

JERSEY / JUDGMENT

Mr Ferdinando Moniz de Assuncao v Mr José Lemos t/a Portuguese Landscape Gardeners

Source: jerseylaw.je · Research copy typeset by Esheria. Not court-issued or certified.

Jersey Employment and Discrimination Tribunal Employment (Jersey) Law 2003 NOTIFICATION OF THE TRIBUNAL'S

JUDGMENT

Reference: [2017]TRE010 Applicant: Mr Ferdinando Moniz de Assuncao Respondent: Mr José Lemos t/a Portuguese Landscape Gardeners Hearing Date: 08 June 2017 Before: Mrs Hilary Griffin, Chairman Mrs Marilyn Wetherall, Mr Mike Baudains, Panel Members For the Applicant: In Person, assisted by Miss C Assuncao and Mr Rui Perez (translator) For the Respondent: In Person THE TRIBUNAL'S JUDGMENT THE DECISION It is the unanimous decision of the Tribunal that: · the Respondent did not constructively dismiss the Applicant; · the Applicant resigned and is not entitled to recover notice pay; · the Applicant's claim for unpaid wages arising from an alleged pay increase fails; · the Applicant's claim for unpaid holiday pay fails; and · the Respondent failed to provide itemized pay statements. At the start of the hearing, the Respondent agreed that he must pay: · the Applicant's wages for December 2016; · a sum to reflect the Applicant's entitlement to bank holiday pay. THE REASONS 1. A Tribunal hearing ('Hearing') was convened to hear the following claims brought by the Applicant: a) that the Respondent constructively unfairly dismissed the Applicant; b) that the Respondent failed to give statutory notice to the Applicant (this amounting to a claim of wrongful dismissal); c) that the Respondent failed to pay to the Applicant wages:

- i. for hours worked by the Applicant during December 2016; and ii. arising from an increase in the Applicant's hourly rate from July 2015 to the effective date of termination; d) that the Respondent failed to pay holiday pay to the Applicant; e) that the Respondent failed to pay the Applicant for Bank Holidays; f) that the Respondent paid a wage to the Applicant which fell below the minimum wage; and g) that the Respondent failed to provide to the Applicant itemised pay statements. 2. The Applicant withdrew his minimum wage claim at the start of the Hearing. 3. At the Hearing the Respondent agreed to pay to the Applicant: a) the sum of £955.40, being the net wages earned by the Applicant during December 2016 (Social Security contributions and ITIS having already been deducted at source and paid by the Respondent); and b) a sum to reflect 18 bank holidays. 4. The Respondent submitted that the Applicant was engaged under a "zero hours" contract, that the Respondent was not under an obligation

to provide work to the Applicant and that he did not have sufficient continuous employment to claim unfair dismissal. 5. The Tribunal heard evidence from the Applicant and from his daughter, Miss C Assuncao and from Mr Lemos on behalf of the Respondent. Evidence 6. The Applicant worked for the Respondent as a gardener between March 2015 and January 2017 when the Applicant resigned. The terms of the contract between the Applicant and the Respondent were set out in a document which was signed by both parties. This document was headed 'Terms of Employment' and 'Zero Hours Contract' ("Contract"). The Contract contained the following provisions: a) The Applicant was to be paid £8 per hour, in arrears on the fifteenth of each month; b) 4% rolled-up holiday pay was included in the Applicant's hourly rate; c) Each party was required to give notice to terminate; d) The Applicant was subject to a probationary period; e) The Respondent had the discretion to require a medical certificate to be provided and/or for the Applicant to be examined by a doctor appointed by the Respondent; f) The Applicant was not entitled to bank holiday pay unless required to work. 7. The Tribunal was shown two copies of the Contract, both of which were signed, but one of which had manuscript questions marked upon it by the Applicant's daughter ("Marked-up Contract"). When the Applicant gave the Marked-up Contract to the Respondent, the Respondent immediately printed off an identical clean copy which both parties then signed. There were no discussions between the Applicant and the Respondent as to the terms of the Contract or about the manuscript questions on the Marked-up Contract. 8. The Tribunal heard that the Applicant routinely worked Monday to Saturday from 8am until approximately 6pm. Save for the period immediately after the Christmas break, the Applicant was always aware of his timetable in advance. The Applicant's hours did vary each week, depending upon the volume of work but the Applicant appeared for work every day and the Respondent made it clear in his evidence that if the Applicant were not to arrive for work as anticipated, the Respondent would immediately call him to query why he was not in attendance. Unpaid wages 9. The Applicant told the Tribunal that shortly before accepting the role, the Respondent told the Applicant that his hourly rate would increase from £8 per hour to £8.50 per hour from July 2015. The Contract did not contain any reference to such a pay increase and, despite reading carefully through the Contract with his daughter, the Applicant did not raise this omission with the Respondent at the time of signing the Contract.

