



Cotterill and Cherry (T/A Caring Companions Nursing Agency)
Royal Court
28th March 2014

JUDGMENT
12/2014

Appeal against the decision of the Employment and Discrimination Tribunal.

Approved Text
28.03.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

The Employment and Discrimination Panel Appeal

Case No: ED064/13

Between: MS SUSAN M COTTERILL Appellant

-and-

TINA CHERRY
(T/A CARING COMPANIONS
NURSING AGENCY) Respondent

Date of hearing: 10th March 2014

Decision handed down: 28th March 2014

Before: Richard James McMahon, Esq., Deputy Bailiff

The parties were not represented by Advocates in court.

Legislation referred to:

The Employment Protection (Guernsey) Law, 1998
The Employment Protection (Appeals and References) Order, 2006
The Conditions of Employment (Guernsey) Law, 1985

Introduction

1. On 10 March 2014, the Court heard Susan Cotterill's appeal against the decision of the Employment and Discrimination Tribunal of 20 January 2014 refusing to hear her complaint of unfair dismissal in Case No: ED064/13. At the conclusion of the hearing, I announced that I was dismissing the appeal and outlined briefly my reasons for doing so. Partly because both parties were not represented by Advocates, I indicated that full reasons would be provided in due course in writing. This judgment contains those reasons.

Background

2. The Appellant's complaint of unfair dismissal was made on Form ET 1 dated 11 November 2013. She gave her former employer as Tina Cherry/Allington and indicated that her complaint arose from asserting a statutory right and health and safety matters. In the section of the form in which the details of the complaint could be set out, she stated that she had requested that her contract of employment be made compliant and challenged what her former employer had provided to the Social Security Department as the reason for dismissing her, alleging that she, the Appellant, had appropriate authorisation to arrange fire protection for a patient for whom she was employed to care, there being no need to run such matters past management.
3. The Appellant's former employer completed a response to that complaint on Form ET 2 dated 27 November 2013. The name of the employer was given as "Caring Companions Nursing Agency" and it was by that name that the Tribunal referred to the Respondent to those proceedings. This appears to have been an error, in the same way that the style used in the contract of employment attached to the Appellant's Form ET 1 purports to be an agreement between Caring Companions Home Care and the Appellant. Tina Cherry, now Tina Allington, is the proprietor of a business trading under either or both of these styles, but a trading name does not make it an entity separate from her. This was confirmed by Daniel Allington and Sadie Rosamond, who represented the Respondent at the appeal hearing. Therefore, the proper Respondent to the proceedings before the Tribunal and before this Court should have been Mrs Tina Cherry, who signed the Form ET 2 and the letter attached to it. If Mrs Cherry's name had become Mrs Allington before the Tribunal proceedings were completed, that name could have been used instead.
4. The attached letter set out the Respondent's opposition to the Appellant's complaint. She noted that the Form ET 1 appeared only to refer to contract compliance issues, save for the reference to calling in the fire service, for which the Respondent "*would have applauded her had she mention [sic] it*" to her, but noting that this was not the reason for the Appellant's dismissal.
5. The further background to the bringing of the complaint in Case No: ED064/13 is that the Appellant had made an earlier complaint on 8 October 2013, which was given the reference Case No: ED056/13, in which she alleged that she had been employed by the Respondent since August 2005 and had been dismissed in September 2013. In her response to that complaint, the Respondent stated that the Appellant had been employed from September 2007 to August 2008, at which time she resigned, and then resumed employment only in December 2012. By letter dated 28 October 2013, the Secretary to the Tribunal indicated that this claim would be rejected because she was not satisfied that the qualifying period of one year's continuous employment prior to the effective date of termination specified in section 15 of the Employment Protection (Guernsey) Law, 1998, as amended, had been met. The new complaint in Case No. ED064/13 therefore appeared to circumvent the qualifying period by raising reasons for the dismissal to which it does not apply.
6. The Tribunal Chairman held a Case Management Meeting with the parties in December 2013, attended by the Appellant and by Mrs Rosamond and Mr Allington on behalf of the Respondent. (The Tribunal's decision refers to that Meeting having taken place on 12 December 2013, but the letter from the Secretary to the Tribunal to the parties and contemporaneous e-mails refers to it having taken place two days before that.) The Chairman sought documentary evidence relating to the Appellant's periods of employment. The Appellant showed him a letter dated 24 October 2013 from the Social Security Department in which the approximate dates of her employment with the Respondent were set out. This evidence satisfied the Chairman that the Appellant's claim of unfair dismissal in Case No. ED056/13 had properly been rejected for failing to meet the required qualifying period.

