

JERSEY / JUDGMENT

Mr M Le Lay v States Employment Board

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Summary – Constructive unfair dismissal | Effective date of termination of employment 77/2015 Jersey Employment AND DISCRIMINATION Tribunal 11 September 2015 Before : Deputy Chairman Mrs Hilary Griffin Panel Members xxxxxxxx Between Mr M Le Lay Applicant And States Employment Board Respondent For the Applicant: The Applicant represented himself For the Respondent: Advocate J Gillies, Law Officers Department 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 DECISION It was 'reasonably practicable' for Mr. Le Lay to submit his complaint of constructive unfair dismissal within the time limit prescribed under Article 76(2)(a) of the Employment (Jersey) Law 2003 but he failed to do so. Accordingly, Mr. Le Lay's complaint of constructive unfair dismissal is struck out by the Tribunal. The Tribunal also found that Mr. Le Lay's Effective Date of Termination occurred at the time of his initial resignation on 16 December 2014 and that subsequent correspondence and discussions between the parties amounted to a 'cooling off' period and did not vary the Effective Date of Termination. THE REASONS 1. This case concerns the late filing at the Tribunal's office of a complaint of constructive unfair dismissal by Mr. Le Lay against the Respondent. Article 76(2)(a) of the Employment (Jersey) Law 2003 ("Law") requires that such a complaint be presented to the Tribunal before the end of the period of 8 weeks commencing on the Effective Date of Termination ("EDT"). 2. This Interim Hearing was convened to hear: a) an application by Mr. Le Lay that the Tribunal exercise its discretion under Article 76(2)(b) of the Law and allow Mr. Le Lay's claim for constructive unfair dismissal to proceed notwithstanding the late filing; and b) to establish the EDT. Mr. Le Lay submitted that his EDT was 9 April 2015. On this basis, he should have filed his JET1 by midnight on 3 June 2015. The Respondent submitted that the EDT was either 16 December 2015 (in which case the JET1 should have been submitted by midnight on 9 February) or 16 January 2015 (in which case the JET1 should have been submitted by midnight on 12 March 2015). Mr. Le Lay did not file his JET1 form with the Tribunal until 4 June 2015 and accepted that, depending on the EDT, he was either one day out of time, 12 weeks out of time or 16 weeks out of time. 3. The Tribunal heard evidence from Mr. Le Lay regarding his reasons for late submission of the JET1 and also heard submissions from both parties regarding the EDT. The Tribunal was provided with a joint bundle of documents from the parties, containing the JET1, the JET2 and other documentary evidence which related particularly to the issue of the EDT. 4. Mr. Le Lay has brought a separate claim in the Petty Debts Court. No evidence was heard in relation to that claim.

FACTS

5. Mr. Le Lay was represented by an Advocate ("Advocate") during the entire period from 16 December 2014 to 4 June 2015. Mr. Le Lay gave evidence that he was "guided at every stage by [his] lawyer" and that he also obtained guidance from JACS in April or May 2015. 6. On 16 December 2014, the Advocate sent a letter of resignation on behalf of Mr. Le Lay to the Respondent and the Respondent received the letter on the same day. The letter referred to issues between Mr. Le Lay and another member of staff and continued as follows: "There is in every Contract of Employment an implied term of mutual trust and confidence. In this particular instance our client has lost the trust and confidence previously reposed in his employer by them failing properly to address issues raised by Mark going back to 2013. ... The breach of this term of trust and confidence is such that it is sufficiently serious that Mark simply cannot continue to be employed in these circumstances and this letter is notice of his resignation. It is quite clear that Mark has been unfairly treated during the course of these events and he claims his 3 month notice period together with his statutory damages for unfair dismissal." 7. On 17 December 2015 the Respondent replied to the letter of resignation as follows: "It was with surprise that I received from your Advocate correspondence yesterday which indicated you wished to resign and that you appear to believe that you have no alternative to that course of action by virtue of your employer's actions. I encourage you to rethink your decision and to facilitate this I suggest that you advise me on 22 December whether you still wish to go ahead with your decision. In the event that you decide to proceed with your resignation on 22 December 2015 then I will advise HR to proceed with your resignation with immediate effect. I look forward to hearing from you in due course and wish you the very best for the future." 8. The Advocate was absent during the festive period and Mr. Le Lay did not wish to engage in discussions with the Respondent without guidance from his Advocate. The Respondent therefore agreed to await the Advocate's return in January in order to allow Mr. Le Lay the opportunity to review his decision to resign. There followed a number of written exchanges between the parties and these discussions culminated on 16 January 2015 when Mr. Le Lay re-affirmed his resignation by email in the following terms: "...My resignation as an employee of the department still stands, and I am happy for you to proceed with my resignation as stated in December 2014." In the same email, Mr. Le Lay also requested disclosure by the Respondent of emails, meeting notes and other correspondence. 9. On 22 January 2015 the Respondent wrote to Mr. Le Lay: "... Your resignation made on 16 December 2014 was not accepted and we refute all claims of constructive dismissal. We subsequently accepted your resignation with effect from 16 January 2015 on the basis that our employment relationship has irrevocably broken down and this gave us no alternative but to accept your resignation. In accordance with your terms and conditions, you are required to give 12 weeks' notice and this can be paid to you with effect from 16 January 2015 up to and including 9 April 2015. This will equate to your full rate of pay up to and including 27 February 2015 and thereafter at your half of your full rate of pay until 9 April 2015, the final payment being made at the end of April. Thank you for agreeing to provide a medical certificate up to and including 16

