

**THE EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**Applicants: GINTS SLESERS and IEVA STEIMANE**  
Represented by: In Person (assisted by Ms H. Plsek)

**Respondent: ALISON DE LA MARE or EDMOND LTD. t/a THE CAPTAIN'S**  
Represented by: Advocate T. Crawford

**Tribunal Member:** Crown Advocate J. Hill (Chair, sitting alone)

**Decision of the Tribunal**

The Applicants made complaints of unfair dismissal.

“Alison de la Mare” made an application pursuant to *The Employment and Discrimination Tribunal (Guernsey) Order, 2020* for an order dismissing, alternatively, striking out the entirety of the complaints.

The Chair of the Tribunal appointed to hear the claim determined the application having received written submissions from the parties.

Having considered all of the matters presented, whether referred to in this judgment or not, and the representations of the parties and with due regard to all the circumstances, the Tribunal dismisses the applications to dismiss and to strike out the complaints. The Respondent is “Edmond Ltd. t/a The Captain’s”. The complaints will be scheduled for a full hearing.

J Hill

09 June 2021

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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](mailto: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 and Discrimination Tribunal (Guernsey) Order, 2020

**The cases referred to in this document are as follows:**

The Insight Group Ltd. v. Kingston Smith [2012] EWHC 3644 (QB)  
The Sardinia Sulcis [1991] 1 Lloyd's Rep. 201, CA

**Extended Reasons****1. Introduction**

- 1.1 The Applicants each lodged ET1 forms on 2<sup>nd</sup> June 2020 in which they complained about the way in which their employment at The Captain's Hotel, St. Martin's, Guernsey had been terminated. In those forms they named their employer as "Alison de la Mare" and gave a contact address of The Captain's Hotel. Identical ET2 forms were lodged in response on 15<sup>th</sup> June 2020; each ET2 identified the respondent employer as "Edmond Ltd. t/a The Captain's Hotel", denied allegations of unfair dismissal and explained how the dismissals were fair. Apart from simply correcting the name of the respondent employer on the *pro forma* first page and in the attached Particulars of Response, no other issue was taken about the identity of the employer in either ET2. It is accepted that each ET1 had been lodged within the three month time limit for making a complaint.
- 1.2 On 27<sup>th</sup> April 2021 an application was lodged by "Alison de la Mare" against the Second Applicant for an order dismissing the complaint in its entirety, alternatively, striking out the complaint in its entirety. Given that the issues raised are identical for each Applicant, for the purposes of this decision I shall treat the application as being made against both Applicants. Putting the matter quite shortly, the application alleges that the Applicants have brought their claims against the wrong Respondent (*i.e.* "Alison de la Mare"); that it is too late to bring a claim against the correct employer (*i.e.* "Edmond Ltd. t/a The Captain's Hotel"); and that the Tribunal has no power to substitute the correct employer for the wrong employer.

1.3 In reaching my decision I have taken into account the material in the ET1s and ET2s, the Application dated 27<sup>th</sup> April 2021 and attached skeleton argument, the Applicants' responses contained in the emails from Ms Plsek dated 18<sup>th</sup> and 25<sup>th</sup> May 2021 and Advocate Crawford's response in his email dated 28<sup>th</sup> May 2021. I have also read with care all of the authorities and other documents referred to in the various communications.

