Employment and Discrimination Tribunal

Form ET3 (05/16)

Case No ED0/21/21

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Mr Matthew Banton**
Represented by: Mr Banton represented himself

Respondent: **V.W.T. (Guernsey) Limited**
Represented by: Mr Richard Sheldon of Appleby (Guernsey) LLP

Tribunal Members: Mrs Paula Brierley (Chair)
Mr Patrick Hardy
Mr George Jennings

Hearing date(s): **4 August 2022**

Decision of the Tribunal

Having considered all the evidence presented, whether recorded in this judgment or not, and the representations of both parties, and having due regard to all the circumstances, the Tribunal unanimously finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was unfairly dismissed.

When calculating the award under Section 22(2) of the Employment Protection (Guernsey) Law 1998 as amended, the Applicant's pay during the six months prior to the termination was £16,552.68.

However, the Tribunal concluded that it would be just and equitable to use its discretion under Section 23(2) of the Law to reduce the award by 10%. This reduction is made in consideration of the fact that the Applicant had not engaged in the appeal stage of the process.

Therefore, an award of £14,897.41 is made.

....
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 717056)
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:
Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017)
Reynard v Fox [2018] EWHC 443 (Ch)

Extended Reasons

1. Introduction

1.1. Throughout these extended reasons documents within the hearing bundle shall be referred to like this: "[x]", which means "page x"

1.2. The Applicant, who it was agreed was employed by the Respondent from 21 October, 2019 as a Storeman/Driver to 6 May 2021, complains that he was unfairly dismissed.

1.3. The Respondent denies that the Applicant was dismissed unfairly, it alleges that he was dismissed for 'some other substantial reason' following consultation to amend the terms on conditions of employment.

1.4. Accordingly, the Respondent had the burden of proof that on the balance of probabilities the dismissal had been fair.

1.5. The Tribunal, consisting of three members, met on Thursday 4 August 2022 to hear and determine the Applicant's complaint. All of the material submitted by the parties has been taken into account by the Tribunal, whether specifically referred to in this judgement or not.

1.6. The Applicant represented himself and did not call any other witnesses.

1.7. The Respondent was represented by Richard Sheldon of Appleby (Guernsey) LLP and called Wendy McHugh and Jason Langmead as witnesses.

1.8. The Tribunal was conscious that the Applicant was not legally represented and was anxious to ensure that all necessary steps were taken to ensure that both parties had a fair hearing. The Tribunal took account of the 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.

2. Background

2.1. The Respondent is a small Guernsey company specialising in the importation and supply of wholesale goods (mainly food and drink, including alcohol) for distribution to hospitality, retail, catering and restaurant industries in Guernsey.

2.2. Following the two COVID lockdowns due to customer demand the Respondent had taken the decision to expand its delivery service to Saturday mornings in order to stay competitive. They had operated a Saturday service during the lockdown periods.

2.3. In order to operate a permanent Saturday delivery service they required their existing warehouse team and drivers work one of out four Saturdays on an ongoing basis. At the same time the Respondent sought to introduce two further changes to their contracts one of which was an embargo on holidays during the two week run up to Christmas Eve.

3. Evidence Summary

3.1. The Tribunal had a joint bundle of documents "ER1" which included a skeleton argument from the Respondent (108).

3.2. The Applicant had been able to work on the Saturdays during the lockdown periods because his ex-partner had not been working during the first lockdown and during the second there had been no overlap between the Applicant and his ex-partner's shifts and therefore was able to take care of their son. The Applicant's temporary shift pattern put in place specifically over the lockdowns had been different to the permanent arrangement the Respondent wanted to put in place from week commencing 10 May 2021. During normal times the Applicant's ex-partner worked on Saturdays and the Applicant had responsibility for the care of their son.

3.3. At the time of deciding to put in place the changes, the Respondent was trying to recruit extra staff but was finding this challenging.

3.4. As set out in the Letter of Dismissal (36) The Applicant was dismissed by the Respondent on 6 May 2021 due to being unable to agree to the changes to his contract of employment (namely a) and b) listed below):-

a) That the Respondent would commence opening on each Saturday morning with effect from 10 May 2021 and that the Applicant was asked to work one Saturday in every four week period on a rota basis;

b) No holidays would be permitted for the two week lead up to Christmas Eve on an annual basis; and

c) All holidays requested, must be approved in writing by the Applicant's line manager, and would be done so on a first come first served basis, so that only 2 warehouse / drivers could be absent at any one time

3.5. Whilst working in the warehouse on a date in March (neither of the parties could recall nor had any record of the actual date) the Applicant's supervisor asked him if he would work on Saturdays to which the Applicant said he could not work on Saturdays due to his childcare responsibilities.

