



THE EMPLOYMENT & DISCRIMINATION TRIBUNAL

Applicant: CRAIG WILLIAM MELLON

Represented by: Self-represented

Respondent: SANDPIPER C.I. LIMITED

Represented by: Mr. S. Forrester (Group HR Director)

Tribunal Members: Crown Advocate J. Hill (Chair)
Mrs. J. de Garis
Mr. G. Jennings

Hearing dates: 19 and 20 October 2021

Decision of the Tribunal

The Applicant made a complaint of constructive dismissal.

Having considered all the evidence presented, whether referred to in this judgment or not, the representations of both parties and with due regard to all the circumstances, the Tribunal finds that, under the provisions of *The Employment Protection (Guernsey) Law, 1998*, as amended, the Applicant resigned from his employment and was not constructively dismissed. In the circumstances, the Applicant’s claim is dismissed. The Tribunal made no order for costs.

Advocate J Hill

10 November 2021

.....
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 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)

Street v Sandpiper C.I. Ltd. (Guernsey E&DT, ED033/19)

Appelqvist v States of Guernsey (Guernsey E&DT, ED008/10)

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".
- 1.2 The Applicant, who it was agreed was employed by the Respondent from 1 August 2018 to 11 December 2019 as a store manager, complains that he was constructively unfairly dismissed. The Respondent denies that the Applicant was dismissed; it alleges that he resigned, at first with notice by email dated 7 November 2019 at 1719hrs ([24]) and then for a second time without notice by email dated 11 December 2019 at 1004hrs ([31]). Accordingly, the Applicant had the initial burden of proving to the civil standard, that is to say on the balance of probabilities, that he had been dismissed. The Tribunal, consisting of three members, met on Tuesday and Wednesday, 19 and 20 October 2021 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 judgment or not (including material submitted during the course of the hearing: viz. the Rentokil receipt dated 4 November 2019 [155a], the Handbook and Investigation, Disciplinary & Appeals Policy ER2 and nine photographs taken by the Applicant EE2).
- 1.3 The Tribunal was conscious that both the Applicant and the Respondent were not legally represented and was anxious to make sure that all necessary steps were taken to ensure that they both 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.

2.0 Background

- 2.1 The Applicant started working for the Respondent on 1 August 2018 in Jersey and in October 2018 he moved to Guernsey, ultimately to manage the L'Islet Morrison's store. In an email dated 7 November 2019 at 1719hrs ([24]) the Applicant resigned with notice giving as his reasons the stage of his divorce proceedings and the desire to return to the UK to support his children. He requested garden leave as soon as possible. This was acknowledged in writing by the Respondent on 14 November 2019, confirming a contractual termination date of 29 January 2020 and other matters such as outstanding relocation balances due to the Respondent; access to the Respondent's IT system beyond the date of termination; and matters relating to the Respondent's property.
- 2.2 Following a failed internal audit carried out on 28 October 2019 ([257-274]) and two unsatisfactory visits from the Environmental Health Officer on 31 October and 8 November 2019 ([150-152] and [154-155]) the Respondent began an investigation. The investigation was fact-finding and not a disciplinary process and was intended to allow the Respondent to gather all necessary information and to determine what remedial action might be required including, possibly, disciplinary action against the Applicant. The investigation included face to face interviews with the Applicant on 20 and 21 November 2019; the first meeting was adjourned to allow the Applicant to have a witness (Paul Billien) with him during the meeting. At the reconvened interview on 21 November 2019 the Applicant was suspended on full pay and without prejudice pending the conclusion of the investigation. Notes of those meetings are at [117-147].
- 2.3 A further investigation interview with the Applicant was scheduled for 11 December 2019, but by email dated 28 November 2019 at 2052hrs ([73]) the Applicant informed his landlord that he had moved out of his rented home in Guernsey. This prompted the landlord to contact the Respondent seeking contact details for the Applicant, who then asked the Applicant if he was going to attend the interview on 11 December, concluding from available information that the Applicant had left Guernsey. The Applicant replied by email dated 10 December 2019 at 1601hrs ([75]) to the effect that he would be attending the interview the following day. In an email dated 11 December 2019 at 1004hrs ([31]) the Applicant resigned without notice explaining that he felt very uncomfortable with another investigation; that the first investigation had been carried out unprofessionally; that his performance would never satisfy the new retail director; and that there had been a witch hunt organised against him. The Respondent sent the Applicant a "resignation in haste" letter the same day ([32-33]) offering him an opportunity to reconsider his resignation, which was followed by a telephone call.
- 2.4 The Applicant opened his case to the Tribunal and identified the following matters that he alleged converted his admitted resignations into constructive dismissal:
- (1) The Respondent's failure to follow the correct process during its investigation following the unsatisfactory visits from the Environmental Health officer on 31 October and 8 November 2019 (for which see the letters at [150-152] and [154-155]).
 - (2) A lack of support from senior management.

