

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr Nigel Ogier
Represented by: Self Represented

RESPONDENT: MVS Ltd and Monarch Vulcanising Systems Ltd
Represented by: Advocate Jessica Roland

Witnesses:

Called by the Applicant:

Miss Fabienne Ogier
Mr John Pierre Bourgaize
Ms Chantal Marie Quinn

Called by the Respondent:

Mrs Toni Elderfield
Mrs Julie Mabel Rogers
Ms Elaine Hamilton Ruse

Decision of the Tribunal Hearing held on 14 June 2010

Tribunal Members: Mr Peter Woodward (Chairman)
Mr Andrew Vernon
Mrs Paula Brierley

DECISION

Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended, the Applicant had not submitted his complaint within the prescribed time limit and therefore this complaint is dismissed.

Mr Peter Woodward
.....
Signature of the Chairman

2 July 2010
.....
Date

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr Nigel Ogier represented himself and gave both oral and documentary evidence (EE1 refers).
- 1.2 The Applicant called the following witnesses:-
 - Fabienne Ogier
 - John Pierre Bourgaize
 - Chantal Marie Quinn
- 1.3 The Respondent, MVS Ltd and Monarch Vulcanising Systems Ltd, was represented by Advocate Jessica Roland; Mrs Toni Elderfield, Managing Director of the Respondent company, gave both oral and documentary evidence (ER1 & ER2 refer).
- 1.4 The Respondent called the following witnesses:-
 - Toni Elderfield
 - Julie Mabel Rogers
 - Elaine Hamilton Ruse
- 1.5 The Applicant asserted that he had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998 as amended.
- 1.6 The Respondent resisted the complaint, asserting that the Applicant had not been an employee and that even if this assertion was rejected then his formal complaint on Form ET1 had not been received until 5 February 2010. The Respondent would rely on Section 17 of the Employment Protection (Guernsey) (Amended) Law 2005 entitled "Time limit for presenting complaints" which states that the Tribunal shall not hear and determine a complaint under section 16(1) unless it is presented to the Secretary –
 - (a) within a period of three months beginning on -
 - (i) the effective date of termination
- 1.7 After initial submissions from both parties the Tribunal gained agreement that they would hear arguments from the parties on the "Time Limit" issue. For the purposes of these submissions it would be accepted hypothetically that the Applicant had been an employee. If the Tribunal found that the complaint had been presented in time then further hearings would be scheduled to consider whether the Applicant was an employee; and if so what were the substantive issues in his complaint. If the Tribunal found that the complaint had been submitted out of time then it would be dismissed.
- 1.8 The Respondent asserted that the Applicant was dismissed on 4 November 2009 and did not submit his ET1 until 5 February 2010, outside of the three month time limit. The Applicant was not relying on any issue of practicability in complying with the three month time limit. The Applicant claimed that his Effective Date of Termination (EDT) had been 20 November 2009, as this was the first possible date for him to open mail which confirmed he no longer had a contract with the Respondent.

2.0 Facts Found

- 2.1 Monarch Vulcanising Systems Ltd (MVS) based in Guernsey manufactures vulcanising equipment for the repair of tyres as well as equipment for rubber crawler and conveyor belt tracks. These products are sold into an international marketplace.
- 2.2 Mrs Elderfield is the principal shareholder of this company.
- 2.3 Mr Ogier agreed to join this enterprise in 2005 and worked with it until 2009, although in what contractual capacity is a contested issue.
- 2.4 Both parties agreed that any contractual agreement between them had been oral. Thus there was no written evidence available to confirm how any such relationship would be brought to an end and when.
- 2.5 A meeting took place between Toni Elderfield and Nigel Ogier on 30 October 2009 in the MVS Board Room.
- 2.6 At the end of this meeting Mr Ogier left the premises of MVS Ltd and did not return.
- 2.7 On 4 November 2009 Mrs Elderfield received an email from the Applicant (ER1 Tab 1 Attachment G refers). She responded to this letter on 5 November 2009 by way of letter post, registered post and by DHL Courier (EE1 Tab 3 refers).
- 2.8 On 24 November 2009, Mr Ogier sent a letter to the Respondent refuting that there had been any agreement between them that his “*employment*” would end on 4 November 2009 (EE1 Tab 5 refers).