7. Turning to case No: ED064/13, as recorded in the letter sent to the parties dated 18 December 2013 by the Secretary to the Tribunal, the Appellant “*conceded that, whilst she had some complaints as to deficiencies in her written terms of employment, these were not complained of during her employment; she withdrew this allegation*”. In relation to the allegation that the Appellant’s dismissal fell within section 11 of the 1998 Law, the Chairman directed that a Tribunal be convened to consider, upon reviewing the material placed before it in the Forms ET 1 and ET 2, if that complaint could properly be heard.
8. The Tribunal convened on 8 January 2014. The parties were not present. On 20 January 2014, in its notice of its decision, the Tribunal gave its reasoning for rejecting the Appellant’s complaint as being that it “*lacks sufficient grounds for it to proceed to a hearing*”, finding it “*to be vexatious within its understanding of this term and therefore has refused to hear the complaint prior to a hearing as set out in section 19 (3) (b) of the Law*”. The written decision expands upon those reasons.
9. The Appellant sent an e-mail to the Secretary to the Tribunal on 21 January 2014 indicating her wish to appeal that decision. In it she described the grounds on which she wished to challenge that decision. Those grounds were clarified by way of a letter from her dated 3 March 2014, by which they have crystallised into three heads. The first relates to not receiving a contract that was compliant with the requirements of the Law. It was headed “*Asserting a statutory right*” and I have treated it as being a ground saying that the Tribunal was wrong to have refused to hear a complaint relating to section 12 of the 1998 Law. The other two grounds are also headed “*Asserting a statutory right*” but relate to health and safety matters, so I have treated them as relating to the other basis of the Appellant’s unfair dismissal claim relating to section 11 of the 1998 Law. They relate to raising fire safety issues and the use of a hoist for lifting the patient for whom she was caring and the fact that no training was to be provided for a new hoist. Whilst the notice of appeal may not have been in the form required by the Employment Protection (Appeals and References) Order, 2006, given that the Appellant was representing herself, for the sake of expediency I did not reject the appeal on that basis when it was transmitted by the Secretary to the Tribunal.

Asserting a statutory right

10. In relation to the first ground of appeal advanced by the Appellant, by which she effectively repeats the complaint made in her Form ET 1 that her contract of employment, or perhaps more specifically the written terms provided, as required by the Conditions of Employment (Guernsey) Law, 1985, were inadequate, the real difficulty she has is that she conceded at the Case Management Meeting before the Chairman that she did not make any complaint about this to her employer whilst she was employed. At the hearing the Appellant indicated that she now wished to withdraw that concession because she claimed she had raised the matter with the Commerce and Employment Department and had sent an e-mail to her employer on 29 July 2013, whilst still employed, following that up with several further requests. However, a copy of that e-mail was not produced to the Court.
11. Section 12 of the 1998 Law provides that, if the reason (or principal reason) for dismissing the employee is because the employee “*brought proceedings against the employer to enforce a right of his which is a relevant statutory right*” or because the employee “*alleged that the employer infringed a right of his which is a relevant statutory right*”, then the dismissal will be regarded as having been unfair. The term “*relevant statutory right*” is defined to include a right conferred under the 1985 Law. The section further clarifies that there is no need to demonstrate that the right asserted was actually infringed, but the claim that it has been must have been made in good faith and also that the employee does not have to be too specific about the right being asserted as long as it is reasonably clear to the employer what it actually is.