- (3) General understaffing at the shop he managed.
- (4) The need to work excessively long hours.
- (5) Workplace bullying from senior management.

2.5 During the course of the hearing the Applicant elaborated his allegation in 2.4(1) to include:

- (1) Instigating an investigation without proper justification and in circumstances that had not triggered investigations into other managers in similar situations. He stated that he had not seen the file note ([70-71]) until he received the hearing bundle.
- (2) Deliberately withholding (or denying the existence of) relevant and highly probative evidence, in particular the photograph of the relevant shop premises used and shown to him during the investigation interview; CCTV footage that would have shown other photographs being taken; emails sent to and from his work email account showing his interactions with the Respondent's HR department; that it was not his signature on the Rentokil receipt dated 11 November 2019 ([156]); and the failure to include the positive Rentokil service receipt dated 4 November 2019 ([155a]) in the hearing bundle.

2.6 The Respondent opened its case and drew to the Tribunal's attention:

- (1) The Applicant had continued to work for the Respondent following his resignation on 7 November 2019.
- (2) The investigation was justified because of two unsatisfactory Environmental Health Officer visits and a failed internal audit.
- (3) The investigation was not a disciplinary hearing.
- (4) The Applicant had made no complaint about his treatment, nor had he initiated the grievance procedure.
- (5) The allegation of bullying was not made in the ET1 and appeared for the first time in the Applicant's witness statement ([21-23]).

3.0 Evidence Summary

3.1 The Applicant did not call any witnesses other than himself, notwithstanding the opportunity and his expressed intention to do so during the Case Management Meeting held on 23 June 2020. The Applicant took the oath and read out his witness statement ([21-23]). His evidence dealt with what he described as 14 months of bullying in and out of the workplace. He described a "verbal bashing" on his first day at work in Guernsey following a misunderstanding over his comments about his aspirations. He described how he found it difficult to make friends as a result of his conflict with the Guernsey management style and recounted being humiliated in the Landes du Marche shop by the former retail director. There was a problem with a tobacco stock discrepancy that arose before he was employed by the Respondent and when he resolved the issue without any support from senior management the director commented, "*Took you long enough*" and withheld the Applicant's bonus. At a Christmas party (held in February 2020) the Applicant learned of the existence of the "Top Table", which he understood was code for a group of managers particularly trusted by the former retail director and whose purpose was to keep issues such as bullying, cash and stock losses and certain other behaviour away from the attention of

the Respondent's head office. He also described abuse following a problem with petrol pricing and an in-store visit that included a "character assassination".