3.0 Mrs Toni Elderfield

- 3.1 Mrs Elderfield read from a prepared witness statement (EE1 Tab 1 Refers).
- 3.2 Mrs Elderfield stated several times during her testimony that from the commencement of their contractual arrangement in 2005 that the Applicant had made clear his desire to retire when he reached the age of 60 and that it was his judgement that his agreed project would be completed by that time. The witness told the Tribunal that this project had a fixed purpose; she required business activities in the UK be run down and transferred to Guernsey. A detailed list of the project tasks can be found in paragraph 21 of her witness statement.
- 3.3 The witness stated she had desired a written agreement should exist between them however, due to long-standing friendship with the Applicant and his “adamant” insistence that this was not required, this issue was not pursued.
- 3.4 Mrs Elderfield asserted it was known generally within the company that the contract with the Applicant would expire when he reached his 60th birthday.
- 3.5 In the summer of 2008, the Respondent became increasingly concerned that the project would not be completed before the expiry of the verbal agreement. It seemed to the Respondent that the Applicant was “dragging his feet” and appeared to have no intention of finishing the project within the agreed time frame. In response to these concerns he told her that she should not be concerned and that the project would be completed before the end of their verbal agreement i.e. by his 60th birthday.

- 3.6 The witness stated she had a clear recollection that, during the summer of 2009, she had suggested to the Applicant that they could make a new agreement once the present arrangement expired and that this new agreement might involve doing some research and development work.
- 3.7 On 20 October 2009, Mrs Elderfield realised whilst in conversation with the Applicant that his birthday would fall on November 4. As it was her intention that any new agreement would be in writing she determined that a meeting must take place before that date.
- 3.8 Mrs Elderfield convened a meeting with the Applicant on 30 October 2009. During this meeting Mrs Elderfield alleged that she told the Applicant that the verbal agreement was ended and that he should hand over his works keys to her. The Applicant strongly resisted these arguments and questioned whether the company could continue to run successfully without him. Mrs Elderfield responded by telling the Applicant that she could no longer afford to pay for his services and that the agreement must end. Mr Ogier became very agitated and shouted at her; however she was insistent that the arrangement was at an end. The Applicant made some counter proposals none of which were satisfactory to the Respondent. After extensive discussions the Applicant finally left the meeting and the premises. (ER1 Tab 1 Attachment F refers). He was also required to leave his office keys with the Respondent.
- 3.9 Mrs Elderfield made a file note of the 30 October meeting. (ER1 Tab 1 Attachment F refers).
- 3.10 The witness informed the Tribunal that such was her concern following this meeting that she decided to sleep in the office overnight and to have the locks to the premises changed the following day.
- 3.11 The witness was challenged by the Tribunal as to the clarity of the language which she used during this meeting. She responded by stating she had used the term “this contract has ended” and that in her opinion the Applicant could have had no doubt that their contractual arrangement had come to an end with immediate effect. In her evidence she stated she had been so concerned by the Applicant's litigious nature and her concern he might press for further payments that she had been extremely clear in conveying this message.
- 3.12 The email sent by the Applicant on 4 November (ER1 Tab 1 Attachment G refers) asserted that his status within the company remained unchanged and that he would wish to suggest a future way forward after he returned from his vacation.
- 3.13 Mrs Elderfield responded to this email by letter post the following day, 5 November 2009 (EE1 Tab 3 refers). In this letter she stated that it was made clear to the Applicant on 30 October 2009 that the verbal consultancy agreement ended on 4 November 2009; she added that he had been told that there was no agreement in place after that date and also she had informed him that he no longer held any position in the company.
- 3.14 Mr Ogier responded to the letter of 5 November 2009 with his own letter of 24 November 2009 with a detailed refutation of the Respondent's assertions; denying that there had been any agreement between them that his contractual arrangements should cease on 4 November 2009.

