

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Mr James Harvey

Tribunal Panel Member: Mrs J de Garis

Hearing date(s): Monday, 15 December 2014

Decision of the Tribunal

The Applicant sought to have a complaint of unfair dismissal, submitted outside of the prescribed time limit, allowed in.

Having considered all the evidence presented and having due regard to all the circumstances, the Tribunal Panel Member found that, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant has shown that it was not reasonably practicable to submit the claim within the prescribed time limit. The complaint is therefore allowed.

Mrs Joanne de Garis
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Tribunal Panel Member

28 January 2015
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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 Legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended (the 'Law')

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mr James Harvey, submitted an ET1 unfair dismissal complaint, which was received on 29 September 2014, listing his last date of employment as 9 March 2014.

1.2 The complaint was considered under The Employment Protection (Guernsey) Law 1998, as amended. Section 17 (1) of the Law, entitled 'Time Limit for Presenting Complaints', states that:

'The Tribunal shall not hear and determine a complaint under section 16 (1) unless it is presented to the Secretary

- (a) within three months beginning on
(i) the effective date of termination...'

The Tribunal may, on the application of the Complainant presented to the Secretary, allow in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the said period of three months.

1.3 The complaint was submitted outside this time limit and, in accordance with procedure, was rejected by the Secretary to the Employment and Discrimination Tribunal.

1.4 The Complainant made an application that the claim be allowed in and was given options to progress through a hearing or by written representation. He chose to proceed on the basis of a paper review.

1.5 I was appointed as a single Panel member to review the papers. Dates were set for their exchange and my formal consideration of this issue.

1.6 The Respondent, Vista Hotels Limited, appointed a legal representative, Ms Carly Parrott, Senior Associate, Mourant Ozannes, several days before the agreed date for the exchange of papers. Ms Parrott requested an extension to the date for submission of papers and their exchange between parties.

1.7 There were unusual practical circumstances in that the Applicant was serving a prison sentence which may subsequently have extended the communication process. In view of this situation, together with the late introduction of a legal representative by one party; the declared potential for witness statements by the Respondent in a matter to be decided by written representation; and to afford adequate time for both parties to consider the submissions and respond if they so wished, the date set aside for the formal consideration of the issue was put back seven working days.

- 1.8 The documents considered were: the Applicant's ET1 with two additional letters outlining the grounds for the application (labelled A1); his further submissions labelled A2, A3 and A4; and submissions R1, R2 and R3 from the Respondent.
- 1.9 The sole issue to be determined was whether further time should be allowed for this complaint to be presented where the Applicant could show that it was not reasonably practicable for the complaint to be presented within the said period of three months.
- 1.10 This matter will be determined on 'the balance of probabilities' and not 'beyond all reasonable doubt' having considered all submitted evidential material, whether specifically referenced or not.
- 1.11 The very limited territory within the Law that applies on this occasion provides discretion as to the time limit, where it was not reasonably practicable for the complaint to be made within the three month time limit beginning on the effective date of termination (EDT).
- 1.12 The effective date of termination as registered by the Applicant in his ET1 is 9 March 2014, the date he was placed on remand for alleged assault.
- 1.13 The Respondent asserts that the EDT is 29 March 2014.
- 1.14 It is generally accepted that the EDT is the date on which the termination of an employee's employment is communicated by an employer to an employee, or where the employee has had reasonable chance of finding out that he/she has been dismissed. Such notification can be oral or in writing.

2.0 Facts Found

- 2.1 The Applicant was employed by Vista Hotels Limited at Fermain Valley Hotel from 6 February 2013.
- 2.2 The Applicant was arrested on 9 March 2014.
- 2.3 The Applicant was remanded in custody and was sentenced by the Court on 28 March 2014, having pled guilty to six charges of assault and one of criminal damage to property.
- 2.4 The Applicant was sentenced to 18 months imprisonment.
- 2.5 The Applicant filed his complaint for unfair dismissal on 29 September 2014. This is six months after the Respondent's asserted EDT of 29 March 2014.
- 2.6 In written evidence, the Respondent states it took advice from the Commerce and Employment Department to delay making any decision in relation to the termination of the Applicant's employment until such time as his case had been determined.
- 2.7 Upon notification of the Applicant's sentencing, the Respondent determined that he would be dismissed and its HR Manager prepared a letter advising the Applicant of his summary dismissal (R1 refers).

- 2.8 In his written statement the Respondent's Commercial Manager stated the HR Manager had arranged for the letter to be sent to the Applicant at Guernsey Prison through the Hotel's usual mail handling processes.
- 2.9 The Respondent cannot provide a copy of the letter, believed to be dated 28 March 2014.
- 2.10 Guernsey Prison records all incoming and outgoing communication with prisoners. There is no record of incoming post from the Respondent for the Applicant on or around 29 March 2014.
- 2.11 The Guernsey Prison correspondence record shows the first correspondence from the Respondent to the Applicant was recorded as received on 9 July 2014.
- 2.12 The Respondent did not submit evidence of follow-up steps to confirm receipt of the letter or to manage the personal issues this situation generated, such as issuing a final pay-slip, the management of his mail or the removal and disposal/retention of the Applicant's belongings from his place of work and accommodation which was provided in part by the Respondent.
- 2.13 The HR Manager left the Respondent's employment and the new HR Manager responded to the Applicant's correspondence dated from 1 July 2014.
- 2.14 The Applicant wrote to the Respondent on 1 July 2014 (addressed to the former HR Manager) regarding arrangements for his belongings and mail and seeking a copy of his last pay-slip.
- 2.15 The Respondent (the new HR Manager) replied on 8 July 2014 addressing each question and enclosing what she described as the Applicant's final pay-slip.
- 2.16 The Applicant wrote a further letter on 19 July 2014 expressing concern that his personal belongings had been given away. No response from the Respondent was presented in evidence.
- 2.17 The Applicant wrote to the Respondent on 12 August 2014 seeking confirmation of the date when his property was given away ; the date and reason for his dismissal; an explanation of his final month's salary including deductions made; information on pay arrangements and copies of previous pay-slips from November 2013.
- 2.18 The Respondent replied by letter dated 4 September 2014 giving different information regarding the whereabouts of the Applicant's belongings and answering the questions posed, enclosing pay-slips from November 2013 - March 2014.

