JERSEY / JUDGMENT

Mr F Ferreira v Waitrose (Jersey) Limited

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Summary – Unfair dismissal 94/2013 Jersey Employment Tribunal INTERIM HEARING 7 November 2013 Before : Deputy Chairman Advocate C R Davies Panel Members Mr M Therin and Mr S Le Breton Between Mr F Ferreira Applicant And Waitrose (Jersey) Limited Respondent For the Applicant: The Applicant represented himself For the Respondent: Mr D Read, Ogier 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: Summary 1. The Tribunal sat to consider the Respondent's application for this unfair dismissal claim to be struck out on the basis that it was presented to the Tribunal outside of the eight week time limit set out in Article 76 of the Employment (Jersey) Law 2003 (the "Law"). The Tribunal found this to be a difficult case but we conclude for the reasons set out below (a) that the Applicant's claim was presented to the Tribunal outside of the requisite time frame and (b) that we would not exercise our discretion pursuant to Article 76 (2) (b) of the Law to admit the claim late. The Applicant's claim for unfair dismissal is therefore struck out and the Applicant's remaining claims shall proceed to a final hearing. The Facts 2. The parties provided us with two bundles of documents and we heard evidence from the Applicant. The Tribunal contacted the Citizen's Advice Bureau ("CAB") to find out whether they held any other relevant documents but we were assured that this was not the case. The Respondent provided a written statement from a human resources manager, AM, who did not give evidence at the hearing – which statement is relevant to the post script set out at the conclusion of this judgment. 3. The Applicant was employed by the Respondent until May 2013 when he was dismissed following a disciplinary procedure. In his Form JET1, the Applicant stated the effective date of the termination of his employment as being 13 May 2013. That date was agreed by the Respondent. There was clear documentary evidence that the Applicant was very clearly informed in person by the Respondent at a meeting that his employment was terminating with effect from that day. He ceased to be paid and did not return to work. We find that this was the effective date of termination. 4. The Applicant did not present his Form JET1 to the Tribunal until 12 July 2013; this was four days outside the time limit set out in Article 76 of the Law. That form was accompanied by a letter from the CAB which is summarised below. The Tribunal concluded that the issue for us to determine was whether to permit the Applicant's claim to proceed. To do so, we would have to be satisfied that the Applicant had presented his case as soon as it was practicable to do so. This provision is rarely used. 5. The unusual facts which led up to the late presentation of the form were not in dispute. Following his dismissal the Applicant went to see the CAB to obtain advice. The CAB adviser telephoned JACS in

the presence of the Applicant. JACS informed the CAB that the Applicant had 56 days from the termination date to submit a claim. The Applicant understood that advice – he had to come to the Tribunal with his case within that period or it would be “a broken job”. 6. The Applicant told us that he had taken this advice from the CAB just after 17 June

2013. The CAB told him to get together all of the documents so that they could consider if he had good reason to appeal internally against his dismissal. Unfortunately, the Respondent admits that it was slow in sending that documentation. The Applicant went back to the CAB a number of times and on 3 July the adviser rang JACS again and they repeated their advice. The CAB persisted in advising the Applicant that they needed to see the files. The Applicant finally received the documentation from the Respondent on 9 July 2013. Unfortunately, on this occasion the CAB were then too busy to deal with the completion of the Form JET1 which was not submitted until 12 July. 7. The form was submitted with a letter from the CAB which stated that the CAB understood that the claim was out of time; that the Applicant had been following advice from JACS and the employer in relation to an appeal against dismissal. The letter stated that the CAB and the Applicant were under the (mistaken) impression that the appeal had to be completed before a claim could be presented to the Tribunal. This is slightly odd in that the internal appeal was not heard until 19 September, after the letter was written. 8. The Applicant told us something slightly different under oath. He told us that JACS had said that his claim should be submitted to the Tribunal within 56 days but that the advice of the CAB was that the employer would not take issue with the delay because they had been slow in providing him with documents. We have not heard evidence from the CAB adviser, but we accept the evidence of the Applicant and it seems to us that an assumption was made that the eight week deadline would be overlooked in this case. The Law 9. The relevant aspects of Article 76 are set out above. The Applicant relied on the discretionary power contained at Article 76(2) (b) of the Law. The use of that power is exceptional as set out in a variety of decisions from this Tribunal including that of Skrzat v Jersey Telecom Group (2011) 1005-66/11. The time limit is there to provide certainty to all users of the Law. The Tribunal will only exercise its discretion “in the most exceptional circumstances for example where some highly unusual and unforeseen event intervenes in the time between the ETD and filing the form JET1..or where an applicant genuinely did not know of the time limit or his rights.”