4.0 Mrs Julie Mabel Rogers

- 4.1 The witness, who is the Customer Care Manager of MVS Ltd, read from a prepared witness statement (EE1 Tab 4 refers including Attachment A, pages 182 to 184).

- 4.2 The witness stated that on 30 October she had been in attendance at the MVS office and had been seated at a desk just outside the Board Room.
- 4.3 The witness informed the Tribunal that there was only a glass partition between herself and the Board Room and given lack of sound proofing it was possible to hear conversations being conducted in that room.
- 4.4 Mrs Elderfield and Mr Ogier met in the Board Room that morning and it was the recollection of the witness that Mrs Elderfield told the Applicant that his current contract was over and that he should send her proposals for a new contract. Mrs Elderfield also told the Applicant that he should take some days off prior to vacation on 6 November to consider his new proposals.
- 4.5 Under cross examination the witness could not recall how the Applicant responded other than he did so in a loud voice.
- 4.6 The witness was also challenged as to her recollection of the time taken for this meeting and agreed that she might have over-estimated the length of the meeting; she agreed it was possible that the Applicant might well have left considerably before 1pm and not as written in her witness statement.

5.0 Ms Elaine Hamilton Ruse

- 5.1 The witness, who is the Finance Manager of MVS Ltd, read from a prepared witness (EE1 Tab 2 refers).
- 5.2 The witness confirmed with the aid of Attachment A of Tab 2 EE1 that the Applicant had been paid up to 4 November 2009. These payments being mandated by her employer, Mrs Toni Elderfield.
- 5.3 The witness confirmed that no further payments were made to the Applicant as she understood from Mrs Elderfield that this was the agreed end of contract date. This agreement being between Mrs Elderfield and the Applicant.
- 5.4 In response to a question the witness stated her belief that there was no written record of any contractual arrangements between Mrs Elderfield and the Applicant. To the best of her belief there was an oral agreement that the Applicant provided consulting services and was not party to a contract of employment.

6.0 Mr Nigel Ogier

- 6.1 The Applicant stated his firm conviction that in law his contract with the Respondent could not be ended other than by written confirmation and with reference to the first date on which he reasonably could have been assumed to have read it.
- 6.2 The letters sent to him on 5 November by Mrs Elderfield, including the courier delivered letter via DHL, did not arrive at his house until after he left for vacation on 6 November 2009. Evidence of his flight plan was submitted (EE1 Tab 2 refers) as confirmation of this assertion. Thus it was impossible for him to read this letter until 20 November 2009 and as such this should be the date on which any contractual arrangements he had with the Respondent should be deemed to have ended. He had several witnesses who could confirm that he had no possibility to see these letters until 20 November.

