

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Dokrak TIMTHEERAPONG
Represented by: Mr. O. Eihe

Respondent: Bao Asian Cafe Limited
Represented by: Mr. R. Yau (Director)

Tribunal Members: Advocate J. Hill (Chairman)
Mr. J. Shambrook
Dr. S. Brewer

Decision of the Tribunal

The Tribunal finds that the Applicant was constructively dismissed and, following a reduction of 25% on the grounds that to do so would be just and equitable in all the circumstances, awards her £9,544.42.

The Tribunal has decided not to exercise its discretion to award costs. Accordingly, there is no order for costs.

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Signature of the Chair

17.10.23

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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 (Form ET3A) are available on application to the Secretary to the Tribunal, The Secretary to the Tribunal, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.

(Telephone: 01481 220025)

Email: Employmentrelations@gov.gg.

The legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Employment Protection (Recoverable Costs) Order, 2006

The authorities referred to in this document are as follows:

Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017)
Reynard v Fox [2018] EWHC 443 (Ch)
Streeter v. Sandpiper C.I. Ltd. (ED033/19)

Extended Reasons**1.0 Introduction**

- 1.1 Throughout these extended reasons documents within the hearing bundle shall be referred to like this: "[x]", which means "page x"; or "[x:y]", which means "page x, paragraph y".
- 1.2 The Applicant, who it is agreed was employed by the Respondent as Head Chef from 1 August 2019 to 30 May 2022, complains that she was constructively dismissed. The Respondent denies that the Applicant was dismissed. The Tribunal, consisting of three members, sat on Tuesday, 10 October 2023 to hear and determine the Applicant's claim. All of the material submitted by the parties in the joint bundle has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.
- 1.3 The Tribunal was conscious that neither the Applicant nor the Respondent were legally represented and was anxious that all necessary steps were taken to ensure that the parties had a fair hearing. The Tribunal took account of the then Deputy Bailiff's general comments in Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017) and, in particular, those at paragraph 45 concerning the need to give appropriate help to unrepresented parties regarding procedure and possibly also with the case that they wish to present. Accordingly, the Tribunal took care to explain the Tribunal's procedure to the parties throughout the proceedings and to explore potential arguments and lines of questioning that they could have advanced. The Tribunal was also mindful of the commentary in paragraph 44 of Reynard v Fox [2018] EWHC 443 (Ch) that the fact that a litigant was acting in person was not in itself a reason to disapply procedural rules, orders or directions or excuse non-compliance with them. The exception to that principle being that a special indulgence to a litigant in person might be justified where a rule was hard to find, difficult to understand or it was ambiguous.
- 1.4 The Applicant, whose first language was not English, also had the assistance of an interpreter, paid for by the States of Guernsey.

2.0 Background

- 2.1 The Applicant's mother, who lived in Thailand, sadly died in January 2022. As part of the Buddhist mourning ritual, the Applicant wished to attend a ceremony in Thailand 100 days after the death. In about mid-January 2022 she negotiated with the Respondent unpaid leave for a period variously described as "2 months" ([36:10.1]), "prolonged" ([54:2]) and "unspecified" ([55:2]). Travel arrangements were complicated by virtue of the Covid travel restrictions then in force and the Applicant's impecuniosity, but flights were eventually

booked on 5 February 2022 for 23 March 2022 (outbound) and 19 May 2022 (return) ([11]). The Respondent was a little unhappy about the date of the Applicant's departure as it had been arranged without specific discussion and agreement, but nevertheless agreed to it when told about it on 7 February 2022. During the Applicant's absence from work the Respondent employed someone to fill her place with the intention that he would be subsequently kept on to work in a second establishment that was under construction.

- 2.2 Very soon after the Applicant left for Thailand her former partner delivered a medical certificate to the Respondent ([64]) that described her as being unable to work for two months. This caused the Respondent some concern and resolving the question of the Applicant's fitness to work became an important issue for the Respondent.
- 2.3 The Applicant says that she not only told the Respondent of her departure date, but also her return date. The Respondent is adamant that the Applicant only mentioned her departure date and not her return date. The Respondent maintains that the Applicant was required to give "fair notice" of her intended return date, which she did not do; the Respondent only being told by WhatsApp message on 10 May 2022 of the Applicant's proposed return to Guernsey on 19 May 2022.
- 2.4 The Applicant had a meeting with the Respondent's representative, Mr. Yau, and his partner on 20 May 2022. During that meeting the Applicant maintains that she was told that the Respondent had no work for her because a replacement had been hired and that she should find a temporary job until the Respondent's second establishment was open when there would be work for her. The Respondent maintains that the Applicant's return was unexpected and that they simply needed time to arrange things for her return to work. In any event, the Applicant submitted further medical certificates to the effect that she remained unfit for work.
- 2.5 There then followed an exchange of emails between the Applicant's former partner and Mr. Yau ([62, 63, 65, 67-70]), the culmination of which was that the Applicant alleged that the Respondent was in breach of contract by not allowing her back to work, and that the contract of employment had been terminated by that breach. The Respondent, in contrast, alleged that the Applicant had resigned.

