his employer’s calls and that [this conclusion was communicated to the Applicant on 5th July]; (vi) We find that on 8th July 2012 the Respondent offered a fixed two week period of work to the Applicant to help him out. The Law
22. Article 57(1) of the Law in so far as it is relevant here provides that any week breaks the employee’s continuity of employment if it is not (a) a week governed by a contract of employment for 8 hours or more weekly (Article 57(2)) or (b) where the employee is absent from work due to sickness or injury (Article 57 (3)). We find that there was a break in the continuity of employment in this case due to the actions of the Applicant. We did not find the Applicant was incapable of working due to sickness or injury and we find that the Respondent was entitled to treat the contract as at an end when the employee failed to attend work without good reason, failed to respond to his employer’s attempts to contact him, and was seen to be working elsewhere.
23. We have carefully considered whether the Respondent could be said to have affirmed the Applicant’s breaches and to have chosen to continue the relationship by offering him further work when he did reappear on 8th July. On balance we think not. The Respondent made it clear that this was a finite period of additional paid work simply to help the Respondent out as they had known each other a long time and the employer did not want to cause him hardship. It was clear that there was to be no resumption of the employment relationship

generally and that this was at an end.

24. We want to make clear that it would have been good practice for the employer to have written to the Applicant to make it clear that the employer was treating the employment as at an end. The employer should have kept copies of payslips and other documentary records and those documents should have clearly stated that rolled up holiday pay was being paid, and the rate applicable. We strongly suggest that this employer should take advice and revisit its record keeping. We understand that it is difficult for small employers to keep good records; but keep good records they must. Had the other evidence been less clear in this case, the employer may well have had to suffer a different outcome.
25. Article 73 (1) states that Article 61 (the right not to be unfairly dismissed) does not apply to an employee who has been employed for a continuous period of less than 26 weeks; or in the case of a fixed term contract to an employee who has not worked 2/3 of the contract or 13 weeks – whichever is longer. It is clear that when the employee finished the two week period in July (taking into account the break in continuous employment) that he had not been employed for the requisite period. The Decision
26. The Tribunal finds that there was a break in the Applicant's employment and that the contract of employment that had been in place from 2008 to June 2012 was terminated by the employee. The Tribunal therefore strikes out the Applicant's claim for unfair dismissal.

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