3.6. The Applicant received a letter with the title, "Contract Addendum" dated 7 April 2021 (23) giving notice that his terms and conditions would be amended effective week commencing 10 May 2021.

3.5. The Applicant responded to the Respondent by letter dated 15 April 2021 (25) stating that he "strongly" objected to the first and second changes meaning the requirement to work on one out of four Saturdays and also the embargo on holidays in the two week period up to Christmas Eve and he was seeking 'further clarification' on the third change, namely the approval of holidays by the line manager. The Applicant stated that he felt the Respondent was neglecting their duty of care requiring their employees to work extra on top of the 45 hour week already in place. He also added that he had to look after his son at the weekend as his ex-partner worked on both days.

3.7. The Respondent met with the Applicant on 27 April 2021 (26) to discuss the concerns raised by the Applicant in his letter of 15 April 2021. The meeting was attended by Ian Champion (IC) Sales Manager at the Respondent (IC has since left the Respondent and therefore was not called as a witness) and Wendy McHugh (WM), HR Consultant, engaged by the Respondent. The meeting was file noted by WM and the file note signed by WM (26). According to the file note the discussion centred around the Applicant's childcaring responsibility.

3.8. During the meeting of the 27 April 2021, in response to a suggestion from the Applicant that the Respondent should employ part time people (Page 26, paras 8 and 11) IC said that the "Company could not have people working just on Saturdays" for health and safety reasons. During the hearing, the Respondent confirmed that they had since engaged people on a Saturday but that these people had been experienced.

3.9. The Applicant wrote a letter to the Respondent (31) noting that a meeting had been arranged at 12.30 pm the following day, Friday 30 April 2021, but that he would like to reschedule as he wanted a "member of the States of Guernsey Employment Relations" present. The Respondent replied (32) stating that as it was an internal meeting he could have another employee

present but that they did not have the facility available for anyone other than another employee to be present. Further noting that they were in a process of consultation and giving the options of meeting that day or on 4 May 2021.

3.10. The second meeting took place on 4 May 2021 which was file noted and signed by WH (33-35). The meeting centred around the Applicant's childcare arrangements and various suggestions were made by the IC and WM. During the meeting IC referred to the clause in the Applicant's current contract which stated that he could be required to work such additional hours which may include weekends (16).

3.11. In oral evidence the Applicant said that he had not seen the file notes of the meetings and in his witness statement the Applicant said that the contents of the file notes were inaccurate as things had been taken out of context, and the file notes had been written only from IC's point of view.

3.12. During the second meeting held on 4 May 2021 IC gave the Applicant 24 hours to say whether or not he would agree to the Contract Addendum dated 7 April 2021.

3.13. Despite agreeing to do so, the Applicant did not respond to IC on 5 May 2021.

3.14. The Respondent wrote to the Applicant on 6 May 2021 terminating his employment with effect from 5 June 2021 noting that they had "reached an impasse". The letter contained a right of appeal to the Managing Director (Jason Langmead).

3.15. The Applicant did not exercise the right of Appeal. In oral evidence he had said that he felt that JL would be biased as it was his decision to make the change.

3.16. In oral evidence the Respondent relied heavily on a conversation it had with another member of staff during which discussion took place about termination being a consequence of not accepting the new terms and conditions. The Respondent's representative putting it to the Applicant during cross examination that the Applicant was bound to know about the possible consequence of not accepting the terms and conditions because he and the other member of staff would have discussed together the content of their meetings. Even though WM made no reference to the topic of consequences in her file noting of the meetings with the Applicant nor was there reference in the termination letter of the topic being discussed, WM noted in her witness statement (page 98 clause 19) that "dismissals were an action that VWT could possibly take".

3.6. When the Tribunal asked a question about the lack of reference in the file notes about any discussion regarding the consequences of not accepting the amended terms and conditions i.e. that the Applicant's employment would be terminated, WM stated that she had stopped writing notes at that point therefore it was not recorded in the file note.

3.7. When further asked by the Tribunal why the discussion about the consequences of not accepting the terms and conditions i.e. that his employment would be terminated, were not referred to in the termination letter, WM responded that "it was an omission".

