

IN THE INDUSTRIAL TRIBUNAL

Case No. 20/2004

BETWEEN

JUAN JOSE AVILA BORGES

Complainant

v.

PCG GROUP (OVERSEAS) LIMITED

Respondent

INDUSTRIAL TRIBUNAL
- 2 NOV 2005
RECEIVED TODAY

JUDGMENT

No appearance by or on behalf of the Complainant

Mark Isola Esq for the Respondent

1. On 22nd October 2004 the Complainant, Juan Jose Avila Borges, filed an Originating Application with this Tribunal complaining that he had been unfairly dismissed. He alleged that the dismissal was unfair because the absence from work which triggered it was the result of an injury sustained at work, standard procedure was not followed, no attempts at conciliation were made and no alternative employment offered. In his Originating Application he said that, although the Notice of Termination was dated 16th July 2004 and (according to him) was stated to expire on 23rd July 2004, the termination was not effective until 8th August 2004 because that was the first time he was told he was being dismissed.

2. Clearly the Originating Application on its face raised a potential limitation issue since, if the Notice of Termination is taken at its face, the complaint would be out of time. If, on the other hand, it was true the Complainant did not learn of his dismissal till 8th August, it would not be.

3. The Respondent's Notice of Appearance dated 9th November 2004 stated that the claim would be resisted on the grounds that the Complainant was fairly and reasonably dismissed in all the circumstances.
4. A request for further information from the Respondent followed. In response to the questions as to who informed the Complainant of his dismissal, and where and when he was so informed, the Complainant, through his then solicitors, Charles A Gomez & Co replied that he had been told of his dismissal by an employee of the Respondent called Anna at the Respondent's offices at Waterport on 9th August 2004 when he had returned to work from sick leave followed by a 2 week holiday. He added that this lady, Anna, had handed him the letter of dismissal dated 16th July 2004 and that she, with the help of a lady accountant employed by the Respondent, explained to the Complainant that the letter was a letter of dismissal.
5. That letter is dated 16th July 2004 and reads as follows:

"NN/NDC/189

16th July 2004

TERMINATION

Dear Juan Jose Avila Borges, employee 189,

We would like to inform you that your contract of employment with our company will be terminated as from today, Friday the 16th of July 2004.

We have noticed that you have been absent from work for unknown reason on several occasions.

As a permanent employee of our company, you have to always notify the company for any absence from work during the first day of your absence, whether it is for one day or more.

As a reminder the three acceptable reasons for absence are the following:

- 1) To be on sick leave (Doctor's certificate always necessary to be submitted to the company the 1st day of absence).*
- 2) To be on injury leave (Doctor's certificate always necessary to be submitted to the company on the first day of absence. In addition, the site engineer has to confirm that the injury took place during working hours).*
- 3) To be on annual leave (leave request form should be filled and approved before absence).*

You are asked to contact our head office on Friday 23rd July for your papers and last salary.

Signed

(Did not want to sign)

*Nicos Nikita
Project Engineer*

*Juan Jose Avila Borges
Employee 189"*

6. At a directions hearing on 24th June 2005, the Respondent's solicitors informed the Tribunal that they would be taking a preliminary objection to the effect that the complaint was out of time. The Complainant was at the time still represented by Charles A Gomez & Co.
7. On that day, directions were given provisionally fixing the substantive hearing for a date in November 2005. It was also ordered that day that the hearing of the Respondent's preliminary objection would take place on 26th September 2005.
8. On 15th July 2005, Charles A Gomez & Co informed the Respondent's solicitors that they were no longer acting for the

Complainant and that he had intimated to them that he would be seeking alternative legal representation.

9. On 23rd August 2005, Charles A Gomez & Co similarly informed the Tribunal.
10. On the date fixed for the preliminary hearing, that is, 26th September 2005, the Complainant did not appear either personally or through a representative.
11. The Respondent, on the other hand, appeared with its witnesses and invited me to hear its objection there and then.
12. Because the Tribunal was aware that the Complainant was no longer represented by Charles A Gomez & Co and in order to give him the benefit of the doubt for not appearing that day, I decided to give the Complainant a further and final opportunity to appear at the hearing of this preliminary objection.
13. I therefore asked the Secretary to write to the Complainant (which she did) as follows:

*“Our ref:
Your ref: IND TRI 20/2004*

26 September 2005

*Mr J J Avila Borges
Paseo De La Habana 23 BD
La Linea
Cadiz Spain*

Dear Mr Avila Borges

Re: Juan Jose Avila Borges v PCG Group (Overseas) Ltd

You failed to attend before the Industrial Tribunal at 10.00 am today when, the Respondent’s application to dismiss your complaint as being out of time, was due to be heard.

