

JERSEY / JUDGMENT

Mr Rhees Evans v Gallichan Marine Limited

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

JUDGMENT

Reference: [2016] TRE042 Applicant: Mr Rhees Evans Respondent: Gallichan Marine Limited
Hearing Date: 13 July 2017 Before: Mrs Hilary Griffin, Chairman For the Applicant: In person THE
TRIBUNAL'S JUDGMENT 1. A hearing ("Hearing") was convened to consider the Applicant's
claims that the Respondent: a) constructively and unfairly dismissed the Applicant; b) failed to
make a payment in lieu of the Applicant's statutory notice entitlement; c) failed to pay wages to
the Applicant for January 2017; d) failed to pay to the Applicant 11.5 days' accrued but untaken
holiday pay from 2016; and e) failed to provide itemized pay statements to the Applicant (together
"Claims"). 2. No-one attended the Hearing on behalf of the Respondent. However, lawyers did file
a Response form on behalf of the Respondent. 3. The majority of the relevant documents were
destroyed in a fire at the Respondent's premises. I therefore only had copies of the pleadings, two
letters from the Applicant to the Respondent and the Applicant's signed witness statement. The
Applicant also provided evidence under oath.

Facts

4. Based on the evidence, I made the following findings of fact: a) the Applicant was employed
by the Respondent as a mechanic in its boatyard in St Aubin ("Boatyard"). b) the Applicant's
employment commenced on 1 April 2001 and terminated when he resigned without notice
on 27 January 2016. In its Response, the Respondent agreed that the Applicant's effective
date of termination was 27 January 2016. c) On 7 December 2015, the Boatyard and all of its
contents were destroyed in a fire. d) On 23 December 2015, the Respondent paid the
Applicant his normal monthly salary. e) On 30 December 2015, Mr Gallichan, who was the
sole director of the Respondent, passed away. f) In early January 2016, the Applicant
contacted the Company Secretary of the Respondent to ascertain what he should do and to
whom he should report. The Company Secretary was unable to help him but was aware that
the Applicant was an employee of the Respondent. g) On 14 January 2016, the Applicant
wrote to the Respondent at its registered office requesting "direction as to whom I should
now report" ("First Letter"). He confirmed receipt of his December salary and notified the
Respondent that his next salary payment was due on 26 January

2016. He sent copies of the First Letter to the shareholders whom he identified on the Jersey Financial Services Commission website. h) In its Response, the Respondent stated that the First Letter did not reach the relevant personnel within the shareholder company until 16 February 2016 due to a lack of identifying reference. The Respondent stated that the shareholder was not aware of the existence of an employee until it received the First Letter. i) The Applicant did not receive his monthly salary payment on 26 January 2016. On 27 January 2016, having received no salary and no response to the First Letter, the Applicant again wrote to the Respondent at the Registered Office ("Second Letter"). The Second Letter stated that he was resigning in response to the Respondent's failure to pay him his January salary. 5. In its Response, the Respondent stated that the First Letter did not reach the relevant personnel within the shareholder company until 16 February 2016 due to a lack of identifying reference. The Respondent stated that the shareholder was not aware of the existence of an employee until it received the First Letter. Similarly, the Respondent also stated that the Second Letter did not reach the relevant personnel within the shareholder company until 1 March 2016.

Conclusion

Constructive unfair dismissal

6. 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)).

7. I first considered whether, in failing to pay the Applicant his wages for January 2016, the Respondent was in breach of contract and, if so, whether that breach was fundamental, thus amounting to a repudiatory breach of contract. 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.