4. Legal Framework

4.1. The Law referred to is The Employment Protection (Guernsey) Law, 1998, as amended.

4.2. The relevant parts of that law for this matter are:-

Section 6 (1) In determining for the purposes of this Part of this Law whether the dismissal of an employee was fair or unfair, it shall be for the employer to show:-

(b) that it was a fair reason falling with subsection (2)

(2) For the purposes of subsection (1)(b), a reason falling within this subsection is a reason which –

(e) was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3) where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of sections 8 to 14 [15], the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with the equity and the substantial merits of the case.

5. Facts Found

5.1. The Applicant's contract of employment dated 21 October 2019 (13) stated:-

- at 6.2 "You may be required to work such additional hours outside of your Contracted Hours, which may include weekends";
- At 9.4 "the Company may, in its sole and absolutely discretion, terminate the employment at any time and with immediate effect by paying you a sum in lieu of notice."; and
- At 13.1 "We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change."

5.2. The 'informal consultation' the Respondent relied on was an undocumented question put to the Applicant whilst working "filling the crisps" in the warehouse. The Applicant had responded that he would not be able to work on Saturdays because he had his son. The date of the chat could not be recalled by either the Respondent or the Applicant.

5.3. Following what was referred to by the Respondent as 'informal consultation' a letter was sent to the Applicant dated 7 April, 2021 (23) telling him that his terms and conditions would be changing from the week commencing 10 May 2021.

5.4. The Applicant wrote to the IC on 15 April 2021 raising concerns with the contract addendum (25).

5.5. In response to the letter from the Applicant, IC and WM met with the Applicant on two occasions to discuss how the Applicant might be able to rearrange his childcare commitments to work on a Saturday.

5.6. File notes of meetings were drafted and signed by WM but were never seen by the Applicant. The file notes did not refer to any discussion of possible consequences, such as termination, in the event the Applicant could not/would not accept the new terms and conditions of employment.

5.7. During the second meeting which took place on 4 May 2021 the Applicant was given 24 hours to say whether or not he was going to accept the changes to his contract.

5.8. The Applicant did not respond to IC within the 24 hours, or at all.

5.9. The Respondent sent a letter dated 6 May 2021 terminating the Applicant's employment effective 5 June 2021, stating that he was not required to work his notice and giving the right to appeal.

5.10. The termination letter was silent on any discussions that had taken place regarding the consequences of not accepting the new terms and conditions.

6. Conclusion

6.1. The key question in determining this case is whether the employer acted reasonably or unreasonably in treating it [the reason] as a sufficient reason for dismissing the employee".

6.2. Oxford Dictionary definition of reasonable is "having sound judgement, fair and sensible", "no reasonable person could have objected".

6.3. Best practice and guidance as set out by ACAS and in the States of Guernsey Employment Guideline: Varying Terms and Conditions of Employment good practice set out the need for meaningful consultation, however they are not law binding in themselves.

6.4. However, even if the ACAS and Guernsey Guidelines do not apply to this case, nor do any Codes of Practice, it seems reasonable to infer (based on principles of equity) that the dismissal procedure should still be objectively fair – as noted by the Respondent in their Skeleton Argument (110, 111).

6.5. The business decision to expand the delivery service to Saturday mornings in itself does not seem an unreasonable one. The Applicant's reasons for being unable to accept terms and conditions that included working from 6 am on a Saturday morning also do not seem unreasonable. Therefore, the tribunal was left to determine whether or not the process followed by the Respondent was fair and whether the decision to dismiss the Applicant was reasonable in the circumstances.

6.6. The burden of proof is on the Respondent to prove that dismissal under the circumstances was a reasonable one and that the process followed was fair.

6.7. The Respondent's skeleton argument suggests the Tribunal considers the following factors taken from the precedents they wished to rely on:-

a) ***"The employer's motives for introducing the proposed changes*** *- the respondent submits that the reasons for introducing the proposed changes were an identified genuine business need. It is denied that the relationship between the Applicant and Mr Champion had any impact at all on the needs of the business as is evidenced by the fact that the proposed changes were ultimately driven by Mr. Langmead and applied to the entirety of its drivers / warehouse staff, including a member of the SMT."*

The Tribunal is persuaded that the Respondent had a good business reason for wanting to introduce the change.