- 3.2 The Applicant went on to describe how he had asked for help from HR, but he was regarded as a "labelled manager" and nobody wanted to help him through fear of reprisals. He said that he was treated differently and unfairly and notwithstanding two positive visits from the CEO the bullying continued. He alleges that it was the Respondent's auditor who made the complaint to the Environmental Health Officer that led to the unsatisfactory visits. He also explained that the photograph showing the rear door of the store he managed as being open ([157]) was not the only one taken - another showed the warehouse in a pristine condition. In support of this allegation, he relied upon the email dated 27 November 2019 at 1644hrs from Paul Billien ([111]).
- 3.3 Under cross-examination, the Applicant accepted that he had not mentioned bullying in his ET1 form ([4]) nor his resignation email dated 7 November 2019 ([24]), but explained this was a result of not having had time to think and his emotions being in a state. He said that he had "hinted" at bullying in his resignation letter of 11 December 2019 ([31]). He accepted that he continued working for the Respondent after his resignation in November 2019. He explained that he had several conversations about his treatment at work with his line manager and a director and that his line manager had said to him to "leave it to me"; the Applicant trusted him to deal with it and it was for this reason that he did not raise a formal grievance. He had not asked for emails that might have helped his case because he said that if he could not trust the Respondent to produce the correct photograph, he couldn't trust them to produce helpful emails.
- 3.4 The Tribunal asked the Applicant what had happened between 7 November and 11 December that prompted him to resign without notice. The Applicant explained that it was concern about the strain on his relationship with his new partner. He had been on holiday off the Island at the time of the internal store audit and the first visit by the Environmental Health Officer. He went on to explain that he wasn't happy going back to work if the investigation was going to lead to a disciplinary hearing and that his perception of what had happened to him was that he had been victimised. He accepted that he was responsible for training (or arranging training for) the staff in the store that he managed.
- 3.5 The first witness called on behalf of the Respondent was Sarah Bree ([19-20]); she took the oath and read out her witness statement. She works for the Respondent as a senior HR adviser; her role included offering support to store managers (including the Applicant) and discussing store HR issues with Mr. Hurl, the Regional Operations Controller. She described how on one visit she and Mr. Hurl spoke to the Applicant about rumours that had been circulating about him and they witnessed the Applicant being physically too close for business propriety to another member of staff in the car park. There was concern that the store that the Applicant was managing was too large for him to cope with.
- 3.6 Sarah Bree was the note taker during the two investigation interviews held with the Applicant and she described how she thought that the process had been fair and that

the Applicant had not raised any concerns or objections to the procedure adopted. She stated that the disputed file note (**[70-71]**) had been issued to the Applicant. She was the person who was contacted by the Applicant's landlord following receipt of information from the Applicant suggesting that he had left the Island and she also sent the "resignation in haste" letter to the Applicant. In a telephone call with the Applicant following his resignation on 11 December 2019 she recalled that he said he now felt uncomfortable and that he thought he had been "targeted". During that conversation the Applicant also said that he would stand by his decision to resign, that he accepted that he was responsible for staff training, that he was not bitter and that he would not have turned down the challenge of running the L'Islet store. The Applicant also mentioned that he would have preferred "garden leave" to assist his looking after his ill parents.

- 3.7 Sarah Bree went on to list the various training attended by the Applicant and she explained that she believed that the Applicant had received all necessary support from senior management. She explained that the investigation was a fact-finding exercise and not a disciplinary hearing.
- 3.8 Under cross-examination Sarah Bree confirmed that the Applicant had not been "targeted" and that the investigation had been triggered by the poor report from the Environmental Health Officer on her re-visit to assess improvements. She explained that had the Applicant returned to complete the investigation hearing and made any complaints of bullying or harassment these would have been investigated. The procedure governing the investigation process is covered in the staff handbook and associated policies (**ER2**).
- 3.9 The next witness called on behalf of the Respondent was Andrew Holmes (**[15-16]**); he took the oath and read out his witness statement. He is the Respondent's retail director and had only met the Applicant twice - once to introduce himself following his recent recruitment and a second time following the Environmental Health Officer's visit. He explained that he had ensured (through Nick Hurl) that the Applicant had sufficient resources to complete the cleaning identified as necessary by the Environmental Health Officer and that on a follow up visit when he noticed that certain cleaning tasks had not been completed he arranged for G4S to return to the store to ensure that the necessary store standards were achieved.
- 3.10 Andrew Holmes considered that the Applicant had been treated fairly during his employment, but that the Applicant was "erratic" in that he was inattentive and would sometimes fail to follow through with tasks given to him. He also considered that the Applicant had been given all necessary resources to fulfil his role.
- 3.11 Under cross-examination Mr. Holmes recalled two other instances in Jersey of investigations following poor Environmental Health inspections. Those managers were investigated under the same process as the Applicant; they were given improvement plans and regained the five-star hygiene rating for the stores. He was not aware of any management structure problems with the Respondent.
- 3.12 The final witness for the Respondent was Charles Kerr (**[17-18]**); he affirmed and read out his witness statement. He is a senior store manager based in Jersey and explained

the basic duties applicable to any manager; he was also the investigating manager responsible for conducting the investigation further to the Environmental Health Officer's visit. He explained that he thought the investigatory process was fair and that the Applicant was kept informed throughout the process of what was happening. He confirmed that the photograph at [157] was the only photograph that he took of the L'Islet Morrison's store and that it was the photograph shown to the Applicant during his interview. The Applicant never asked Mr. Kerr for help during his employment.