12. It is clear that the Appellant did not bring any proceedings against the employer, so her complaint could only engage the second limb set out in section 12(1)(b). A cursory glance through the document supplied to the Court, on which the Appellant's handwritten annotations have been added, demonstrates that the requirements of section 1 of the 1985 Law appear to have been satisfied. There may still have been a dispute between the Appellant and Respondent about her job title and possibly some other matters, but this could have been resolved in accordance with section 10 of the Law by the Appellant referring the issue to the Industrial Disputes Tribunal. However, there has been no real suggestion in the material before the Tribunal or before this Court, that any exchanges between the Appellant and Respondent over these questions led to her dismissal. It was, it seems, a separate issue.
13. In any event, as I have already mentioned, the primary hurdle that the Appellant needs to surmount is that the record of the Case Management Meeting shows that she withdrew this aspect of her complaint before the Tribunal even came to consider her complaint on 8 January 2014. Accordingly, when the Tribunal reached its decision, it was quite properly treating that element of the Appellant's complaint as no longer being pursued, which is why the members were "*unanimous that no further consideration could be given to this issue*". It must be that part of its decision that is the subject of this aspect of the Appellant's appeal and, therefore, having withdrawn her complaint, the Appellant cannot, in my judgment, now seek to resurrect it.
14. The Appellant drew attention to the fact that she had not been invited to attend the hearing of the Tribunal. No one on behalf of the Respondent was in attendance on 8 January 2014. However, what the Tribunal was convened to determine on that day was not the Appellant's complaint, but the preliminary issue of whether the material submitted on her behalf, when read with the employer's response, disclosed a valid complaint or whether to exercise its powers in section 19 of the 1998 Law, as amended, to refuse to hear and determine the complaint. Because the Tribunal is generally master of its own procedure, subject only to complying what has been prescribed for it, I see no reason why the Tribunal could not choose to determine this question on the papers and without inviting any oral submissions on behalf of the parties. Accordingly, the Appellant did not miss out on an opportunity to clarify the position before the Tribunal reached its decision on 8 January 2014.
15. In that regard, I note that the outcomes of the Case Management Meeting held on 10 December 2014 were sent to the Appellant and the Respondent in a letter from the Secretary to the Tribunal on 18 December 2014. If the Appellant had considered that her concession and withdrawal of that aspect of her complaint should not have been made, she had the opportunity to clarify the position upon receipt of that letter and, in any event, prior to the Tribunal convening in early 2014, especially as that letter concluded by inviting the parties to contact the Secretary if either had any questions concerning the information contained in the letter.
16. On the basis of the concession and withdrawal of this aspect of the Appellant's complaint relating to asserting a statutory right before the Tribunal was seized of its consideration of the complaint, there was effectively no decision of the Tribunal from which to appeal. For that reason, the appeal did not succeed on this ground. In any event, I was not persuaded that the concession before the Chairman had been inappropriately made.

Health and safety

17. The reasons for the Tribunal's decision to refuse to hear the Appellant's complaint that the reason, or principal reason, for her dismissal fell within section 11 of the 1998 Law were reached after reviewing the content of the Respondent's response and the Appellant's own Form ET 1. The Tribunal recognised that the parties were not represented by lawyers and gave due allowance for that fact in the way the material that had been presented was viewed. The conclusion reached was that the Appellant's complaint "*was devoid of any example of a*

course of action taken by her in relation to her proper observance of the health and safety requirements of her role leading to her dismissal save that of the contact with the Fire Service not notified to the Respondent". Whilst the Tribunal considered that a reasonable employer would expect an employee to notify them of such contact with the emergency services, the Tribunal did not think the issue merited consideration as a possible breach of section 11. Moreover, this was the only aspect of the Respondent's response that might have engaged section 11 and was only one of nine reasons advanced for dismissing the Appellant.