- 6.3 Whilst Mr Ogier had entered the date 4 November 2009 as his EDT on his ET1 complaint form, he held that he had entered this date as it was his last paid day, however it was not the last day of his contractual agreement with the Respondent.
- 6.4 Mr Ogier adamantly denied that there had been any discussion or agreement with the Respondent as to his retirement from the company on his sixtieth birthday.
- 6.5 It was denied that he shouted at Mrs Elderfield during the meeting on 30 October 2009, although he conceded he did have a “penetrating voice”. It was his belief that he was calm during that meeting.
- 6.6 Mr Ogier accepted that he had left his office keys with the Respondent on 30 October 2009, however he had only agreed to this request as Mrs Elderfield had told him she wished to have access to personal jewellery in the company safe and she had not brought her own keys with her.
- 6.7 Mr Ogier was cross examined on the contents of his letter of 24 November 2009. The letter contained the following text:- *“You made it very clear, at the 30th October 2009 meeting, that your main reason for ending my employment was, in fact, that you needed the value of my monthly pay to assist in covering the anticipated repayments.....”* Mr Ogier stated that the Tribunal should take account of the punctuation as it could still support his assertion that the Respondent did not communicate with any clarity such a message during that meeting of 30 October 2009, rather that this communication of the ending of the contractual relationship was contained in the letter of 5 November 2009.
- 6.8 The letter sent by the Applicant on 24 November 2009 (EE1 Tab 5 refers) included nine specific points which the Applicant claimed should illustrate that there had been no prior verbal agreement between him and the Respondent that the contractual arrangement between them should cease on his sixtieth birthday.
- 6.9 Mr Ogier did not deny that Dominique Ogier had signed for the DHL couriered letter of 5 November 2009 (ER2 refers); however this document had no indication of date / time of delivery.

7.0 Fabienne Ogier

- 7.1 The witness, who is a daughter of the Applicant, and lives at the same address as the Applicant, read from a prepared witness statement (EE1 tab 4 refers).
- 7.2 Miss Ogier stated that letter post addressed to her father, and received between 6 November 2009 and 19 November 2009, including a DHL package, remained unopened until the Applicant returned from his vacation on 20 November 2009.
- 7.3 In response to a question the witness stated she had no knowledge of any pre-agreed commitment by her father to retire on his sixtieth birthday and believed he would have discussed it with her if this had been his intention.
- 7.4 The witness agreed that the signature on the DHL tracking document, which confirmed receipt of the DHL package at the Applicant’s address, was signed for by her sister Dominique (ER2 refers). She had no idea as to when her sister would have signed for the document.

8.0 John Pierre Bourgaize

- 8.1 The witness, who is resident at the Applicant's home address read from a prepared witness statement (EE1 tab 23 refers).
- 8.2 The witness corroborated the statement of Fabienne Ogier. He agreed that post addressed to the Applicant, and received on 6 November 2009 and up to 19 November 2009, including a DHL package, remained unopened until the Applicant returned from his vacation on 20 November 2009.
- 8.3 In response to a question the witness stated he had no knowledge of any pre-agreed commitment by the Applicant to retire on his sixtieth birthday.

9.0 Chantal Marie Quinn

- 9.1 The witness, who is a daughter of the Applicant, read from a prepared witness statement (EE1 tab 21 refers).
- 9.2 The witness stated that on the evening of 6 November 2009 she visited her father's home and noted that post addressed to her father, and received on 6 November 2009, including a DHL package, had not been opened and thus there would have been no opportunity for the Applicant to read this mail until he returned from his vacation on 20 November 2009.
- 9.3 In response to a question the witness stated she had no knowledge of any pre-agreed commitment by her father to retire on his sixtieth birthday and believed he would have discussed it with her if this had been his intention.
- 9.4 The witness agreed that the signature on the DHL tracking document, which confirmed receipt of the DHL package at the Applicant's address (ER2 refers), was signed for by her sister Dominique. She had no idea as to when her sister would have signed for the document.

10.0 The Law

- 10.1 The Tribunal considered the complaint under The Employment Protection (Guernsey) Law, 1998, as amended.
- 10.2 Section 17 of the Law states that a Tribunal shall not hear and determine a complaint unless it is presented to the Secretary of the Tribunal within three months of the Effective Date of Termination (EDT).
- 10.3 The Tribunal may exercise discretion as to this time limit where it was not reasonably practicable for the complaint to be delivered in the three month time limit.
- 10.4 The Employment Protection (Guernsey) Law, 1998, as amended does not require a written communication from an employer to an employee to indicate that an employment contract has come to an end. However, it is clearly good practice for such a communication to be in writing and to have clarity of expression.