- 3.13 The Tribunal asked Mr. Kerr about the wording in the last paragraph on [17]. In particular, he was asked to explain why in the second sentence he spoke of "the picture" in the singular, but in the third sentence he spoke of "pictures" and "them" in the plural. He said that it was just a mistake and that he had only taken one photograph.
- 3.14 Both parties made closing submissions in the course of which they each drew the Tribunal's attention to particular pieces of evidence upon which they sought to rely. No additional legal arguments were raised.

4.0 Legal Framework

- 4.1 An extended discussion of the law relating to constructive dismissal was undertaken by this Tribunal in the recent case of *Streeter v Sandpiper C.I. Ltd.* (Guernsey E&DT, ED033/19, <https://gov.gg/article/178566/Tribunal-Decisions-2020>) at paragraphs 4.1 to 4.9. The Tribunal reminded itself of that analysis and applied the relevant principles to the facts of this case.
- 4.2 The Respondent denied that the Applicant was dismissed and so it was for the Applicant to prove, on the balance of probabilities, that he had terminated his contract of employment, with or without notice, in circumstances such that he was entitled to terminate it without notice by reason of the Respondent's conduct (see section 5(2)(c) of the 1998 Law). In summary, the basic elements that the Applicant must prove in order to be able to claim constructive dismissal are:
- (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 his leaving.
 - (3) He must leave in response to the breach and not for some other, unconnected reason.
 - (4) He must not delay too long in terminating the contract in response to the Respondent's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.
- 4.3 In the case of *Appelqvist v States of Guernsey* (Guernsey E&DT, ED008/10) the Tribunal accepted that the Oxford English Dictionary defined "bullying" as "overbearing insolence; personal intimidations; petty tyranny". The Tribunal adopted that definition in the context of this case.

5.0 Facts Found

- 5.1 There are three particular matters of fact where the parties' accounts are diametrically opposed: the status of the file note and whether it was issued; how many photographs were taken; and whether the Applicant signed the Rentokil receipt dated 11 November 2019 ([156]). The resolution of these discrepancies is not a question of mistaken interpretation, understanding or recollection; the parties cannot both be right. The Tribunal has looked with care at the signature on the receipt dated 11 November 2019 and compared it with the many genuine examples of the Applicant's signature contained in the bundle (for example, on every page of the investigation meeting notes) having confirmed them with the Applicant as genuine. While the Tribunal members do not hold themselves out to be handwriting experts, we do have some concerns about the purported signature on the Rentokil receipt that had initially been omitted from the bundle. We take the view that we are not able to come to a conclusion one way or the other about it. This is very unsatisfactory in a case where credibility plays such an important role; the Applicant is accusing the Respondent of forgery and by its denial of that allegation the Respondent accuses the Applicant of lying.
- 5.2 The discrepancy in the language used in the account given by Mr. Kerr at [17] relating to the "picture" in one sentence and "pictures" in the next has also caused the Tribunal a degree of concern. It might be an example of very sloppy drafting or it might be the "smoking gun" of a clumsy slip that reveals the truth about there being more than one photograph. All witnesses gave their evidence having taken the oath or made the affirmation and it is extremely unfortunate that the Tribunal is being asked to adjudicate upon a dispute as to the truthfulness (and not merely the accuracy of recollection) of some of those witnesses. The Tribunal considered the potentially corroborative evidence of Mr. Billien (at [111]) but decided that as he had not been called as a witness and his evidence tested by cross-examination, the weight that it could attach to that evidence was very limited. The Tribunal also notes with concern that there is no mention of any photograph being shown to the Applicant in the agreed contemporaneous record of the investigation meeting. Regrettably, the Tribunal finds that there simply is insufficient evidence, from either side, to persuade it of either version; this will unfortunately have to be one of those questions that remains unanswered.
- 5.3 In any event, the Tribunal is not entirely sure where these allegations would take the case. Even if the signature on [156] is not the Applicant's and even if there were other photographs of the L'Islet premises, the Tribunal is concerned with what happened to cause the Applicant to resign. Both these matters are subsequent to his resignation on 7 November.
- 5.4 The Applicant did not clarify in his evidence or his submissions which of the two resignations he claims amounted to constructive dismissal. This is important from an evidential point of view as events of conduct subsequent to a resignation are unable to convert that resignation into a constructive dismissal. The Tribunal must, therefore, examine each resignation in turn to determine if either meets the criteria for constructive dismissal.