8. In considering the question of whether the Respondent committed a repudiatory breach of contract, I 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). Therefore the Respondent's submission that shareholders were not aware of the Applicant's existence until after his resignation is not relevant. In any event, I noted that the Company Secretary was aware of his existence from the beginning of January but failed to assist the Applicant.
9. In this case, the Applicant submitted that the Respondent's failure to pay him his salary on 26 January 2017 amounted to a repudiatory breach of contract.
10. 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. This is an unusual case in that the Applicant was not physically able to carry out his normal duties during January 2016 because his place of work had been destroyed. However the Respondent (which was legally represented when it submitted the Response) made no submission that the contract was frustrated by the fire and accepted that the Applicant remained as an employee until his resignation on 27 January 2016. The Applicant, having made himself available for work (as required under his contract of employment) was entitled to receive his monthly salary.
11. Based on the evidence, I was satisfied that the failure to pay the Applicant his wages in January 2016 did amount to a repudiatory breach of contract.
12. I am also satisfied that the Applicant:
 - a) resigned in response to the Respondent's repudiatory breach of contract; and
 - b) did not delay too long in terminating the contract; he resigned the following day.
13. I therefore concluded that the Applicant was constructively dismissed by the Respondent.
14. Having established that the Applicant was constructively dismissed, I was then obliged to consider the fairness or otherwise of the that dismissal in accordance with Article 64 of the Law. I considered whether, in accordance with Article 64(1)(a) of the Law, the principal reason for the Applicant's constructive dismissal fell within any of the five potentially fair reasons for dismissal.
15. The Respondent offered no argument in its Response form to suggest that the Applicant's dismissal fell within one of the five potentially fair reasons for dismissal.
16. I therefore concluded that the Applicant's dismissal was unfair in the circumstances.
17. The Applicant is therefore awarded £7,141.80 by way of compensation for unfair dismissal. Wrongful dismissal/notice pay

18. As set out above, the Applicant resigned in response to the Respondent's repudiatory breach of contract. The Respondent constructively dismissed the Applicant and, due to his length of service, the Applicant was entitled to receive 12 weeks statutory notice to terminate his employment. This was not given to the Applicant.
19. I am satisfied from the facts that the Applicant was entitled to receive payment in lieu of his 12 weeks' statutory notice.
20. The Respondent noted in its Response that the Applicant secured new employment shortly after his resignation. During his evidence, the Applicant confirmed that he secured new employment from 1 March 2016. The Applicant's new monthly salary was £1,789 per month. This amounted to £412.85 per week.
21. The Applicant is obliged to seek to mitigate his losses and to give credit for any earnings he received from elsewhere during what should have been his notice period. This is because if he did not have to give credit for such earnings, he would be in a better position than if the Respondent had complied with the contract and required the Applicant to work his notice (so that the Applicant would not have had the opportunity to earn elsewhere during the notice period).
22. Following his resignation, the Applicant remained unemployed for five weeks. He then secured new employment but on a lower salary for the same hours. Therefore, during the first five weeks of his notice period, the Applicant's losses were £595.15 per week and for the remaining seven weeks, the Applicant's losses were £182.30 per week. $5 \times £595.15 = £2,975.75$
 $7 \times £182.30 = £1,276.10$ Total = £4,251.85
23. The Applicant is awarded £4,251.85 by way of damages for wrongful dismissal. Unpaid wages
24. The Applicant claims for his wages for January 2016.
25. Based on the evidence, I am satisfied that the Respondent owes to the Applicant his wages for January 2016.
26. The Applicant is awarded £2,579 for unpaid wages. Unpaid holiday pay
27. The Applicant claimed for 11.5 days' holiday from the 2016 calendar year. However, during his evidence, he confirmed that he was not ordinarily entitled to carry over holiday entitlement from one calendar year to the next. He confirmed that he was always obliged to use all of his holiday entitlement before the end of the holiday year on 31 December.
28. I therefore concluded that he is not entitled to payment in lieu of untaken holiday entitlement for 2016, but is entitled to payment for the two days which he accrued in January 2017. The Applicant's daily pay was £119.03.
29. The Applicant is awarded £238.06 for unpaid holiday pay.

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30. The total award to be paid by the respondent to the Applicant amounts to £14,210.71
Summary of Award Compensation for unfair dismissal £7,141.80 Damages for wrongful
dismissal £4,251.85 Damages for unpaid wages £2,579.00 Damages for unpaid holiday pay
£238.06 TOTAL £14,210.71 Signed: Mrs Hilary Griffin, Chairman Dated: 14 July 2017
Judgment and Reasons sent to the parties on 14 July 2017 For the Tribunal Office
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Prepared on 26 October 2026 · Esheria