January 2015. Arrangements will be made also to pay you 8 days outstanding leave for 2104 and 6.89 days 2015 ... this will be paid in April at the end of your notice period.:

10. On 29 January 2015, the Advocate again wrote to the Respondent regarding Mr. Le Lay's resignation and stated: "I would not expect you to do anything other than refute all claims of constructive dismissal but a JET1 will be filed within the 8 week period commencing 16 January 2015 claiming the same." The Respondent submitted that this demonstrated that the Advocate was fully aware that there was an 8-week time limit within which Mr. Le Lay had to file the JET1. The Respondent also pointed to an email from Mr. Le Lay on 6 February 2015 in which he confirms that he was preparing a JET1 with his Advocate.
11. The parties exchanged further correspondence as to whether Mr. Le Lay should work his notice period. On 5 February 2015 and at the request of Mr. Le Lay, the Respondent sent a Subject Access Request form ("SAR") to Mr. Le Lay for him to complete. The covering email instructed Mr. Le Lay to return the completed form to "HR South Hill and not the Data Controller as indicated on the form." Mr. Le Lay did not complete the form until 9 April 2015, some two months later. Furthermore, contrary to instructions, he sent the document to the Data Controller. In cross-examination, Mr. Le Lay explained that he deliberately sent the document to the Data Controller because he did not trust the Human Resources Department to deal with his SAR correctly. He also confirmed that he was aware that Human Resources was obliged to respond to his SAR within 40 days of receipt and that he should have been in receipt of the relevant documentation by 19 May 2015.
12. On 2 June 2015, Mr. le Lay discovered that the Respondent had not received his SAR. He gave evidence that he made 'several' calls to locate the SAR but did not establish that it had been mislaid until 2 June 2015. The Respondent confirmed that it has a record of the conversation with Mr. Le Lay on 2 June 2015 but no records of any previous conversations with Mr. Le Lay. Article 76(2) – delay in submitting the JET1
13. Mr. Le Lay gave three reasons for the delay in submitting his JET1: a) He was advised by his Advocate that he could not complete and file his JET1 until he had received a response to his SAR; b) Both Mr. Le Lay and his Advocate were busy at this time and that there were 'other priorities' which stopped him being able to submit his JET1 within the time limit; and c) Mr. Le Lay was unwell at the time, was absent from work and was suffering from stress. He was not responding to the situation in the manner one would usually expect.
14. The Respondent submitted that Mr. Le Lay was legally represented throughout the period in question and that the Advocate should have known that pre-action discovery is not necessary to file a JET1. The Respondent also submitted that Mr. Le Lay's delay in filing his JET1 was due to his own errors (or those of his Advocate) and that the correspondence from both the Advocate and Mr. Le Lay demonstrated that they were each aware of the time-limit set down in the Law. The Respondent submitted that it was 'reasonably practicable' for Mr. Le Lay to submit his complaint within the allotted time-limit, no matter what the EDT.