Because Charles A Gomez & Co are no longer representing you, the Tribunal has decided to postpone the hearing of the Respondent's application to dismiss until 10.00 am on Wednesday 12 October 2005 in order to give you a further and final opportunity to respond to it.

Please note that if you do not appear on Wednesday 12 October 2005 at 10.00 am, the Tribunal may dismiss your entire case on that day.

Yours Sincerely

*Dianne Savignon
Secretary
Industrial Tribunal''*

14. The Secretary herself posted that letter to the Complainant in La Linea on 29th September 2005.
15. On 3rd October 2005, the Secretary telephoned the Complainant on the Spanish telephone number he had given in his Originating Application. The Complainant confirmed having received the Tribunal's letter dated 26th September 2005 and the Secretary fully explained its contents to him. The Secretary has today informed the Tribunal that during that telephone conversation, the Complainant stated that he would not be attending today's hearing, nor would he be retaining the services of another representative. Further, that he understood that his case may be dismissed at today's hearing and asked to be informed of its outcome.
16. At today's hearing, the Complainant did not appear either personally or through any representative.
17. Mr Isola appeared for the Respondent and produced witness statements from the following employees of the Respondent.
 - (i) Nikitos Nikita, a site engineer employed by the Respondent.

(ii) Antigoni Agathokleous, the Respondent's Main Office Secretary; and

(iii) Panikos Faltas, the Respondent's Main Office Accountant.

18. Mr Nikita's Witness Statement is short and reads as follows:

1. *I am the Site Engineer for PCG Group Limited of the Old Naafi Store Complex, Waterport, Gibraltar.*
2. *A number of sick notes had been handed in by the Complainant to me covering the period up to and including the Friday 9th July 2004. These are attached as exhibit "NN1".*
3. *I was expecting the Complainant to return to work on Monday 12th July 2004. He did not do so, nor did I receive a telephone call from him or anyone else informing me of the reason for his continued absence.*
4. *By Friday the 16th July 2004, I had not heard from him for four days and I asked Administration to prepare a letter of dismissal addressed to the Complainant and which they did. I signed it on the 16th July 2004. This is attached as exhibit "NN2". It informs the Complainant that his contract of employment is terminated from the 16th July 2004 and that he is asked to contact the Head Office on Friday 23rd July 2004 for his papers and last salary. The Complainant was not at work on the day I signed that letter.*
5. *On Monday 19th July 2004 he came to see me with another sick note for the period 12th July 2004 to the 23rd July 2004. I told him that the sick note was not valid, would not be accepted by the Company and that on the 16th July 2004 his contract had been terminated. I explained to him the reasons why it had been terminated and which are referred to in the letter of the 16th July 2004 to him. I signed the sick note he handed in on that day with the words "not accepted" and inserted the date as 19th July 2004 meaning the date I had received the sick note and placed my initials next to it. I asked him to go to the main office at Waterport to collect his termination letter. At the time I spoke to him I was at the site office at Europa Point and the Main Office was at Waterport. He informed me that I was not entitled to terminate his contract of employment because he was sick. He was fully aware after speaking to that the Company had dismissed him.*

Dated this 23rd day of September 2005

Signed.....

