

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicants: Mathew GULLY and Matthew WALKER
Represented by: Ms R. De Sanges

Respondent: Maximo Group Limited
Represented by: Mr. D. Read

Tribunal Member: Advocate J. Hill (Chair) – sitting alone

Hearing date: 7 September 2023

Decision of the Tribunal

Having considered all the arguments presented, whether recorded in this judgment or not, the Tribunal directs that claims ED031/22 and ED003/23 shall be joined and heard as a single claim. The claim shall be listed for a further Case Management Meeting at which directions shall be given.

.....
Signature of the Chair

.....
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 and Discrimination Tribunal (Guernsey) Ordinance, 2005

The authorities referred to in this document are as follows:

Tesco plc v. Bush UKEAT/0068/20/AT

Garlick v. Isle of Sark Shipping Co. Ltd. (11 July 2018, ED038/17)

Adams and Raynor v. West Sussex County Council [1990] IRLR 215

Extended Reasons

1.0 Introduction

- 1.1 Documents within the hearing bundle shall be referred to like this: either "[x]" which means "page x" or "[x:y]" which means "page x at paragraph y".
- 1.2 This is an application by the Applicants, Mr Mathew Gully and Mr Matthew Walker, for their claims to be joined, alternatively, heard together, based upon section 5 and paragraph 2(m) of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005*. The Respondent is the same in each claim and opposes the application. There is also a dispute about the correct identity of the Respondent, but that issue is not for determination today and, whatever the outcome, will have no effect on the application before the Tribunal.
- 1.5 The Tribunal, consisting of the Chair, Advocate J. Hill, sitting alone, sat on 7 September 2023 to hear and determine the Applicants' application. All of the material submitted by the parties in the joint bundles has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.

2.0 Background

- 2.1 For the purposes of this judgment it is important to understand how the Applicants put their respective cases because that will form a major part of the decision about whether to grant their applications. The Respondent disputes various allegations made by each Applicant and it is important to understand that no findings have been made about what, in fact, happened in each case. It might appear that the Applicants' cases have been accepted as true, but that is only for "the purposes of argument" and the determination of the applications. What is summarised below is simply how the Applicants articulate their positions; nothing more.
- 2.2 Mathew Gully, in an ET1 dated 31 December 2022, alleges that he was constructively dismissed. The Respondent in that case denies the allegation. Mr Gully began working for IEB Trading Limited ("IEB" - the possible identity of the correct Respondent) in September 2020 as Deputy CEO and was promoted to CEO in March 2021. At the time of his promotion there was an intention for the Respondent to purchase IEB together with a competing business and then to move to an IPO. As a result of various factors, that IPO looked less likely after

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 middle of 2021 and Mr Gully alleges increasing levels of stress arising from unrealistic workloads and time-frames.

- 2.3 Mr Gully describes a breakdown in his physical and mental health as a result of matters at work which resulted in his considering that his employment had become untenable and precipitated his resignation on 3 February 2022. Whilst working his notice period, Mr Gully was persuaded, following certain assurances from IEB's board of directors and shareholders, to retract his resignation on 27 May 2022. Matters did not improve and Mr Gully resigned again on 16 September 2022 giving as his reasons: (1) concerns with communication lines and lack of governance; (2) dividend payment to shareholders; (3) disruption from shareholders; (4) stress and anxiety at work; and (5) loss of trust and confidence with his employer.
- 2.4 Following his second resignation, Mr Gully embarked upon "garden leave" for the remainder of his notice period. At a "handover meeting" on 14 December 2022 he found the process to be "highly unreasonable and distressing" and, consequently, resigned with immediate effect on 31 December 2022.
- 2.5 Matthew Walker, in an ET1 dated 26 January 2023, alleges that he was constructively dismissed. The Respondent in that case denies the allegation. Mr Walker began working for IEB on 10 January 2010 as a Senior Purchaser Manager and on 1 May 2014 was promoted to Purchasing Director. He describes similar problems within the business to those described by Mr Gully.
- 2.6 On 8 September 2022 Mr Walker received a demand for the repayment of a share dividend paid to him in March 2021 that he describes as unjust and unlawful. As a result of this claim for repayment and other matters at work, Mr Walker was signed off for reasons of stress and anxiety from 27 September 2022. Matters did not improve and on 9 December 2022 he resigned with notice giving as his reasons: (1) his position was untenable; (2) he believed that his employer did not see him as part of their future strategy; (3) the undermining of his confidence in his employer (including the demand to repay what he believed to be a lawful dividend); and (4) the protection of his health. There then followed an attempt by Mr Walker to seek adjustments to his working conditions during his notice period. This was unsuccessful and, as a result, he resigned with immediate effect on 9 January 2023.
- 2.7 The Applicants now apply for their claims to be joined, alternatively, heard together. The Respondent accepts that the Tribunal has the power to make such orders, but disputes that these are appropriate cases for such treatment.