## **2. Legal framework**

- 2.1 This is the first application made under *The Employment and Discrimination Tribunal (Guernsey) Order, 2020* ("the 2020 Order") for the dismissal or strike out of a complaint that has come before a Tribunal for decision. It seems appropriate, therefore, that I should set out the way in which applications of these sorts are approached. In accordance with paragraph 4 of the 2020 Order, it is for me sitting alone to determine the applications.
- 2.2 An application for the dismissal of a complaint, or part of it, made under paragraph 1(1)(b) of the 2020 Order succeeds if the complaint or part of it has no reasonable prospects of success. There would appear to be no discretion available to the Tribunal in such a case – if the Tribunal considers that a complaint or part of it has no reasonable prospects of success, it shall send a notice to the parties in accordance with paragraph 1(2) of the 2020 Order. Such a notice must set out the Tribunal's view and reasons for it, order that the complaint (or part) be dismissed on a date at least one month from the date of the notice unless the relevant party makes written representations to the Tribunal, and specify the consequences of the dismissal. If representations are made before the specified date they shall be considered by the Tribunal and provisions are made as to how that may happen.
- 2.3 An application for the striking out of all or part of a complaint made under paragraph 2(1)(a) may succeed if the Tribunal considers that it has no reasonable prospects of success. In such a case the Tribunal has a discretion whether to strike out the complaint or part of it. An order for strike out may

not be made unless the relevant party has had a reasonable opportunity to make representations to the Tribunal in writing or, if requested, at a hearing. If an order is made striking out all of a complaint, the other party may then apply for judgment without a hearing.

- 2.4 The application is phrased in the alternative, that is to say, it asks for an order dismissing the whole of the complaint, alternatively (*i.e.* if that is unsuccessful) for an order striking out the whole of the complaint. Given that that is how the application is phrased, I think that I must approach the application for dismissal first; if that succeeds I do not need to consider the application for a strike out; on the other hand, if I do not grant the application for dismissal then I must go on to consider the application for a strike out.
- 2.5 When I consider the application for dismissal first, I clearly have representations from the Applicants and a response from the Respondent. Should I take them into account when considering the application for dismissal? Paragraph 1 of the 2020 Order envisages the initial consideration of a dismissal application occurring without receiving representations from the Applicants; any representations come later and only if a notice under paragraph 1(2) is issued. What has happened here is that because the application was put in the alternative, the Applicants have made their representations as anticipated in accordance with the procedure under paragraph 2 (*i.e.* relating to a strike out). It would, in my opinion, be wholly artificial to ignore the totality of documentation now before me. In any event, paragraph 1(1) directs the Tribunal to consider "*the papers before it*" when deciding if the complaint has no reasonable prospects of success. The only sensible way of interpreting that provision is to take it to mean the totality of the documentation before the Tribunal concerning the case when the decision on the application comes to be taken.

### **3. The application for dismissal of the complaint**

- 3.1 I am grateful to Advocate Crawford for his analysis of the meaning of the phrase “*no reasonable prospects of success*” as set out in paragraphs 1.7 to 1.9 of his skeleton argument. Ms Plsek, very understandably, does not argue against the interpretation being “*unarguable, bound to fail or no significant chance of success*”. That is therefore the meaning that I propose to give to the test in paragraph 1(1)(b) of the 2020 Order.
- 3.2 Advocate Crawford then sets out in paragraphs 2.1 to 2.12 of his skeleton argument his basis for arguing that the Applicants have identified the wrong employer in their respective ET1s. It is, I think, common ground between the parties that the Applicants were not, in fact, employed by Alison de la Mare, but were employed by Edmond Ltd. Ms Plsek certainly does not try to argue the contrary position.
- 3.3 What is important is how the time limit in section 17 of *The Employment Protection (Guernsey) Law, 1998* (“the 1998 Law”) applies to a complaint and what powers the Tribunal has in relation to a matter that comes before it. The key phrase is in section 17(1) where it provides that, “*The Tribunal shall not hear and determine a complaint under section 16(1) unless it is presented to the Secretary within a period of three months beginning on the effective date of termination*”. Consequently, I must have regard to the date upon which the complaint was presented to the Secretary. It will perhaps be in only the most imperfectly drafted ET1 that it is unclear about which employment (if the Applicant has more than one) the complaint is being made. It must, therefore, be obvious (perhaps save in exceptional cases, of which I do not think this is one) which Respondent employer the Applicant means to refer to. Indeed, by virtue of section 16(1)(a) of the 1998 Law a complaint against an employer by any person that he was unfairly dismissed by the employer may be made to the Tribunal by being presented to the Secretary to the Tribunal; the employer is therefore automatically the person complained about. The inclusion of the name of the Respondent on the ET1 is purely an artefact of the *pro forma*

document and merely facilitates efficient communication of the complaint by the Secretary; it is not a requirement of the 1998 Law. The important point is that provided that an Applicant identifies his or her complaint with sufficient precision (including the relevant employment being complained about) and presents it to the Secretary within the relevant time period, there is compliance with section 17 of the 1998 Law.