3.0 Summary arguments

- 3.1 The Respondent considers the effective date of termination to be 29 March 2014, the date on which it believes the Applicant's termination of employment was, or reasonably ought to have been, communicated to him by means of its letter dated 28 March 2014 as recalled by the Commercial Manager in his written statement.

- 3.2 The Respondent points to other communications from the Applicant that it suggests are consistent with the Applicant being aware that he was no longer employed by the Respondent:
- 3.2.1 The Applicant's request to forward mail from his previous home address to his mother, letter dated 1 July 2014.
 - 3.2.2 The Applicant's request for his last pay-slip, letter dated 1 July 2014.
 - 3.2.3 The Applicant's enquiries and concerns regarding arrangements being made in respect of his personal belongings, letters dated 1 and 19 July 2014.
- 3.3 The Respondent asserts that the fact the Applicant made a specific request in the letter dated 12 August 2014 for further details regarding his dismissal unequivocally demonstrated that he already knew that he had been dismissed. It further asserts that it is relevant that shortly after receiving the details of his dismissal in the letter of 4 September 2014, the Applicant initiated his complaint of unfair dismissal.
- 3.4 The Respondent highlighted confusion regarding dates of communication presented by the Applicant. The Applicant refers in his ET1 to a letter from the Respondent dated 12 August 2014; I note from the papers that this is the date of the Applicant's own letter to the Respondent. The Respondent replied by letter dated 4 September 2014.
- 3.5 The Applicant asserts that it would have been reasonable for him to expect to be made aware directly by his employer that his employment had been terminated rather than to rely on informal information, such as that he might have received from work colleagues.
- 3.6 The Applicant's prison correspondence record, maintained by Guernsey Prison, shows no receipt of inward correspondence from his employer at the date indicated by the employer; 29 March 2014.
- 3.7 Neither party submitted a copy of this letter dated 28 March 2014 which the Respondent asserts confirmed dismissal.
- 3.8 It was after receiving the Respondent's letter of 8 July 2014 enclosing what it called his 'final pay-slip' that the Applicant wrote on 12 August 2014 seeking further clarification of dismissal.
- 3.9 The response from the Respondent was received by letter dated 4 September 2014.

4.0 Conclusion

- 4.1 The complaint had been submitted outside the three month time limit as declared on the ET1 and, in accordance with procedure, was rejected by the Secretary to the Employment and Discrimination Tribunal.
- 4.2 The very limited territory within the Law that applies on this occasion provides discretion as to the time limit where it was not reasonably practicable for the complaint to be presented within the three month time limit beginning on the effective date of termination.

- 4.3 The leading authority on the interpretation of EDT is the UK case of 'Brown v Southall and Knight' (1980) where it was held that 'the termination does not take effect until the employee has either been told of, or has reasonable opportunity of reading, the notice of dismissal'. The date on which the termination takes effect is either the date when he reads of the dismissal or the date when he reasonably had the opportunity of knowing about it.
- 4.4 I am therefore required initially to determine from the evidential material submitted by both parties, at what point the Applicant was either informed of his dismissal or had reasonable opportunity to have been informed of his dismissal.
- 4.5 The Respondent stated that a termination letter dated 28 March 2014 was posted, in the usual manner for the Hotel, to the Applicant at Guernsey Prison but cannot provide a copy.
- 4.6 Guernsey Prison logs all prisoner correspondence and there is no entry in the Applicant's record on or around 29 March 2014 of correspondence from the Respondent.
- 4.7 It would be a reasonable expectation that an employer with HR professionals managing workforce matters, in facing this unusual situation, would take reasonable actions to ensure the employee received notification of his dismissal. No such actions were presented in evidence. Neither is there evidential material to confirm any follow-up by the Respondent to the termination letter dated 28 March 2014, which was despatched in normal post.
- 4.8 From the evidence presented I am persuaded that there was no formal communication from the Respondent received by the Applicant between 9 March 2014 and 8 July 2014, when the Respondent replied to the Applicant's letter dated 1 July 2014. The available evidence shows that there is only absolute clarity on the Applicant's employment situation after his receipt of the Respondent's letter dated 4 September 2014. It was therefore not reasonably practicable for the Applicant to have made his complaint within the three month time limit allowed in Law because of the apparent late formal notification of dismissal.
- 4.9 The complaint is therefore allowed in.

Mrs Joanne de Garis

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Tribunal Panel Member

28 January 2015

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Date