3.0 Summary of submissions

On behalf of the Applicants

- 3.1 Ms De Sanges provided the Tribunal with a written summary of her oral submissions. She argued:

- (1) The Applicants and the Respondent should be put on an equal footing and joining the claims would help to redress the imbalance in

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.

resources available to each party. The claims are, in addition, virtually identical.

- (2) Joining the claims would enable the Tribunal to deal with them in ways which are proportionate to the complexity and importance of the issues.
 - (3) It would avoid delay so far as is compatible with the proper consideration of the issues. In particular, the background to each claim, the context of each claim and the alleged breaches of trust and confidence in each claim are the same.
 - (4) The legal issues in each claim are the same.
 - (5) The witnesses that each Applicant proposes to call are the same.
 - (6) Joining the claims will save all parties expense.
- 3.2 Ms De Sanges submitted that the test for the Tribunal to apply when considering the question of joining claims should be that set out in r.9 of English *Employment Tribunal Rules of Procedure, 2013* ([133]): “Two or more Applicants may make their claims on the same claim form if their claims are based upon the same set of facts.” She also relied upon the decision in *Tesco plc v. Bush* UKEAT/0068/20/AT ([90]) and specifically quoted paragraphs 16, 47, 48, 50 and 52.
- 3.3 She also referred to Guidance Note 1 of the Presidential Guidance ([170]) and comments in support of that approach contained in *Garlick v. Isle of Sark Shipping Co. Ltd.* (11 July 2018, ED038/17) ([78:10]). This requires the Tribunal to carry out a careful balancing exercise of all the relevant factors and having regard to the relative hardship that will be caused to the parties by granting or refusing the application.
- 3.4 Finally, she drew attention to the case of *Adams and Raynor v. West Sussex County Council* [1990] IRLR 215 ([82]) and the test for the proper exercise of discretion by a Tribunal at an interlocutory stage.

On behalf of the Respondent

- 3.5 Mr Read submitted that there was a fundamental error in *Garlick*. In particular, too much reliance had been placed on the rules of the English Tribunal. The Guernsey Tribunal is purely a creature of statute and its powers for the purposes of considering this application are contained in paragraphs 2(m)(i) and (ii) of the Schedule to the 2005 Ordinance. The correct approach was to ask “Is there a real risk of injustice in joining the claims?” and to consider whether there was any other order that could be made which would achieve justice.
- 3.6 He submitted that the cases of the two Applicants were not, in fact, the same and highlighted two important differences: (1) Mr Walker was a shareholder with a financial interest in the outcome of an IPO (whereas Mr Gully was not);

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.

and (2) the Applicants were at different levels within the employer's organisation. These differences could create problems with disclosure obligations if the two claims were joined.

- 3.7 So far as the case of Tesco was concerned, he submitted that [108:38] showed that it was critically important to consider whether there was a material risk of any party not getting a fair hearing if the claims were heard either separately or together. There is obviously a difference between the tests for unfair dismissal and constructive dismissal. The claimants in the Tesco case were represented by different lawyers. Various different factors to be taken into account are set out at [107:34].
- 3.8 He expressed concern that statements for a joint hearing would be unwieldy, that one Applicant would be able to hear the evidence of the other and that there was a risk of a conflict of interest existing between the Applicants.

Applicant's reply

- 3.9 Ms De Sanges replied by saying that the Applicants were happy that there was no conflict of interest between them. If the claims were so different, as alleged by the Respondent, there could be no risk of a conflict of interest and it would not matter if one Applicant heard the evidence of the other.
- 3.10 She was concerned that the Respondent was seeking to "divide and conquer" the Applicants. Both Applicants had been members of the Respondent's senior management team and had worked closely together. Any apparent divergence between the cases arose only after the respective resignations and both Applicants had terminated their notice periods early. The most important feature was the alleged breach of trust and confidence and the risk of there being inconsistent findings is not an important consideration.