10. The Respondent helpfully brought to our attention the English case of Marks & Spencer v Williams-Ryan [2005] ICR

1304. That case also involved an Applicant who had briefly consulted the CAB and submitted a claim late. The Court of Appeal upheld the decision of the tribunal in that case to allow the claim to proceed, a decision which Lord Phillips of Worth Matravers MR considered to be “generous to the employee” but not “perverse”. That case was however different to the present case in a number of important respects. The employer was found to have given insufficient and misleading advice to the employee, who was at the time preoccupied by a teacher training course. The Applicant had only spoken briefly once by telephone with the

CAB who gave advice on an internal appeal but, importantly, did not tell the employee about her right to complain to the Tribunal. The employer did mention the tribunal but not the time limit. To quote from the headnote “the vital question of fact was whether the employee could reasonably have been expected to be aware that there was a time limit for making a complaint to the Tribunal.”

11. The role of the CAB adviser was considered at paragraph 32 of the judgment in Marks & Spencer v Williams-Ryan. The fact that advice was obtained from the CAB would not rule out the possibility that an Applicant would succeed in an application (under Article 76(2) (b)) but much would depend on who gave the advice and in what circumstances. At paragraph 33 the Court of Appeal noted that this was not a case where the CAB had advised the employee that she did not have to submit her tribunal claim until after an appeal and the importance of that is stressed again at paragraph 47 in the judgment of Keene LJ; the implication being that the case would have been differently decided had that been the case. The tribunal found that the applicant in that case did not know there was a time limit and that the one telephone conversation with the CAB played only a small part.

12. The present case is different. There was no misleading advice from the employer and it was clear from the evidence given by the Applicant that the answer to the key question posed by the Court of Appeal above is “yes” the Applicant was aware of the time limit due to the correct advice received from JACS. We regret that the Applicant may have been led astray by the advice given to him by the CAB, no doubt with the best of intentions. We also have to note that even after the documents requested had been received by the Applicant it took several days for him to then complete and submit the Form JET1.

Conclusion

13. We find that the Employee was aware of the time limit in relation to the presentation of his claim, and that it was not impracticable for it to have been submitted earlier. We find that we cannot exercise our discretion under Article 76(2) (b) and we therefore strike this claim out. Post Script

14. The witness statement submitted by the Respondent drew to our attention a letter that was sent to the Applicant at the time of his unsuccessful appeal which was not concluded until September

2013. This letter noted that as the employee had a long period of service with the employer his dismissal had not taken effect until the appeal. In her statement AM stated that this was erroneous and that the letter was simply incorrect. The employee had been taken on from previous employment and given continuity of employment but only for certain purposes under the Law, not the protection afforded by this policy of the Respondent. The query in the mind of the Applicant at the time of the hearing was whether this in fact put his effective termination date much later – in September or October

2013. The Respondent's argument was that the employee had clearly been dismissed in May 2013 and that, rightly or wrongly, this dismissal had not been suspended pending appeal. If that was wrong then the Applicant's remedy lies in breach of contract. The Tribunal agrees with the Respondent. This case can be distinguished from the case of Upton v the States' Employment Board [2013] 2809-134/12 where the Applicant had been told that he would be on full pay pending an appeal and where the employer continued to offer various support. The Tribunal in Upton referred to the test set out in the case of Drage v Governors of Greenford High School [2000] IRLR 315 where it was stated that the critical question is whether between the notification and the appeal the employee stands (a) dismissed with a possibility of reinstatement or (b) is suspended with the possibility of dismissal being confirmed. In the present case we accept that this was a situation of the first category and that the employment ended in May

2013. The Applicant was not paid after that date and had found alternative employment before the appeal. Whether the Applicant has a claim in contract as a result of his dismissal in these circumstances is an interesting matter for another day.

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