

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Frederic Joseph Raffray
Represented by: Ms Lois Madden of Carey Olsen

Respondent: States of Guernsey (Acting by and through the Law Officers of the
Crown and/or the Policy and Resources Committee)
Represented by: Advocate Emily Bamber

Tribunal Members: Mrs Paula Brierley - Chairperson
Mrs Christine Le Lievre
Mr Peter Woodward

Hearing date(s): 1 April 2021

Decision of the Tribunal

The Tribunal considered, as a preliminary point, whether employer pension contributions should be included within the calculation of an award.

Having considered all the evidence presented in connection with the preliminary issue, whether recorded in this judgement or not, and the representations of both parties, and having regard to all the circumstances presented to it, the Tribunal unanimously determined that the employer pension contributions in respect of the defined contribution scheme did not fall within the meaning of 'pay' as set out in Section 34 of The Employment Protection (Guernsey) Law, 1998 as amended and therefore should not be included in the calculation of any award.

In relation to the claim of unfair dismissal, having considered all the evidence presented and having due regard to all the circumstances, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, on the balance of probabilities, the Applicant was unfairly dismissed and therefore an award of £66,094.50 is made.

Mrs P Brierley
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Signature of the Chairperson

8 April 2021
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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 and Discrimination Tribunal (Guernsey) Ordinance, 2005
Billet d'Etat XVIII 17 October 2004

Previous cases referred to in this document are as follows:

Good v Credit Suisse (Guernsey) Limited ED050/06 10 July 2007

Extended Reasons**1. Introduction and Background**

- 1.1. The Applicant, who it was agreed was employed by the Respondent from 22 May 2000 to 10 December 2019 as a Crown Advocate, complained that he had been unfairly dismissed. The Applicant alleged in the ET1 that:-
 - By letter dated 10 September 2019, the Respondent gave notice to terminate the Applicant's employment with last day of employment being 10 December 2019;
 - The Respondent did not undertake any form of process to reach the decision to terminate;
 - The Applicant was dismissed without good reason and without any process;
- 1.2. The Respondent admitted that the Applicant had been dismissed, therefore the burden of proof rested on the Respondent to show that the dismissal was fair.
- 1.3. During a lengthy period of case management the Respondent withdrew its defence of the claim.
- 1.4. Given there was no defence to the claim to be heard from the Respondent and there was enough information in the ET1 for the Tribunal to make a decision, it was decided that the claim would be decided on the content of the ET1.
- 1.5. The parties agreed the amount equal to 6 months' salary, but the Applicant argued that employer pension contributions should also be included in the calculation of the award. The Respondent resisted this point.
- 1.6. The Tribunal, consisting of three members, met on Thursday, 1 April 2021 to hear and determine the preliminary point concerning the inclusion of employer pension contributions in any award.

- 1.7. The ET1 was taken as read and no further evidence was heard in relation to the complaint of unfair dismissal. Therefore no one took the oath or affirmation.
- 1.8. The Applicant's representative relied on a bundle of documentation EE1, to put forward their case for the inclusion of pension contributions in any award made.

Preliminary Issue of inclusion of employer pension contribution in the calculation of an award for unfair dismissal

2. Legal Framework

- 2.1. In order to consider the preliminary point the Tribunal focused on:
 - The calculation of an award as set out in The Employment Protection (Guernsey) Law, 1998, as amended, Section 22 (1) (a) and (2) (a) and (b);
 - The definition of 'pay' as set out The Employment Protection (Guernsey) Law, 1998, as amended, Section 34;
 - The meaning of 'pecuniary benefit paid in cash'.
- 2.2. According to The Employment Protection (Guernsey) Law, 1998 as amended, Section 22 (1) "Subject to the provisions of section 23, the amount of an award of compensation for unfair dismissal is a sum equal to –
 - (a) six month's pay,
 - (2) For the purposes of subsection (1), the amount of a month's pay
 - (a) shall be an amount equal to the complainant's average monthly pay during the six month period immediately preceding the effective date of termination or
 - (b) in a case where, in the opinion of the Tribunal, the basis set out in paragraph (a) for calculating the amount of a month's pay or (as the case may be) a week's pay is inappropriate, shall be calculated on such other basis as the Tribunal may consider to be just and equitable in the circumstances of the case."
- 2.3. According to The Employment Protection (Guernsey) Law, 1998 as amended, Section 34 "pay" means all wages or salary (whether or not earned wholly or in part by way of commission) paid to the employee in question pursuant to his contract of employment, including –
 - (a) Overtime rates, shift pay and holiday pay, and
 - (b) Any other pecuniary benefit paid to him in cash"