- 3.4 My view of the interpretation of section 17 of the 1998 Law is bolstered by the Respondent's action when responding to the ET1. Instead of there being a denial of liability by Alison de la Mare, citing as her defence the fact that she was not the relevant employer, what happened was the filing of a substantive ET2 by Edmond Ltd. – an action that I interpret as being a waiver of the potential irregularity created by the naming of the incorrect employer and an acceptance by Edmond Ltd. that they are the correct Respondent. This must particularly be so since the only way in which Edmond Ltd. could have come into possession of the ET1 was by its being given to them by Alison de la Mare.
- 3.5 Consequently, my analysis of the simple mechanics of what happened in this case is that the Applicants presented their complaints concerning their employment at The Captain's Hotel, St. Martin's within the relevant period required by the 1998 Law and that by filing their ET2s Edmond Ltd. corrected the mistaken identification of the employer and put themselves forward as the correct Respondent. By engaging with the process of the Tribunal and representing themselves as the correct Respondent, upon which the Applicants have relied to the extent that it is now too late for them to present another complaint to the Secretary, I conclude that it would be inequitable for the correct Respondent to resile from that position. The effect and interpretation of Edmond Ltd.'s conduct is that they have added (or substituted) themselves.
- 3.6 If, however, I am wrong in my simplistic analysis, I have also considered the position in the following way, which comes to the same conclusion. Advocate Crawford seeks to argue in paragraph 2.13 of his skeleton argument that the

mistake in the ET1 is *“one of misidentification of the employer rather than one of misnaming or misspelling the employer’s name”*. I disagree. I have looked for guidance at Rule 19.5 of the *Civil Procedure Rules* (“the CPR”) in England and Wales that deals with the addition or substitution of parties after the end of a relevant limitation period; in particular I have consulted pages 711 to 716 of volume 1 of the 2021 edition of *The White Book*. I remind myself of the judgment of Leggatt J in *The Insight Group Ltd. v. Kingston Smith* [2012] EWHC 3644 (QB) in which he observed that the identification of a party by reference to a description *etc.* means identification *“by reference to what description is material from a legal point of view to the claim made”* (at paragraph 52). He goes on, *“Thus, where for example the defendant is sued for breach of a duty owed by reason of being the claimant’s employer, or landlord, then that will be the relevant description of the intended defendant, and if the claimant turns out to have been mistaken in thinking that the person sued fitted that description because the actual employer or landlord was someone else, the mistake can be characterised as one as to name”* (paragraph 53). I conclude, therefore, that the Applicants’ mistake was as to the name of the Respondent and not the description.

- 3.7 This conclusion is important when one considers the principles derived from *The Sardinia Sulcis* [1991] 1 Lloyd’s Rep. 201, CA, and in particular point 5, as set out on page 714 of *The White Book*: *“thus, if the claimant gets the right description but the wrong name for their intended defendant, there is unlikely to be any doubt as to the identity of the person intended to be sued; but if they get the wrong description, it will be otherwise”*. Both Applicants in this case intended to complain about their employer - there is no doubt about that. They both mistakenly named the employer as Alison de la Mare, but obviously intended the complaint to be levelled at their employer. The correct employer took no point about this at the time of filing their ET2s and helpfully named themselves as the correct Respondent.