*Nikos Nikita
Site Engineer"*

19. Ms Agathokleous's Witness Statement is similarly short and reads as follows:

- “1. *I am the Main Office Secretary for PCG Group Limited.*
2. *On the 16th July 2004 I was asked by Nikos Nikita, the Site Engineer, to prepare a letter of dismissal to hand to the Complainant together with a Termination of Employment form for filing with the Employment Service. As the Complainant did not attend the offices on Friday 16th July 2004, I did not hand him these documents on that day.*
3. *On Monday 19th July 2004 he attended at the Main Office and I personally handed him the letter dated the 16th July 2004 together with the Employment Service Notice of Termination which are exhibited and attached hereto as “AA1”. The Complainant refused to sign for either of these documents but he did receive them on Monday 19th July 2004. I personally handed them over to him and explained to him in Spanish what they referred to. He became very argumentative, arguing that we could not terminate his contract of employment on these grounds. He knew he had been dismissed but was challenging the Company's right to do so on the grounds I had explained. I asked the other Main Office Secretary Ms Anna Rocca, to explain to him again that his contract of employment had been terminated, and the reasons, namely that he had not produced a medical certificate for the period after the 16th July 2004 and that his contract had therefore been terminated. My understanding of the Spanish language is good, and whilst I am and was fully satisfied that I had communicated to the Complainant the fact that his contract had been terminated and the reasons why, I wanted to be satisfied given his argumentative state of mind, that this was very clear to him by asked Ms. Rocca whose spoken Spanish is better than mine. I also wanted him to sign the Employment Service Notice of Termination form and letter dated 16th July. He was speaking very quickly, was very angry, refusing to sign the documentation, and threatening to report the matter to the Union. He knew that he had been dismissed and it was for that reason that he was becoming argumentative and angry.*
4. *In my presence, Ms. Rocca explained to him that he had been dismissed and he asked why his contract had been terminated. It was explained to him by Ms. Rocca that if someone is sick, they should call the office or have someone call the office to inform them. He was angry and continued complaining that the Company could not do this, that it was not fair and that he had received no notice of the Company's intention to terminate his contract. He refused to sign the Employment Service Notice of Termination and the letter dated the 16th July 2004 but took the letter with him.*
5. *The Employment Service Termination of Employment form was subsequently sent to the Employment Service and which is attached to my statement as*

exhibit "AA2". It was dated by the Company on the 19th July 2004, not signed for by the Complainant for the reasons already stated, and received by the Employment Service on the 21st July 2004.

6. On Thursday 22nd July 2004, the Complainant came to the Main Office where he collected the employee's yellow slip of the Employment Service Notice of Termination form and signed for his pay slip containing his final salary in cash. He specifically wanted the Employment Services Notice of Termination to allow him to claim unemployment benefit and specifically informed me that he was at the office to collect his termination papers. He knew that his contract of employment had been terminated when I spoke to him on the 19th July 2004 and when he attended on 22nd July 2004 it was to collect his final salary and papers to allow him to make a claim for unemployment benefit.

Dated this day of 2005

Signed.....
ANTIGONI AGATHOKLEOUS
Main Office Secretary"

20. Finally, Mr Fattas's Witness Statement states:

"1. I am the Main Office Accountant for PCG Group Limited.

2. On Friday the 16th July 2004, I was informed by Antigoni Agathokleous (main office Secretary) that the Complainant had been dismissed and to prepare an envelope containing his final salary for the period up to and including W/E 16th July 2004. This was handed to him personally by me on Thursday 22nd July 2004 with his pay slip and which he signed for. I attach this pay slip marked "PF".

Dated this 23rd day of September 2005

Signed.....
PANIKOS FATTAS
Main Office Accountant"

21. Mr Isola told the Tribunal that the employee known as "Anna" referred to in the Complainant's Answer to the Further and Better Particulars no longer worked for the Respondent but that he had interviewed her. This person would appear to be the other Main Office Secretary, Anna Rocca, referred to in Ms Agathokleous's Witness Statement. Although this lady was apparently reluctant to

come and give evidence, she did, according to Mr Isola, confirm that the Complainant received the Notice of Termination on 19th July 2004.

22. I have no reason to doubt the truth of what is said in the various statements set out above about the date when notice was given, especially as the Complainant, with full knowledge of today's hearing and its consequences, has chosen not to attend and give the Tribunal his version of events.
23. Section 70(4) of the Employment Ordinance states that:
“(4) The tribunal shall not entertain a complaint presented under this section unless it is presented before the end of the period of three months beginning with the effective date of termination unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented within that period.”
24. On the evidence before the Tribunal, I find that the effective date of termination was 19th July 2004, so that the Complaint was filed outside the 3 month time limit set out in that subsection.
25. There is no evidence or even a contention on behalf of the Complainant which suggests that it was not practicable for the complaint to be presented within that 3 month time limit. In fact there is a letter from the TGWU dated 13th September 2004 to the Respondent which states that on the basis of the facts as explained by the Complainant to the Union, the Complainant was unfairly dismissed. The Complainant nevertheless took nearly another 6 weeks to file his complaint, which was by then outside the 3 month time limit.
26. In the circumstances there is no material before the Tribunal on which I can possibly or properly exercise the Tribunal's discretion

to extend the 3 month time limit. The result is that the Tribunal is not empowered to hear the substantive complaint, which is dismissed accordingly.



Lewis Baglietto
Chairman
12th October 2005