10. In July 2015, the Applicant approached the Respondent to ask why his hourly rate had not increased to £8.50 per hour. The Applicant's evidence was that the Respondent told him that he 'did not deserve' a pay increase.
11. In his evidence, the Respondent denied ever telling the Applicant that his hourly rate would increase. His evidence was that he told the Applicant that his hourly rate would be between £8 and £8.50 per hour, depending upon how he performed. When the Applicant approached the Respondent in July 2015, the Respondent said that there would be no increase in the Applicant's hourly rate because it had become apparent to the Respondent that the Applicant did not have the experience which he had claimed to have when he entered into the Contract. By way of example, the Respondent told the Tribunal that the Applicant did not

know how to use a hedge-cutter or a lawnmower.

12. The Applicant confirmed to the Tribunal that after July 2015 he did not raise the issue of the pay rise again. Unpaid holiday pay
13. The Applicant gave evidence that he did not receive any holiday pay for the duration of the Contract. The Respondent drew the Tribunal's attention to a clause in the Contract which specified that 4% rolled-up holiday pay was included in the Applicant's hourly rate. The clause was underlined in the Contract to highlight its importance and the evidence showed that the Applicant and his daughter were aware of it because on the Marked-up Contract, the Applicant's daughter wrote next to this clause: "so should his wages not be more than £8. Should it not be £8.50." Late payment of wages
14. Under the terms of the Contract the Respondent was to pay the Applicant's wages monthly in arrears on the fifteenth of each month. The Applicant gave evidence that the Respondent never paid on that date and that the Applicant usually received his wages at the end of the month. The Applicant's bank statements and payslips supported his evidence and the Respondent accepted that he paid at the end of each month.
15. The Applicant told the Tribunal that he did periodically raise the issue of the late payment of his wages with the Respondent. On one occasion he refused to work until he received payment. However the evidence showed that the Applicant came to expect payment of his wages towards the end of the month and if he required funds before that date, he asked the Respondent for a loan.
16. The Respondent explained that the late payments were due to cash flow and personal reasons. He gave evidence that although the Applicant occasionally asked for a loan, for the most part the Applicant "seemed happy to help out". At no point did the Applicant threaten to resign due to the failure of the Respondent to pay on the fifteenth of each month.
December 2016 payment
17. The Applicant gave evidence that in December 2016 the Respondent told him that he would pay the Applicant's wages one week early. The Applicant assumed that this would mean that he would receive payment on fifteenth of the month. Instead, the Respondent paid the Applicant's November wages by cheque on 22 December 2016. This was a week earlier than normal but was not in accordance with the terms of the Contract. The Applicant was particularly angry because he had expected to be paid by BACS directly into his bank account. The receipt of a cheque so shortly before the Christmas break meant that the Applicant did not have immediate cleared funds available to him for Christmas.

18. The Respondent considered that he did pay the Applicant one week early and he explained that he usually paid his workforce by cheque and not by BACS. Although he had occasionally paid by BACS, the majority of his employees expressed a preference to be paid by cheque so they could more easily monitor their own cash flow. The Respondent preferred this method of payment and wanted to pay all of his staff in the same way. There was no term in the contract which specified that he must pay by any specific means. Resignation
19. The Applicant did not work over the Christmas period. On 3 January 2017, the Applicant telephoned the Respondent to find out when he was expected to return to work. The Respondent told the Applicant that he would call him within the next week to let him know; generally there is less gardening work at this time of year.
20. On 6 January 2017, the Applicant telephoned the Respondent and resigned. The Applicant that he did not give a reason for his resignation to the Respondent.
21. On 9 January 2017, the Applicant started a new part-time position which then became full-time.
22. The Applicant submitted that the reason he resigned was because the Respondent was “a liar” because: a) he failed to pay the Applicant’s November wages by 15 December 2016; and
b) he paid the Applicant’s wages by cheque rather than by BACS. Itemized payslips
23. The Applicant stated that the Respondent failed to give him itemised payslips. According to the Applicant, the Respondent only provided payslips for 2015 in February 2016 and only provided the payslips for 2016 prior to the Hearing.
24. The Respondent gave evidence that his accountants prepared the monthly payslips on his behalf. The Respondent’s accountancy procedures required him to calculate his employees’ wages directly from their worksheets. Once he had calculated the wages, the Respondent then sent the worksheets to his accountant who would then prepare the payslips. In the meantime, the Respondent paid his employees. The Respondent would usually receive the payslips from the accountant after he had paid the monthly wages. The Respondent therefore gave the payslips to the employees at some point after they received payment of their wages.
25. The Respondent confirmed that he routinely provided copies of the payslips to his employees at the end of the financial year because they often mislaid the originals.