11.0 Conclusions

- 11.1 The Tribunal noted that with this complaint there was a total absence of any written contractual agreements as to how the contractual relationship could be ended and by whom.

- 11.2 The Tribunal also noted that a letter of dismissal was not issued contemporaneously on 30 October 2009; no written confirmation of the ending of contract was sent by the Respondent until 5 November 2009. Further, given the Applicant left the island for a vacation on 6 November, there is no conclusive evidence that he could have read this communication until 20 November 2009. The Tribunal would have been sympathetic to the argument that the alleged dismissal had taken place on 20 November if there had been ambiguity as to the verbal communication on 30 October 2009 between the Respondent and the Applicant. In consequence, the Tribunal gave considerable attention to the language allegedly used by the Respondent during this meeting. The Tribunal also took significant account of the Respondent's subsequent confirmatory letter of 5 November 2009 and the detailed written response to this by the Applicant on 24 November 2009.
- 11.3 The Tribunal was persuaded that Mrs Elderfield did use the expression that the Applicant's contract was ended during the meeting of 30 October 2009 and used unambiguous language in communicating this. This was restated in her letter of 5 November 2009, which expressed again in unambiguous terms that during the meeting of 30 October she had made it clear to the Applicant that his contract ended with effect from 4 November 2009 and that he held no further position in her company after that date.
- 11.4 Mr Ogier in his letter dated 24 November 2009 (EE1 Tab 5 refers) made very direct reference to the verbal ending of his contract on 30 October 2009. The Tribunal finds little merit in the arguments of the Applicant that another interpretation of his letter should be allowed by considering the punctuation. The Tribunal considers that his written response should be taken at its face value.
- 11.5 It was also noted by the Tribunal that in this letter of 24 November 2009 Mr Ogier did not respond to Mrs Elderfield regarding the possibility of exploring a new agreement, as invited in her letter of 5 November (EE1 Tab3 refers). It seemed to the Tribunal that Mr Ogier was solely intent on establishing that he should receive further recompense for this rupture of contract in the form of payments in Lieu of Notice and for accrued Holiday Pay.
- 11.6 Whether there had been an oral prior agreement between the parties as to the Applicant's retirement on his sixtieth birthday had little weight in determining this complaint. Whatever was agreed, or not agreed, prior to 30 October 2009, it did not have any significance once Mrs Elderfield had made it clear, in unambiguous terms, on 30 October 2009 that whatever contract they had between them had no further existence after 4 November 2009.
- 11.7 The Tribunal placed some additional weight on the fact that Mr Ogier, even after time to reflect and to complete his ET1, still considered his termination date to be 4 November 2009; which he stated on the ET1.
- 11.8 The Tribunal noted that the Applicant referred to the ending of his payments on 4 November as the ending of a contract; and expressed this as a fact when giving evidence.
- 11.9 The Tribunal has concluded that Mrs Elderfield had the power and authority to bring whatever contract she had with Mr Ogier to an end on 4 November 2009. His acceptance or non acceptance of this decision had no bearing on the fact that the contract was ended on 4 November 2009.
- 11.10 It was not contested that the ET1 was signed and delivered to the Secretary to the Tribunal at Commerce & Employment on 5th February 2010. This date being outside of the 3 month allowed time limit when calculated from a 4 November 2009 EDT.

- 11.11 No arguments were offered by the Applicant as to the practicability of complying with the three month time limit with reference to an EDT of 4 November.
- 11.12 The Tribunal was persuaded that the EDT, if it had been a contract of employment between the parties, was 4 November 2009; and consequently the Tribunal has concluded that this complaint was out of time when it was delivered to the Secretary to the Tribunal on 5 February 2010.

12.0 Decision

- 12.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of The Employment Protection (Guernsey) Law, 1998 as amended, the Applicant had not submitted his complaint with the prescribed time limit and therefore this complaint is dismissed.

Mr Peter Woodward
Signature of the Chairman

2 July 2010
Date