CONCLUSION

15. In order for the Tribunal to accept a late application for constructive unfair dismissal under Article 76(2)(b) of the Law, an applicant must successfully persuade the Tribunal of both components of the two-stage test as set out in that Article. In this case, Mr. Le Lay must demonstrate: a) that it was not 'reasonably practicable' for him to submit his complaint to the Tribunal within the allotted 8-week time limit; and b) having satisfied the first limb of the test, that the complaint was filed within a 'reasonable period' in view of the circumstances which led to the late filing of the complaint.
16. The recent case of *De Heiden v States Employment Board* (JET 151/14) makes it clear that the Tribunal will only accept a submission that it was not 'reasonably practicable' for an applicant to file a complaint within the relevant time limits in the 'most exceptional or unforeseen circumstances.'
17. The Tribunal notes that both Mr. Le Lay and his Advocate expressed an intention to submit a SAR and make a complaint of constructive unfair dismissal in January 2015. Mr. Le Lay received the SAR for completion on 5 February 2015. He then chose not to submit the SAR for two months and failed to follow specific instructions to send the SAR to the Human Resources Department. This resulted in the document being mislaid. Furthermore, the Advocate should have known that pre-action discovery is not necessary to file a JET1 and should have advised his client to file his complaint as soon as possible after his resignation based upon the information to hand at the time.
18. Having considered all the evidence provided by Mr. Le Lay, it is apparent that there was nothing which prohibited Mr. Le Lay from filing his complaint for constructive unfair dismissal within the allotted time-limit. Mr. Le Lay's evidence strongly suggests that both he and his Advocate made the error of concentrating on other elements of Mr. Le Lay's claim and effectively put the Tribunal claim on the 'back burner'. It was this error which caused Mr. Le Lay to miss the deadline and not some 'exceptional or unforeseen circumstance'. Mr. Le Lay has therefore failed to pass the first element of the two-stage test under Article 76(2) (b) of the Law.
19. For these reasons, Mr. Le Lay's complaint of constructive unfair dismissal is **HEREBY STRUCK OUT**. Effective Date of Termination
20. The Tribunal heard extensive evidence and submissions regarding Mr. Le Lay's EDT. Its finding that Mr. Le Lay's claim should be struck out (even based upon his submission that his EDT was 9 April 2015) means that a finding on the EDT point is not strictly necessary. However the Tribunal believes it would be helpful to provide guidance on this issue.
21. Mr. Le Lay submitted that his EDT was 9 April 2015 on the grounds that the letter from the Respondent dated 22 January 2015 stated that he was to be paid in lieu of his notice pay up until 9 April 2015. a) The Respondent argued that Mr. Le Lay's EDT was the date upon which he resigned ie. 16 December 2014 and that an EDT can only be varied with the specific

agreement of both parties. No such agreement to vary took place. The Respondent further submitted that (a) the correspondence between the parties and, in particular, the letter of 17 December 2014, simply amounted to a ‘cooling off’ period which did not serve to change the EDT and (b) the correspondence relating to meetings and to Mr. Le Lay’s notice period had no effect on the fact that he resigned without notice on 16 December 2014 in response to an alleged breach of contract by the Respondent.

22. In the alternative, the Respondent submitted that the EDT was 16 January 2015 ie. the date on which Mr. Le Lay confirmed his resignation and the date from which the Respondent purported to accept Mr. Le Lay’s resignation.
23. Article 63 of the Law deals with how to identify the EDT and reflects the equivalent Section 97 of the Employment Rights Act 1996 in England and Wales: “63 Effective Date of termination
 - (1) Subject to the following provisions of this Article, in this Part and in Part 6A the “effective date of termination” -
 - (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his or her employer or by the employees, means the date on which the notice expires;
 - (4) Where
 - (a) the contract of employment is terminated by the employee;
 - (b) the material date does not fall during a period of notice given by the employer to terminate that contract; and
 - (c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by Article 56 to expire on a date later than the effective date of termination (as defined by paragraph (1)), for the purposes of Article 73 the later date shall be the effective date of termination.
 - (5) in paragraph (4) “the material date” means –
 - (a) the date when notice of termination was given by the employee; or
 - (b) where no notice was given, the date when the contract of employment was terminated by the employee.”
24. It is a well established principle that in circumstances where an employer dismisses an employee, that employee is entitled to be informed of, or at least have a reasonable opportunity of finding out about his dismissal before time starts to run in terms of filing a complaint of unfair dismissal. In the case of *Gisda Cyf v Barratt* [2010] UKSC 41, the Supreme Court found that where an employee is summarily dismissed by letter from an employer, the EDT is the date upon which the employee is informed of the dismissal or when the employee has had a reasonable opportunity of discovering that he or she has been dismissed.

