JERSEY / JUDGMENT

Mr A Gouveia v R G Buesnel Limited

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Summary – Holiday pay 82/2011 Jersey Employment Tribunal 15 March 2012 Before : Chairman Mr David Le Quesne Panel Members Mrs Kelly Flageul & Mr Alan Hall Between Mr A Gouveia Applicant And R G Buesnel Limited Respondent For the Applicant: The Applicant represented himself For the Respondent: The Respondent was represented by Mr Rodney Buesnel, the owner and director of R G Buesnel 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 Chairman: THE FACTS 1. The Respondent, R G Buesnel Limited is a firm of builders of which Mr Rodney Buesnel is the owner and a Director. The Applicant was employed, initially as a labourer, from 13th October 2006 until 19th May 2011, when he resigned. Mr Gouveia claims that he was not paid for bank holidays during the first year or so of his employment, and that he was not paid at all for annual holidays. Mr Buesnel told us that holiday pay was included in the weekly wages, at the rate of 50pence per hour, and that Mr Gouveia knew and accepted this. Mr Gouveia denied that he knew or accepted that his wages included holiday pay. 2. We were provided with a statement of employment particulars signed by Mr Gouveia and Mr Buesnel, dated 30/07/10. We were told, and we accept, that there were previous contracts, the essential terms of which, including the one quoted below, were the same as this one, but neither party could tell us when the first such contract came into being; it seems that it was a year or perhaps a year and a half after Mr Gouveia's employment started. In this contract, and in the earlier versions, these words appear "The company does not pay sick pay, holiday pay, maternity or paternity pay, redundancy pay or provide for a pension, but does pay Bank Holiday pay. Company holidays are the last 2 weeks of August, and between Christmas and the New Year, which are unpaid." 3. The clear words that the company does not pay holiday pay placed a substantial obstacle in the path of Mr Buesnel's argument. He accepted that the wording did not support his case, but argued that, despite the words, he and Mr Gouveia knew that holiday pay was incorporated in the wages; he said that Mr Gouveia was simply exploiting an opportunity which had been pointed out to him not long before he left, and in support of this, Mr Buesnel stated that Mr Gouveia had not previously complained about lack of holiday pay. 4. We cannot find any ground, as a matter of law, for going behind the clear words in the written contract. We have carefully considered whether we could imply a term into the contract, as in the Velosa v FDJ Construction Limited case which was in the Respondent's bundle, but we do not think that this is a legally correct approach where, as here, there is a written contract which is clear and unambiguous; none of the circumstances in which a term may be implied into a contract fits this case. Had there not been

this written contract, there may have been room to imply a term such as that suggested by Mr Buesnel, but the existence of the written contract puts this case on a completely different footing from the Velosa case. 5. Therefore, we agree with the Applicant, Mr Gouveia, that he was entitled to holiday pay. We also agree that he was entitled, in principle, to some pay for bank holidays, but Mr Gouveia provided insufficient material on which we could make any calculation for bank holidays, so we make no award in this regard. As far as holiday pay is concerned, we had disappointingly little evidence upon which to make our calculations, but we have done the best we can with the evidence before us, and our calculation is as follows. (i) Mr Gouveia had no written contract until one or one and a half years after he started; during that time it is possible that holiday pay was included in his wages, for we have no evidence either way, so we make no award for this period. (ii) From a date which we estimate as 1/1/08, Mr Gouveia was on a permanent full time contract. For the period from 1/1/08 to 31/12/08 the calculation is 2 weeks holiday pay @ 44 hours per week @ £10 per hour = £880.00 (iii) Mr Gouveia's wages increased to £11.00 per hour and then £11.50 per hour during 2009. The calculations for 2009 therefore are: 1 week holiday pay @ 44 hours @ £11.00 per hour = £484.00 1 week holiday pay @ 44 hours @ £11.50 per hour = £506.00 (iv) In 2010 Mr Gourveia's wages increased to £12.00 per hour and then to £12.50 per hour, so the calculations are: 1 week holiday pay @ 44 hours @ £12.00 per hour = £528.00 1 week holiday pay @ 44 hours @ £12.50 per hours = £550.00

(v) For the 4 months of 2011 we calculate that Mr Gouveia was entitled to one third of his annual holiday entitlement at the rate of £12.50 per hour, amounting to £366.00 The total holiday pay which we order the Respondent to pay to the Applicant therefore is £3,314.00. 6. Article 3 of the Employment (Jersey) Law 2003 (which came into force in 2005) provides as follows 3(1) ....not later than 4 weeks after an employee begins employment, the employer shall give to the employee a written statement of the terms of his or her employment. 3(2)....[it] shall contain the following particulars-...

(g) any terms and conditions relating to –

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated). As already stated, we do not know when the Respondent first provided written terms of employment, but we do know that it was long after the Law came into force, so this complaint of Mr Gouveia is upheld. It is fair, however, to point out that Mr Buesnel did introduce written contracts, however defective they may have been, at about the time when it became standard practice in the industry. Also, we are pleased to hear that Mr Buesnel now has consulted JACS and as a result now provides proper written terms to the employees. Had the original written terms of employment stated what Mr Buesnel told us was agreed, that holiday pay was included in the wages, rather than stating that there was no holiday pay, today's problem would not have arisen.

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