4.0 Legal Framework and analysis

- 4.1 The basis of the Tribunal's power is paragraph 2(m) of the Schedule to the 2005 Ordinance: "*the Tribunal may ... (i) determine its own procedure, and (ii) give such directions, subject to such terms and conditions, as it thinks fit for the purposes of the hearing and determination of the complaint*". English case law, or other provisions, may or may not be persuasive and it is for the Tribunal to decide how to approach the question of joinder.
- 4.2 The key question to be addressed, when considering two or more claims by different Applicants against the same Respondent, is whether joining the two claims would create injustice or unfairness to either party. There will, of necessity, be a balancing exercise when determining on which side of the line a particular application falls.
- 4.3 In these cases there are a number of similarities:

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.

- (1) Both Applicants held very senior managerial roles with IEB.
 - (2) Both Applicants claim to have been constructively dismissed.
 - (3) Both claims feature allegations illness and absence induced by stress and anxiety at work.
 - (4) There are common allegations of managerial mismanagement by the Board and shareholders.
 - (5) Both Applicants eventually terminated their notice periods forthwith after alleged interference by the Board and/or shareholders.
 - (6) It was alleged and was not disputed that the witnesses to be called by each Applicant would be the same.
- 4.4 There are, equally, some differences between the cases of each Applicant. In particular, Mr Walker was a shareholder with a financial interest in the outcome of an IPO (whereas Mr Gully was not). The two Applicants were also not at exactly the same level within the employer's organisation.
- 4.5 Careful consideration must be taken of the likelihood of injustice or unfairness to any party if the claims are joined or remain separate. The Respondent's objections seem to be rather hypothetical and not based upon concrete allegations of injustice or unfairness to the Respondent. Whether the claims are joined or not, there will be some prejudice to one side or the other. The task that the Tribunal must perform is to weigh in the balance any identifiable prejudice and determine which course of action causes the least.
- 4.6 There is a marked difference between the test for joinder of claims as set out in the English *Employment Tribunal Rules of Procedure, 2013* ([133]): "*Two or more Applicants may make their claims on the same claim form if their claims are based upon the same set of facts.*" and that contained in r.31 of *The Royal Court Civil Rules, 2007* ([62-63]) which requires consideration of whether some common question of law or fact arises, whether the rights to relief claimed are in respect of or arise out of the same transaction or the same series of transactions, or for some other reason it is desirable to make an order. The test under r.31 is much broader.
- 4.7 The Tribunal comes back to Mr Read's submission that the Tribunal is entirely a creature of statute and it has only those powers expressly conferred upon it. As a result, the Tribunal considers that the appropriate test to be applied is whether, in all the circumstances, joinder of the two claims is a fit direction for the hearing and determining of each complaint. That is the only way in which paragraph 2(m) of the Schedule to the 2005 Ordinance can be interpreted, from which the power to join claims arises.
- 4.8 The Tribunal is particularly concerned to avoid inconsistent findings in two cases based largely upon evidence relating to very similar scenarios. That can only be

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.

avoided by hearing both cases together. Hearing the claims back-to-back is not a complete solution that stops short of joining cases; there are many imponderables that might happen between one case and the next. The Tribunal's view is that there is less risk of inconsistency (and consequent unfairness or injustice) if the two claims are joined and heard together. The objections raised by the Respondent can be ameliorated by suitable case management directions.

4.9 The Tribunal is quite capable of directing itself about the evidence used in the claim by one Applicant not necessarily being relevant to the other. There is, certainly, a risk that cross-contamination might occur, but that is a less serious risk than that of inconsistent findings and can be more easily guarded against.

4.10 The Tribunal is also mindful of the potential saving of time and expense by joining the two claims. Such a saving will probably be less for the Respondent than for the Applicants, but it will exist.

5.0 Conclusion

5.1 For the reasons given above, the claims will be joined and shall proceed together as a single case. The claim shall be listed for a further Case Management Meeting at which directions shall be given.

.....
Signature of the Chair

.....
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.