However, as Advocate Gillies submitted, the purpose of the legislation is to protect an employee's rights. Therefore, when an employee chooses to resign in response to a repudiatory breach of contract, the Employment Appeals Tribunal has adopted a different approach to the question of an employee's communication of that decision and the EDT.

25. In the constructive unfair dismissal case of *Horwood v Lincolnshire County Council* UKEAT/0463/11, Mrs Horwood resigned in response to an alleged repudiatory breach of contract by her employer. She resigned by letter on the Friday and the letter was received and date stamped by the Respondent on the same day. On the following Monday, the letter was read by a manager and on the Tuesday, the Council responded to Mrs Horwood purporting to accept her resignation and stating that her EDT would take effect from the Tuesday. Mrs Horwood did not challenge this date and both parties proceeded on the basis that the Tuesday was the EDT. Mrs Horwood filed her complaint for constructive unfair dismissal out of time and submitted that her EDT was the Tuesday as confirmed in writing by the Council. The Employment Appeals Tribunal upheld the Employment Tribunal's decision that the EDT was the Friday. Mrs Horwood resigned with immediate effect and there was no variation to the EDT even though the Council had stated in writing that her resignation was to take effect from the Tuesday.
26. In *Secretary of State for Justice v Hibbert* UKEAT/0289/13/GE, the Employment Appeals Tribunal considered circumstances where the employer gave the employee time to review her decision to resign and then subsequently wrote to the employee purporting to accept her resignation. The Employment Appeals Tribunal found that the letter of resignation was an immediate resignation and that the EDT was unaffected by the employer suggesting that Mrs Hibbert review her decision; this was merely a 'cooling off' period and did not alter the EDT. Furthermore, it was not possible for either party to unilaterally alter an EDT by purporting to either accept or reject an employee's resignation. Once the resignation has been communicated to the employer, that resignation takes effect and the EDT is fixed to that date unless the two parties specifically agree to vary it. (*Willoughby v CFC Plc* [2011] EWCA Civ 115).

CONCLUSION

27. In view of the guidance provided by *Horwood* and *Hibbert*, the Tribunal makes the following findings with regards to the EDT: a) The relevant case law in this area is clear that a resignation by an employee can only be varied with the specific agreement of both parties. Such agreement did not take place in this case. Mr. Le Lay, through his Advocate, resigned in response to an alleged breach of contract on 16 December
2014. The resignation letter was clear and unambiguous that the resignation was without notice in response to an alleged repudiatory breach of contract. b) The Respondent's letter of 17 December 2014 which suggested that Mr. Le Lay review his decision amounted only to a 'cooling off' period as addressed in *Hibbert*. It did not 'undo' the words of resignation which had been communicated by Mr. Le Lay to the Respondent. c) The email from Mr. Le Lay on

16 January 2015 in which he confirmed his decision to resign was just that; a confirmation of a decision which had been conveyed to the Respondent at an earlier date ie. on 16 December 2014. d) The subsequent correspondence between the parties had no impact on the fact that Mr. Le Lay had already resigned from his position. Indeed, even the Respondent purporting to accept Mr. Le Lay's resignation had no effect in law; purporting to accept or reject an employee's resignation cannot alter the EDT. Similarly, the Respondent's letter of 22 January 2015 which notified Mr. Le Lay that his EDT was 16 January 2015 did not change the EDT from 16 December 2014. In view of the above, it is clear that once Mr. Le Lay had resigned by letter on 16 December 2014, the only means to change that EDT would have been through a specific agreement between the parties. There was no such agreement and as such, the Tribunal finds that Mr. Le Lay's EDT was 16 December 2014.

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Prepared on 22 October 2026 · Esheria