3.0 Evidence Summary

On behalf of the Applicant

- 3.1 The Applicant was the only witness to give evidence in support of her claim ([54] and [36:10]). Her account of events was in accordance with the summary given above.
- 3.2 She was cross-examined by Mr. Yau on behalf of the Respondent. She explained that she had not told the Respondent of her injury before she left for Thailand because she thought that she would be able to have a good rest during her absence and would return to Guernsey fit enough to resume work. The second and subsequent sick notes were caused by the unwelcome news from the Respondent that there was no work for her after her return and that caused anxiety and depression. She specifically denied that the Respondent would have had her back to work had she been fit enough; she was told that there was no work for her. She did not want to tell anyone about her depression and that is why she did not mention it to the Respondent.

- 3.3 When questioned by the Tribunal the Applicant said that [13-14] was a copy of the medical certificate given to the Respondent and that all the handwriting on both sides were present on it when handed over. This was later clarified and she agreed that the copy given to the Respondent was that at [64] (showing the front) and an agreed copy produced by the Respondent during the hearing that showed the back. The back page given to the Respondent did not, in fact, contain the planned return date of 20 May 2022 shown on [14].

On behalf of the Respondent

- 3.4 Mr. Yau was the only witness to give evidence on behalf of the Respondent ([55-71]). His account was in accordance with the summary given above. Specifically, he denied that the Applicant had told him of her planned return to Guernsey on 19 May 2022. He also said that all discussions with the Applicant were in English and that he spoke no Thai.
- 3.5 Under cross-examination he explained that he had only seen the flight booking when he received the bundle for the hearing; he had been unaware at the time that the Applicant had booked a return flight for 19 May 2022. He said that he had been surprised by the Applicant's return; he had expected it to be at least 12 weeks.
- 3.6 The Tribunal asked some questions and he explained that the Applicant's replacement was employed on a permanent full-time basis and was intended to work in the second establishment once it was ready.

4.0 Closing submissions

- 4.1 Mr. Yau, on behalf of the Respondent, submitted that the Applicant presented an unusual request for a significant period of unpaid leave and that the Respondent tried its best to accommodate that. All the Respondent had ever desired following the Applicant's return to Guernsey was clarification of what she wanted. There was no question of redundancy. It was all a matter of a failure of communications. The Respondent remained confused about what the Applicant wanted and had been surprised at her return so soon from Thailand. The Respondent did not accept that the Applicant had been told to find alternative interim work for "cash in hand".
- 4.2 The Applicant submitted that there had been a misunderstanding and miscommunication between the parties. The first email written on her behalf had been to try to obtain clarification, but the Respondent had failed to give any. The breach that triggered the constructive dismissal was during the meeting of 20 May 2022, specifically it was the suggestion that the Applicant would not have any work and would not receive any pay.

5.0 Legal Framework

- 5.1 The Tribunal proposes to follow the analysis set out in *Streeter v. Sandpiper C.I. Ltd.* (ED033/19) in paragraphs 4.1 to 4.9. The basic framework is that since the Respondent denied that the Applicant was dismissed, it was for the Applicant to prove, on the balance of probabilities, that she had terminated her contract of employment, with or without notice, in circumstances such that she was entitled to terminate it without notice by reason of the Respondent's conduct (see section 5(2)(c) of the Law). In order for the Applicant to be able to claim

constructive dismissal, the burden is upon her to prove four conditions, namely:

- (1) There must be a breach of contract by the Respondent. This may be either an actual breach or an anticipatory breach.
- (2) That breach must be sufficiently important to justify the Applicant resigning, or else it must be the last in a series of incidents which justify her leaving.
- (3) She must leave in response to the breach and not for some other, unconnected reason.
- (4) She must not delay too long in terminating the contract in response to the Respondent's breach, otherwise she may be deemed to have waived the breach and agreed to vary the contract.

5.2 Questions of constructive dismissal should be determined according to the terms of the contractual employment relationship and not in accordance with a test of 'reasonable conduct by the employer'. Lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms. When deciding whether there has been a breach of contract, the Tribunal must reach its own conclusion on this question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence adduced before it the Tribunal considers that there was.

5.3 The implied term of trust and confidence (often referred to as 'the T&C term') to behave reasonably towards employees means that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The T&C term is of potentially wide scope; it can extend to extremely inconsiderate or thoughtless behaviour.