- 5.5 The resignation email dated 7 November 2019 at 1719hrs (**[24]**) makes absolutely no reference to bullying, harassment or anything else that might equate to a breach of contract by the Respondent. Similarly, the Applicant's ET1 (**[3-4]**) makes no allegations of bullying or harassment; instead the Applicant complains of a defect in procedure. Furthermore, any complaint from the Applicant concerning the Respondent's failure to provide copies of work emails is hampered by the Applicant's failure to seek an order for their disclosure either at the Case Management Meeting or in a subsequent application for directions. The Tribunal does note, however, that the Respondent's policy set out in the handbook does indicate that it is general practice to commence such grievances on an informal basis, which is what the Applicant purports to have done. Indeed, he then escalated his concerns to the HR department and although this is not evidenced by any emails, it is corroborated by the witness statement of Sarah Bree through the telephone conversation following his resignation with immediate effect following the investigation meeting. This coincides with the reasons set out in the ET1.
- 5.6 The Tribunal unanimously finds as a fact that the investigation procedure was triggered by the unsatisfactory report from the Environmental Health Officer. This was a perfectly reasonable response to a serious incident in which the hygiene rating for the store had been reduced. It might have turned out that the investigation would have exonerated the Applicant from blame and found that the fault for the poor inspection was that of other staff members who had not followed the Applicant's instructions while he was on holiday. The whole point of the investigation was to get to the bottom of these very issues; it was not a disciplinary procedure.
- 5.7 So far as the second resignation on 11 December 2019 is concerned, the Applicant in his own words explained that the only thing that had changed between 7 November and 11 December was his relationship with his partner. That is not a breach of contract by the Respondent and so cannot be grounds for a finding of constructive dismissal.
- 5.8 The Tribunal remains concerned, however, about the status of the "file note" at **[70-71]**. Its initial interpretation of that description was that it was simply a record of something done or said, rather in the same way that a lawyer might record an activity in a file note. Upon examining the Investigation, Disciplinary & Appeals Policy (**ER2**) it became clear that a "file note" is the lowest rung on the ladder of disciplinary sanctions. It seems very curious, therefore, that the file note at **[70-71]** is incomplete in that it is not signed by either the manager or the employee and does not have any comments from the employee in the appropriate section. The Tribunal is left, therefore, with a concern that the Applicant might be right when he said he never saw the file note until he received the hearing bundle. The Tribunal has thought long and hard about whether this gives sufficient support to the allegation that there was bullying towards the Applicant with the intention of getting rid of him. On balance it concludes that the file note is a very difficult document for it to work with and there are several unresolved issues concerning its provenance. Even if there is something not quite right about it, the Applicant admits that he was unaware of its existence until well after he resigned, and it could not have had any impact upon his decision to resign. The Tribunal concludes, therefore, that any concerns that it has about the file

note are not sufficient to lead it to find that the Applicant was constructively dismissed.

- 5.9 The Tribunal has some sympathy for the Applicant. Food retail is obviously a competitive business that requires hard work to make it a success. That must involve a degree of supervision by senior management and investigations if things go wrong. Simply because there is an investigation does not mean that the person being investigated will end up being disciplined and even if they are it does not automatically mean that the person will lose their job. The Tribunal finds that the Applicant overreacted to the investigation and may have mistakenly perceived it as targeted and unjustified criticism that amounted to bullying.
- 5.10 The Tribunal is satisfied that the investigation process in general, and the interviews with the Applicant in particular, were carried out broadly in accordance with the relevant policy and were fair. The process was triggered by a serious failing at the Applicant's store. The Tribunal was a little concerned, however, about the notes of the interviews being slightly disjointed in places although not sufficient to make it doubt their overall veracity, noting also that they had been signed as a true record. The absence of any evidence in the notes relating to the production of photographs during the meeting and the failure to refer to the second Environmental Health Officer letter are matters of concern but are insufficient to make the investigation process unfair.

6.0 Conclusion

- 6.1 For the reasons set out above, the Tribunal unanimously concludes that the Applicant was not constructively dismissed. In those circumstances the Tribunal dismisses the Applicant's claim and makes no award.

7.0 Costs

- 7.1 The Tribunal's power to award 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.
- 7.2 Having taken into account all of the material before it, the Tribunal has decided not to award costs to either party.