Conclusion

Preliminary issue – zero hours contract

26. The Tribunal first considered the Respondent’s submission that the Applicant was engaged under the terms of a ‘zero hours’ contract and could not claim constructive unfair dismissal or notice pay.

27. A genuine 'zero hours' contract is one where: a) The employer is not obliged to provide work to the individual; and b) If the employer does offer work, the individual is under no obligation to accept that offer and will suffer no detrimental action if they do decide to reject the offer of work.
28. In essence, a genuine 'zero hours' contract will reflect an 'ad hoc' arrangement between two parties.
29. Based on the evidence, the Tribunal was satisfied that, despite the Contract being marked as 'zero hours', this was not a genuine 'zero hours' contract but a 'variable hours' contract. Neither the written terms of the Contract nor the behaviour of the parties supported the assertion that this was an 'ad hoc' arrangement between the Applicant and the Respondent. The Applicant routinely worked a six-day week throughout his employment and there was no doubt that he formed an integral part of the Respondent's workforce.
30. The Tribunal was satisfied that the Applicant had sufficient continuous employment to submit claims of constructive unfair dismissal and a wrongful dismissal claim for notice pay. Constructive unfair dismissal
31. As set out in previous Tribunal cases, in order to establish a successful complaint of constructive dismissal, four conditions must be met: a) the employer must be in breach of a contractual term (either an express term or an implied term); b) the breach of contract must be fundamental, amounting to a repudiatory breach of contract; c) the employee must resign in response to the employer's repudiatory breach of contract; and d) the employee must not delay too long in terminating the contract; otherwise the breach may be found to have been waived and the contract affirmed. (See: *Robinson v States of Jersey, Department of Education, Sport & Culture* (JET 1910-028/05); *Oprey v Woolworths plc* (JET 2604-085/07); *Western Excavating (ECC) v Sharpe* [1978] ICR 221; *Maclagan v States Employment Board* (JET 79/2015)). Was there a repudiatory breach of contract?
32. The Tribunal first considered whether, the breaches in question were fundamental, thus amounting to repudiatory breaches of contract. The Tribunal has considered what constitutes a repudiatory breach of contract on previous occasions. In short, unless the breach of contract is significant and either goes to the root of the contract or shows that the employer no longer intends to be bound by an essential express or implied term, that breach will usually fall short of being repudiatory. Simply acting in an unreasonable manner is not in itself sufficient grounds for a successful complaint of constructive dismissal.
33. In considering the question of whether the Respondent committed a repudiatory breach of contract, the Tribunal applied an entirely objective test and did not consider the Respondent's motives or intentions (see: *Maclagan*; *The Leeds Dental Team Ltd v Rose* UKEAT/0016/13).

