

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Neil Duffy

Respondent: The States of Guernsey (acting by & through the Policy & Resources Committee)

Tribunal Member: Mr. Patrick Hardy (Chair)

Decision date: 18 April 2023

Decision:

The Tribunal determines, after considering the documents presented to it, that it has no jurisdiction to consider the above complaint brought by the Applicant against the Respondent. The reasons for its decision are set out below. Accordingly, the complaint is dismissed with effect on 18 May 2023, being one month from the date of this notice, unless before 18 May 2023, the Applicant has presented written representations to the Tribunal explaining why the complaint should not be dismissed.

If the Applicant has presented written representations to the Tribunal before 18 May 2023, they shall be considered by the Chair of the Tribunal who shall either permit the complaint to proceed or shall fix a hearing for the purpose of deciding whether it should be permitted to do so.

Upon the dismissal of the complaint, the Applicant will not be able to pursue the complaint pursuant to the Employment Protection (Guernsey) Law, 1998 (as amended) (the "Law").

This decision is made by the Chair of the Tribunal pursuant to article 4 of The Employment and Discrimination Tribunal (Guernsey) Order, 2020.

The Tribunal makes no order as to costs.

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Signature of the Chair

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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.

Reasons for the decision

1. Mr. Neil Duffy (the "Applicant") filed an ET1 form with the Secretary to the Employment and Discrimination Tribunal (the "Secretariat") dated 16 November 2022 claiming that he was unfairly dismissed by his employer which he identified to be Autism Outreach. Autism Outreach is administered by the States of Guernsey (acting through its Committee for Health and Social Care) (the "Respondent").
2. In response, Mr. Glen Symons, acting on behalf of the Respondent, filed an ET2 form with the Secretariat dated 19 January 2023 which argues that the Applicant was not employed by the Respondent but was made available to the Respondent pursuant to an agreement between the Respondent and TXM Healthcare ("TXM"), an agency company based in England which provided agency workers to the Respondent from time to time. Pursuant to an agreement between TXM and the Applicant, the Applicant was procured to work for the Respondent in Guernsey as a health support agency worker.

The Respondent argues that there is no employer-employee relationship between the Respondent and the Applicant, and therefore the Law, on which the Applicant relies in his claim of unfair dismissal, does not apply. The Respondent accordingly has requested that the Tribunal determine as a preliminary matter that the Tribunal lacks the jurisdiction to hear and determine the Applicant's complaint.

3. The Applicant's complaint that he was unfairly dismissed is based on section 3 of the Law which states that "In every employment to which this Part of the Law applies [this Part applying to unfair dismissal] every employee shall, subject to the provisions of section 15 (which specifies the qualifying period), have the right not to be unfairly dismissed by his employer".
4. Section 34(1) of the Law defines an employee to be "an individual who has entered into or who works under (or, where the employment has ceased, who worked under) a contract of employment". Section 34(1) defines an employer to be "in relation to an employee,...the person by whom the employee is (or, where the employment has ceased, was) employed".
5. It follows from section 3 of the Law that if an individual is not an employee of a person or entity against which a claim of unfair dismissal is brought under the Law, that individual fails to qualify to make such a claim.
6. In determining whether the Applicant is an employee of the Respondent, the Tribunal considered whether there is a contract of employment between the Applicant and the Respondent or any agreement between them which might reasonably constitute such a contract of employment. For this purpose, it has considered the correspondence made available to it between the Applicant and

the Respondent and with TXM concerning the Applicant's appointment as a health support worker in Guernsey.

7. In response to a request from the Tribunal, the Respondent has confirmed to the Tribunal that there is no document which is or might be construed as a contract of employment between the Applicant and the Respondent.
8. The Tribunal notes in the Respondent's offer letter to the Applicant dated 17 May 2022 which was sent care of TXM that reference to the existence of an agency (being TXM) in respect of the Applicant is made as follows: (1) the agency was to be invoiced for the Applicant's accommodation costs which were to be reimbursed by the Applicant to TXM, (2) payments to the Applicant were to be made in line with TXM and signed timesheets were to be sent to TXM, (3) if the Applicant had to self-isolate due to having coronavirus symptoms, payment made to the Applicant was to be confirmed by TXM and (4) any questions from the Applicant arising from the appointment were to be referred to TXM.
9. The Tribunal also notes that in the attached documents to the ET2 form, TXM is referred to as a contracted agency and paid a contracted agency management fee in numbered Document 2, and in numbered Document 3, the Applicant's personal information is set out in a form headed "Agency Worker's Declaration".
10. The Tribunal also notes that in an email dated 18 January 2023 from Rhiannon Topley of the Respondent's Human Resources section, Ms. Topley asked TXM to "confirm that Neil Duffy was appointed to work with Autism Outreach/States of Guernsey on an agency basis and that he was not appointed as a States of Guernsey employee". In response to that email, Rebecca Rowe of TXM responded that "I can confirm that Neil Duffy was in a contracted position via TXM Healthcare Agency within the Autism Hub".
11. In response to a request for information from TXM, TXM has provided the Tribunal with a copy of the Candidate Application Form headed D.O.I. December 2019, completed and signed by the Applicant. This includes the declaration: "I declare that I have read and understood 'The Agency' Handbook". TXM has also provided the Tribunal with a copy of The Agency Handbook which states:

"Your status as a 'the agency' locum is that of an 'agency worker.' This is important in relation to your employment rights and state benefits you may or may not be eligible to".

12. The Agency Handbook also states:

"TXM Healthcare conditions of engagement include a substantial requirement that the client/trust/hospital pay TXM Healthcare an appropriate recruitment fee should the client employ directly any TXM Healthcare locum who has worked for the client previously via TXM Healthcare. This applies equally whether the work be on a temporary, permanent, full time or part-time basis. "

The Tribunal considers that this requirement which concerns the future employment of the Applicant (being the TXM Healthcare locum) by the Respondent (being the client) is based on the Applicant not being, and reinforces that the Applicant was not, an employee of the Respondent during the period he was assigned to work for the Respondent.

13. Based on the above, the Tribunal determines that the Applicant was not employed by the Respondent and therefore is not a qualifying employee for the purposes of making a complaint against the Respondent pursuant to the Law.

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Signature of the Chair

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Date

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