b) ***"The employee's reason for rejecting the Proposed changes*** *– It is accepted that the Applicant had a genuine reason for rejecting the proposed changes however this does not mean the decision to dismiss was unfair – it simply means that the Applicant was unwilling to agree and so there was an irreconcilable difference between the parties."*

The Tribunal is persuaded that the Applicant had a genuine reason for being unable to agree to the changes that required him to work one out of four Saturdays commencing at 6 am / 6.30 am. However, the Tribunal is mindful that this was a permanent change from weekday hours to weekend hours which was a significant variation to the contract and therefore falls outside of 13.1 which allows for 'reasonable changes'.

c) ***"Whether the employee was given reasonable advance warning of the proposed changes –*** *The employees had in fact already been working weekends for some time, but the Respondent first raised the proposed changes on an informal basis during March 2021 through informal consultation. Based on the negative feedback, staff were then all*

written to again on 7 April 2021 advising them formally of the proposed changes, including the date on which it was proposed to introduce the changes on 10 May 2021. It is submitted that this represents reasonable warning of the proposed changes."

The Respondent's reliance on the fact that the Applicant had already been working weekends during the lockdown is flawed as the circumstance of lockdown were so significantly different to normal times.

The Tribunal notes the informal raising of the changes in the form of a question in passing from the supervisor was very 'light touch', labelling the interaction as consultation is somewhat stretching the term.

The Tribunal notes that the letter of 7 April 2021 is the actual contract addendum and does not refer to 'proposed' changes but is actually amending the Applicant's contract with effect from week commencing 10 May 2021. This was not a 'warning' of 'proposed' changes but a contract variation giving notice that it would come into effect in a month's time.

d) ***"Whether the changes and full effect of those changes have been sufficiently and clearly explained to the employees*** – *It is submitted that the Applicant was fully aware and understood the proposed changes, both through the letter of 7 April, 2021, as well as through the consultation meetings, as outlined in the minutes of those meetings. The Applicant has adduced no evidence to the contrary."*

The Tribunal is persuaded that once the Applicant had received the contract addendum dated 7 April, 2021 he was aware of the three changes to his contract. The Tribunal notes that consultation ordinarily takes place prior to changes being imposed and would not rely on the employee instigating the meetings to discuss those changes.

e) ***"Whether the employer has undertaken an assessment of the impact of the proposed changes on employees and whether it has considered alternatives*** – *It is submitted that the Respondent was at all times cognoscente of the impact of the proposed changes on the employees, and as a matter of fact did consider alternatives. In particular, as confirmed in the evidence of Mr Langmead (paragraph 49) and Mrs McHugh (20 and 37) the Respondent made a number of changes to its proposals in order to seek to accommodate all the employees, including the Applicant."*

The Tribunal notes that although the Respondent offered to reduce the hours the Applicant needed to work on a Saturday (although the number of hours were not stipulated in the contract addendum), they still insisted that he work on a Saturday. During the hearing the term "it had to be all in" was used on a number of occasions. The Respondent fell short of flexing to

accommodate the Applicant's inability to work on a Saturday, citing it would be unfair to the others that had signed up to the variation of contract.

f) ***"Whether the employer has attempted to obtain the employees' voluntary agreement to the Proposed Changes –*** *It is submitted that the Respondent did seek to obtain the employees' voluntary agreement to the changes initially via informal consultation in March 2021, and then by writing to employees on 7 April 2021. As confirmed by the witness statement of the Applicant at paragraph 2, this was successful in relation to one employee who immediately agreed to the proposed changes, as well as the other employees who subsequently agreed following consultation, with only 3 other employees rejecting the proposed changes (paragraph 43 of Mrs McHugh's statement)."*

The Tribunal notes the word used is proposed, however as noted previously the 7 April 2021 letter was not setting out 'proposed' changes but was the addendum to the employment contract imposing the changes.

g) ***"Whether a reasonable and genuine consultation process with the affected employees has taken place. This will include listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions, where reasonable to do so*** *– It is submitted that the Respondent did undertake a reasonable and genuine consultation process with affected employees, including in the case of the Applicant on 27 April 2021 and 4 May 2021, where both sides did discuss the options. Ultimately, it was not possible to find an alternative arrangement which would satisfy the needs of both parties."*

The Tribunal is not persuaded that genuine and meaningful consultation took place. Two meetings took place in response to the Applicant requesting a meeting to discuss the changes that had been imposed. The main thrust of the meetings were to find out how the Applicant could make arrangements to enable him to work on Saturdays. The Respondent then giving the Applicant 24 hours to accept the changes, when no response was received the Respondent took the decision that "an impasse" had been reached and therefore terminated the Applicant's employment without further discussion.