3. Background to preliminary point

- 3.1. The Applicant and his representative gave background to his pension benefit, explaining that he had originally been in a 'final salary' scheme, which had been changed by the Respondent to a 'career scheme' with 'career average' salaries being used, as opposed to an individual's actual salary amount. A 'defined contribution' scheme was later introduced to 'top up' the amount of contribution for the higher earning staff. Details of the defined contribution scheme can be found at EE1, Section 7.
- 3.2. The Respondent agreed with the Applicant's description of the various pension schemes.
- 3.3. Membership of the defined contribution scheme was compulsory for the Applicant and it was mandatory for him to make contributions into the scheme. EE1, section 5 gives the detail of both Respondent's and Applicant's contributions made to the defined contribution scheme during 2019.
- 3.4. The Respondent explained that employer contributions were made directly into the scheme, they did not go through the Applicant's pay.
- 3.5. The Applicant argued that a sum equal to 6 months of the employer contributions to the defined contribution scheme should be included in the calculation of any award, because he felt that he had control of the funds, he could choose how they were invested and he could take a lump sum. Therefore, it was put forward the benefit fell into the definition of 'pecuniary benefit paid in cash'. The scheme was administered by a third party and not the employer.
- 3.6. It was noted that the individual could access a lump sum of up to 30% of the value of his fund in line with the income tax rules at retirement if he was over the age of 50 (EE1, Section 7, page 17 Member's booklet). Section 5 of the scheme rules notes that the members of the scheme can choose how their funds are "invested from a range of professionally managed investment funds". The Applicant felt that both of these were examples of how he controlled and had access to the money in his account of the pension scheme.
- 3.7. The Applicant's representative put forward the definition of pecuniary being 'consisting of, measured in or relating to money' ie a company car would not be classed as pecuniary. Further noting that the value was clear because the contributions were paid in cash.
- 3.8. The Respondent put forward the case that the employer contributions were not paid to the Applicant in cash and therefore were not a pecuniary benefit. They were paid to a third party pension administrator of the scheme. Further noting, as set out in EE1, Section 7, page 20, the employee could, if they left the scheme, have a refund of their own contributions into the scheme but they were not entitled to any refund in respect of the contribution made by the employer.

- 3.9. The Applicant stated that he could receive a refund if the amount was 'Trivial'. However, when asked, he agreed the total in his fund exceeded the £15,000 currently allowed under the Tax Rules. (EE1, Section 7, page 20 Member's booklet).
- 3.10. The Respondent further noted that the employer contributions were not recorded on the employee's payslip.
- 3.11. Both the Applicant's representative and the Respondent referenced the Billet D'Etat XVIII 2004 page 1972 (EE1, tab 11 refers) both noting that the 'spirit' of the law regarding the calculation of an award was to keep it simple. The Respondent putting forward that the pension contribution element does not fall in scope of Section 34 of the law, and the Applicant arguing that the inclusion of the pension contribution amount in the calculation still keeps the calculation simple.
- 3.12. Good v Credit Suisse was referred to by both the Applicant's representative and the Respondent. The Applicant's representative put forward that the cash does not have to be paid directly to the claimant for it to be classed as pay.

4. Conclusion

- 4.1. It is noted by the Tribunal, that the Good v Credit Suisse decision is not binding and, also turned on its own specific facts, however, parts of it are helpful, namely 7.1 "that 'pay' for the purposes of the award should pass three "mandatory tests" in that it should be:
- A monetary benefit
 - Paid directly to the claimant
 - Paid in cash"
- 4.2. The Tribunal gave significant consideration to the definition of 'pay' as set out in Section 34 of The Employment Protection (Guernsey) Law, 1998 as amended, specially, the words "paid to the employee in question" and "any other pecuniary benefit paid to him in cash".
- 4.3. The Tribunal is not persuaded that the pension contributions paid to a third party to administer and invest in line with the very specific rules of the pension scheme can be classed as "cash paid to the employee" as set out in The Employment Protection (Guernsey) Law, 1998 as amended.

5. Decision

- 5.1. Having considered all the evidence presented in connection with the preliminary issue, whether recorded in this judgement or not, and the representations of both parties, and having regard to all the circumstances presented to it, the Tribunal unanimously determined that the employer pension contributions in respect of the defined contribution scheme did not fall within the meaning of 'pay' as set out in Section 34 of The Employment Protection (Guernsey) Law, 1998 as amended and therefore should not be included in the calculation of any award.

6. Claim of Unfair Dismissal

- 6.1. The Applicant had been employed by the Respondent from 22 May 2000 to 10 December 2019. He was appointed to the level of Crown Advocate in 2004.
- 6.2. The Applicant’s ET1 noted that, by letter dated 10 September 2019, the Respondent gave notice to terminate the Applicant’s employment with the last day of employment being 10 December 2019.
- 6.3. The ET1 alleged that the Respondent did not undertake any form of process to reach the decision to terminate.
- 6.4. The ET1 further alleged that the Applicant had been dismissed without good reason and without any process.
- 6.5. The Respondent had withdrawn its defence of the claims raised by the Applicant.

7. Conclusion

- 7.1. The burden of proof fell to the Respondent to show the reason for dismissal was a potentially fair one and the procedure followed was also fair in the circumstances, including the size and administrative resources of the employer’s undertaking. However, the Respondent had withdrawn its defence of the claims raised by the Applicant.
- 7.2. For the reasons set out above, the Tribunal unanimously concludes, on the balance of probabilities, that the Applicant was dismissed unfairly.

8. Decision

- 8.1. Having considered all the evidence presented and having due regard to all the circumstances, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed and therefore an award of £66,094.50 is made.

Mrs P Brierley

8 April 2021

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Signature of the Chairman

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Date