18. I am satisfied that the Tribunal gave proper consideration on the material before it as to whether the Appellant's complaint could be viewed as being within section 11. The section was set out in full within the written reasons. At the hearing, I took the Appellant through each of the paragraphs in subsection (1) of that section in order to ascertain on which, if any, of those areas the Appellant sought to rely:

"The dismissal of an employee by an employer shall be regarded for the purposes of this Part of this Law as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee-

- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, carried out, or proposed to carry out, any such activities;*
- (b) being a representative of workers on matters of health and safety at work, or a member of a safety committee-*
 - (i) in accordance with arrangements established under or by virtue of any enactment or other statutory provision; or*
 - (ii) by reason of being acknowledged as such by the employer, performed, or proposed to perform, any functions as such a representative or a member of such a committee;*
- (c) being an employee at a place where-*
 - (i) there was no such representative or safety committee; or*
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety;*
- (d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work; or*
- (e) in circumstances of danger which he reasonably believed to be serious and imminent, took, or proposed to take, appropriate steps to protect himself or other persons from the danger."*

It might have been of assistance if, as part of the directions given by the Chairman at the Case Management Meeting, he had invited the Appellant to identify which of these paragraphs she was relying on and her response could then have been addressed directly by the Tribunal in its decision.

19. The Appellant confirmed that she had not been designated by her employer as required for paragraph (a) or that she had been a worker representative in this area or a member of a safety committee. Accordingly, paragraphs (a) and (b) were clearly not engaged. She further accepted she was not asserting that there had been "*circumstances of danger*", with the consequence that paragraphs (d) and (e) were also not engaged. Accordingly, her complaint could only have been advanced on the basis of paragraph (c).

20. Although the Tribunal's decision did not set this out explicitly, the process it followed really reached the conclusion that what the Appellant asserted had to be viewed on that basis. The Appellant was complaining that she had brought to her employer's attention matters she reasonably believed were harmful or potentially harmful to health and safety, albeit within a slightly narrower compass than in her letter dated 3 March 2014. Upon reviewing the Forms submitted and taking into account all the circumstances of the case, the Tribunal concluded that this could not be the reason, or principal reason, for the Appellant's dismissal. In my judgment, this was a conclusion that the Tribunal was entitled to reach.
21. Whilst it is no doubt frustrating to the Appellant that she regards what has happened as her being denied the opportunity to argue her complaint at a Tribunal hearing, it is important for everyone concerned to appreciate that the Tribunal does not exist to give parties the opportunity to ventilate their grievances at how they feel they have been treated. The Tribunal exists to determine complaints properly made in accordance with the legislation under which it operates and section 19 of the 1998 Law serves as a means of sifting out those complaints that should not progress any further before a full hearing with witnesses is convened. A full hearing should be reserved for cases where there is a legitimate dispute between the parties requiring resolution.
22. Section 19(3)(b) of the 1998 Law, as amended, provides *inter alia* that the Tribunal has a discretion to refuse to hear and determine a complaint of unfair dismissal "*if the complaint ... appears to the Tribunal to be frivolous or vexatious*". A complaint from an applicant who clearly does not satisfy the qualifying period, where applicable, is not a valid complaint of unfair dismissal, because such a person is not even given the right by section 3 not to be unfairly dismissed. In such a case, it is clearly appropriate for that complaint to be ruled out of order at a preliminary stage. In the Appellant's case, having had her first complaint dealt with in that manner, she swiftly commenced a second complaint alleging that her dismissal was for a reason that did not have to satisfy the qualifying period. I take the view that the Chairman, and thereafter the Tribunal, could properly question whether the new complaint actually disclosed a real prospect of establishing that such a ground would be established.
23. Against that background, I could not conclude that the Tribunal erred in law in its analysis of the Appellant's position. The health and safety matters referred to in her Form ET 1 were at best peripheral to section 11 of the 1998 Law and the way the Respondent explained the reasons for the dismissal, especially when viewed in the light of the earlier complaint, all demonstrated that a section 11 reason could not be the reason, or principal reason, for the Appellant's dismissal. Accordingly, in my judgment, the Tribunal was permitted to reach the conclusion it did and to exercise the discretion available to it under section 19(3)(b) to refuse to hear and determine the Appellant's complaint in Case No: ED064/13.

Conclusion

24. For the reasons set out above, I dismissed the Appellant's appeal against the Tribunal's decision of 20 January 2014. Because neither party had incurred any expenses associated with representation or other disbursements in attending Court, I made no order as to costs.