6.0 Facts Found

6.1 The first question which the Tribunal considered was whether the Applicant gave the Respondent "fair warning" of her proposed return to work. In other words, did the Applicant give the Respondent objectively reasonable notice? There is a stark contradiction between the evidence of the Applicant and of Mr. Yau: the Applicant says that she did, Mr. Yau says that she did not. In order to try to resolve this difference, the Tribunal looked for other, preferably independent, corroborating evidence. Initially, it seemed as if [14] would provide it; this was a copy of the reverse of the medical certificate that the Applicant clearly told us had been handed to Mr. Yau by her ex-partner Mr. Eihe at or very soon after she left for Thailand. The important point about that document is that it says in the "Declaration" section "*I plan to start work on:- Date 20/05/2022 Time 5am*". That is entirely in accordance with what in fact happened. Mr. Yau said that although he remembered receiving a medical certificate, he could not remember what, if anything, was written on the back of it. As matters turned out, however, following the production of the actual document received by Mr. Yau after the lunchtime adjournment (now at [72]), the parties accepted that the document handed to Mr. Yau did not have a section containing the Applicant's proposed date of return to work.

6.2 The Tribunal notes, however, that the Applicant's return flight on 19th May 2022

was booked at the same time as the outbound flight (or was at least summarised in the same email dated 5th February 2022 from the travel agent to Mr. Eihe – [11]). The evidence from Mr. Yau was that he had repeatedly asked the Applicant for information concerning her proposed return to Guernsey. The Tribunal finds it more likely than not that, having knowledge of the date of the return flight and no obvious reason to withhold that information from Mr. Yau, the Applicant would have told Mr. Yau of it. Mr. Yau does not accept that he was told this information, but on balance the Tribunal prefers the Applicant’s version of events and finds that she did tell Mr. Yau of the date of her return flight.

- 6.3 The Tribunal then considered the exchange of emails between Mr. Eihe, on behalf of the Applicant, and Mr. Yau, on behalf of the Respondent. These are perhaps most clearly set out at [62, 63, 65, 67-70] (although they are also set out at [7-10]). What strikes the Tribunal as significant is that the Respondent did not deny the allegation contained in two of Mr. Eihe’s emails (those of 24th May 2022 at [62] and 1st June 2022 at [68]) that Mr. Yau had told the Applicant that there would be no work for her for two to three months and that she would not be paid (or words to that effect). Whatever the state of the Applicant’s health, the Tribunal finds as a fact that she was back in Guernsey and looking to the Respondent to allow her to return to her job, and that the Respondent, through Mr. Yau, told the Applicant that there would be no work for her for two to three months. It might be that the Respondent’s attitude to the Applicant was governed by the ongoing presence of the Applicant’s temporary replacement and the possible opening of another shop, but this does not affect the admitted existence of the continuing contract of employment between the Applicant and the Respondent. In fact, at [55] the Respondent accepts that the Applicant’s replacement was taken on “to cover” the Applicant’s absence.
- 6.4 The Tribunal finds that, either viewed as the requirement to provide full-time employment to the Applicant or as part and parcel of the T&C term, the Respondent was in breach of contract. Furthermore, even if what happened between Mr. Yau and the Applicant following her return to Guernsey was simply a misunderstanding, perhaps caused by the language barrier, the Tribunal finds that by not taking reasonable steps to clarify and explain to the Applicant what the Respondent thought was the position and thereby giving the Applicant the opportunity to correct any misapprehension, the Respondent conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Such conduct is also a breach of the T&C term.
- 6.5 The Tribunal finds that the breach of contract identified above was sufficiently serious to justify the Applicant resigning, that her resignation was in response to the breach and that she did not delay too long between the breach and resigning to admit of any suggestion that she had waived the breach and affirmed the contract.

7.0 Conclusion

- 7.1 For the reasons set out above, the Tribunal concludes that the Applicant was constructively dismissed. In those circumstances the Tribunal must consider the appropriate award. The parties had agreed during the course of the hearing that the relevant earnings for the purposes of s.22 of the Law were £12,725.89; on the face of things, that should be the amount of the award of compensation.
- 7.2 The Tribunal then considered what effect, if any, s.23 of the Law should have. That provision enables the Tribunal, in certain circumstances, to reduce the

amount of any award under s.16(1)(a) of the Law. The statutory circumstances that would enable the Tribunal to reduce the amount of the award are that it would be "just and equitable" to do so – see s.23(2). For the avoidance of doubt, none of the exclusions contained in s.23 apply to this case.

- 7.3 The Tribunal is conscious that the Respondent went out of its way somewhat to be helpful to the Applicant when she requested an extensive period of unpaid leave and tried to implement a sensible scheme of replacement cover during her absence. The Applicant's unplanned absence was undoubtedly very inconvenient for the Respondent and came at a difficult and busy time when, the Tribunal is satisfied, there were attempts underway to open a second shop. For those reasons the Tribunal thinks it just and equitable to reduce the award by 25%. The award of the Tribunal is, therefore, £9,544.42.

8.0 Costs

- 8.1 The Tribunal's power to awards costs is discretionary and governed by paragraph 6 of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* and *The Employment Protection (Recoverable Costs) Order, 2006*.
- 8.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.

17.10.23

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Signature of the Chair

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Date