The Tribunal notes that the Applicant did not take up the option of appealing the decision. During the hearing the Applicant stated that he felt that because the appeal was to Mr Langmead, who wanted the change, it would not be heard unbiasedly.

h) ***"Whether the majority of the employees affected have accepted the proposed changes –*** *As confirmed at paragraph 43 of Mrs McHugh's statement aside from the Applicant, 3 other employees left VWT as they were unable to agree to the changes, with the remainder agreeing."*

The Tribunal understands that 4 (including the Applicant) out of 18 employees did not accept the changes.

6.8. The Applicant received a letter of termination dated 6th May 2021 (page 36) signed by Ian Chapman. In the letter (page 37) Ian Chapman stated in reference to the meetings that had taken place, "I outlined the Company's offer to you to be flexible and said that you had some options to consider for working on a four-week Saturday rota. These options were as follows:-

1. Continue working 45 hours a week and leave one hour early on either a Tuesday and Wednesday or Wednesday and Thursday.

2. Receive overtime, which will be paid at your standard hourly rate

3. Accrue all extra hours worked and take this time as Time Off in Lieu (TOIL)."

6.9. The Tribunal notes that none of the options actually addressed the issue i.e. that the Applicant was unable to work on a Saturday. It is also noted that the two meetings referred to as 'consultation meetings' which took place following the Applicant's letter responding to the receipt of the contract addendum, centred around how the Applicant could arrange the care of his son so that he could accommodate the Company's new requirement for him to work on a Saturday from 6/6.30 am.

6.10. In the termination letter (page 37 and 39), the Respondent relies on clauses 6.2 and 9.4 of the Applicant's contract of employment dated 21st October 2019. 6.2 in order to justify the requirement to work weekends and 9.4 in order to be able to terminate the contract. The termination letter goes further in its reliance on clause 6.2 stating, "The Company has not introduced any new conditions to your employment and you have worked weekends during the last two lockdown periods". It is noted that in the contract of employment dated 21st October, 2019 6.2 refers to "additional hours", it seems that 6.2 is only intended to relate to additional hours beyond normal hours which may be necessary from time to time. It is not intended to cover a permanent change to normal hours. It is noted that 9.4 of the employment contract dated 19th October, 2019 is a clause setting out the right of the Respondent to pay in lieu of notice, however the termination letter is giving notice, stating that the termination date will be 5th June 2021 and that the company "does not require you to work your notice period" therefore it is not clear what reference to 9.4 in the termination letter serves.

6.11. The termination letter states "we feel we have reached an impasse" (page 38). At no point in any correspondence is there any reference to any discussion with the Applicant of the consequences of not being able to agree to the new terms and conditions. It was the Respondent's conclusion that "an impasse" had been reached, that had not been discussed with the Applicant. Given the Respondent's feeling that they had reached "an

impasse" they moved to termination, not 'fire and rehire' which, if all other avenues has been thoroughly explored and a genuine and meaningful consultation had taken place, would have been in line with both normal practice as well as in line with the States of Guernsey Employment Guide to Varying Terms and Conditions of Employment and also ACAS guidelines, but instead the Respondent terminated not having ever mentioned that this could be a consequence.

6.12. The Tribunal took into account the size and available resources of the Respondent, noting they have had engaged the services of an external HR consultant.

6.13. The Tribunal concludes that the decision to terminate at that point, (because the Applicant had not accepted the amendment to his contract), without any further discussion and without any indication that that could be a possible outcome, was abrupt and premature which was unreasonable and therefore unfair.

7. Decision

7.1. Having considered all the evidence presented, whether recorded in this judgment or not, and the representations of both parties, and having due regard to all the circumstances, the Tribunal unanimously finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was unfairly dismissed.

8. Award

8.1. When calculating the award under Section 22(2) of the Employment Protection (Guernsey) Law 1998 as amended, the Applicant's pay during the six months prior to the termination was £16,552.68.

8.2. However, the Tribunal concluded that it would be just and equitable to use its discretion under Section 23(2) of the Law to reduce the award by 10%. This reduction is made in consideration of the fact that the Applicant had not engaged in the appeal stage of the process.

8.3. Therefore, an award of £14,897.41 is made.

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Signature of the Chair Date