34. In this case, the Applicant submitted that the Respondent committed two repudiatory breaches by: a) failing to pay the Applicant his November wages on 15 December 2016; and b) paying the Applicant his wages by cheque rather than by BACS. Late payment of wages
35. The right to be paid for work undertaken is a fundamental term of an employment contract and the breach by an employer of that term will usually be repudiatory in nature. In this case, the fact that the Respondent routinely paid the Applicant late did not vary the written term in the Contract which was unambiguous in stating that the Applicant would be paid on the fifteenth of each month.
36. Based on the evidence, the Tribunal was satisfied that the delay in paying the Applicant his wages in December 2016 did amount to a repudiatory breach of contract. Payment by cheque
37. Based on the evidence, the Tribunal concluded that the Respondent's decision to pay the Applicant's wages by cheque did not amount to a repudiatory breach of contract. The Tribunal accepted the Respondent's evidence that the majority of the workforce preferred this method of payment and there was no evidence to suggest that either an express or implied contractual term existed that the Applicant should be paid by BACS. Did the Applicant resign in response to the breach?
38. Having established that the failure to pay the Applicant's wages on 15 December 2016 amounted to a repudiatory breach of contract, the Tribunal then considered whether the Applicant resigned in response to that breach.
39. The Tribunal noted that the Applicant: a) delayed three weeks before resigning in response to the late payment of his wages; b) sought to return to work after the Christmas break by contacting the Respondent on 3 January 2017; and c) did not mention to the Respondent at the time of his resignation that he was resigning in response to the Respondent's failure to pay him on 15 December 2017.
40. The evidence was clear that although the Applicant may have been frustrated with the late payments and the payment of wages by cheque, the Applicant resigned on Friday 6 January 2017 because he had secured a new position which commenced on Monday 9 January 2017.
41. The Tribunal therefore concluded that the Applicant did not resign in response to the Respondent's breach of contract but for other reasons as detailed above.
42. In any event, had the Tribunal found that the Applicant did resign in response to the Respondent's breach, the Tribunal would have found that the delay of three weeks between the breach and the resignation was too long and that the Applicant affirmed the Contract in any event.
43. The Tribunal finds that the Respondent did not constructively dismiss the Applicant. Wrongful dismissal/notice pay

44. As set out above, the Applicant resigned from his position on Friday 6 January 2017 in order to commence new employment on Monday 9 January 2017.
45. The Applicant's claim for notice pay is therefore rejected. Unpaid wages
46. The Tribunal accepted the Respondent's evidence that he did not offer or agree to a wage increase for the Applicant. Indeed, the Contract made no reference to such an increase and the Applicant did not raise this as an issue after July 2015.
47. The Applicant's claim for unpaid wages is therefore rejected. Holiday pay
48. The Contract clearly stated that the Applicant's 4% rolled-up holiday entitlement was included in the £8 hourly rate. The Applicant understood this term and his daughter identified it as a term to query with the Respondent. Despite this, the Applicant did not raise holiday pay as an issue with the Respondent before signing the clean version of the Contract.
49. The Applicant's claim for unpaid holiday pay is therefore rejected. Itemized pay statements
50. The Tribunal accepted that the Respondent did provide pay statements to the Applicant at various times throughout the year. However the Respondent's evidence was clear that those pay statements were generally provided after he paid the Applicant.
51. Under Article 51 of the Employment Law, an employer must provide an itemised pay statement to an employee on or before each pay date. This clearly did not occur in this case, and the Respondent was therefore in breach of Article 51 of the Employment Law.
52. The Tribunal also noted that the pay statements did not separately identify the Applicant's holiday pay for each month. In future, the Respondent should ensure that holiday pay is separately identified in his employees' pay statements.
53. Since the Applicant's employment terminated before the Employment (Amendment No. 10) (Jersey) Law 2016 only came into force on 1 April 2017 (ie. after the termination of the Applicant's employment) the Tribunal may not make an award of compensation in this instance. However the Tribunal strongly urges that Respondent to: a) change his accountancy practices as a matter of urgency so that he is able to provide his employees with pay statements at the same time as giving them their wage cheques; and b) ensure that holiday pay is itemized on the pay statements.
54. The Respondent agreed that he owed the following amounts to the Applicant: a) unpaid wages, amounting to £955.40 (this being a payment net of ITIS and Social Security contributions; and b) bank holiday pay, amounting to a gross payment of £1,152 (total of 18 bank holidays of 8 hours per day at £8 per hour) which is subject to ITIS and Social Security deductions.

55. The Tribunal HEREBY ORDERS that the Respondent pays to the Applicant the sum of £2,107.40. Signed: Mrs HG Griffin, Chairman Dated: 5 July 2017 Judgment and Reasons sent to the parties on 5 July 2017 For the Tribunal Office
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.jerseylaw.je/judgments/tribunal/Pages/%5B2017%5DTRE010.aspx>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/mr-ferdinando-moniz-de-assuncao-v-mr-jos-lemos-t-a-portuguese-landscape-gardeners-2017>

Prepared on 22 October 2026 · Esheria