3.8 Advocate Crawford then argues in paragraphs 2.13 to 2.20 of his skeleton argument that the Tribunal has no power to permit or order the amendment of the complaint by the addition of a party and the removal of another. In my view this argument misses the point somewhat; there is no addition or removal of a party, the Applicants correctly brought their complaints against their employer (the correct description of the correct Respondent) who has been a party from the commencement of this claim. All that has happened since the presentation of the complaint to the Secretary is a clarification of the name of the Respondent, which was done by the correct Respondent itself.

3.9 Furthermore, and in any event, I disagree with Advocate Crawford in his analysis of the meaning and effect of paragraph 2(m) of the Schedule to *The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005* ("the 2005 Ordinance"). First, that paragraph is said to be subject to "*the provisions of any order of [the Committee] under paragraph 3*" (which includes the 2020 Order). Being subject to the provisions of any order means that the order qualifies paragraph 2(m) or overrules it where there is a conflict; it does not mean that unless an order of the Committee gives the Tribunal the power to add or remove a party no such power exists (as argued in paragraph 2.20(f) of the skeleton argument). Second, paragraph 2(m) gives the Tribunal very wide powers to determine its own procedure and give directions and I must interpret that paragraph in such a way as to give effect to that intention. The addition, substitution or removal of a party is one of the necessary powers that the Tribunal must have available to it in its hearing and determination of a complaint. Third, the attempted reliance upon the Explanatory Note to the 2020 Order (see paragraph 2.20(e) of the skeleton) is misguided because the Explanatory Note is just that and is expressly stated not to be part of the 2020 Order.

3.10 Given that I have concluded that the tribunal has the power to add, substitute or remove parties, how should that power be exercised (assuming that it needs to be in this case and in case I am wrong in my analysis in paragraph 3.8

above), especially in circumstances where a time limit has expired? Again, I look to CPR 19.5(2) and (3) and the guidance given by *The Sardinia Sulcis* (see pages 711 to 714 of *The White Book*). In summary, when deciding whether to exercise my discretion I have to have regard to: (1) whether the relevant time limit was current when the complaint was submitted; (2) whether the addition or substitution is necessary; (3) the addition or substitution is necessary only if the new party is to be substituted for a party who was named in mistake for the new party; and (4) is it possible to identify the intended defendant “by reference to a description more or less specific to the particular case”? – if it is, it is a mistake of the type covered by condition (3).

3.11 Taking those matters in turn: (1) the time limit was current when the complaint was presented; (2) the substitution is necessary since “Edmond Ltd.” was the employer and must be the Respondent; (3) “Alison de la Mare” was named in mistake for “Edmond Ltd.” in accordance with my analysis in paragraph 3.6 above; and (4) yes, by reason of the matters set out in paragraphs 3.6 and 3.7 above. I also consider that it was Edmond Ltd. who put themselves forward voluntarily as the correct Respondent and so I do not see that there can be any prejudice to Edmond Ltd. if they are substituted as the correct party in these complaints. Insofar as it may be necessary, I therefore exercise my discretion and make the appropriate order for substitution. Once that is done, the arguments of the Respondent, based as they are solely upon the wrong Respondent being named, to the effect that the complaint has no reasonable prospects of success fall away.

3.12 In conclusion, whether by the analysis in paragraph 3.5 or 3.11, I reject the argument advanced on behalf of the Respondent that the complaint has “no reasonable prospects of success”, that is to say is “unarguable, bound to fail or no significant chance of success”. Accordingly, I dismiss the application for dismissal of the complaint whether in part or in its entirety.

**4. The application to strike out the complaint**

4.1 I can now deal with this alternative application quite shortly. For the same reasons as I have set out above I conclude that there is either no need for an order for substitution or, if I am wrong about that, the Tribunal does have the power to make such an order and that it is appropriate for me to exercise my discretion insofar as it is necessary. I therefore reject the argument advanced on behalf of the Respondent that the complaint has "*no reasonable prospects of success*", that is to say is "*unarguable, bound to fail or no significant chance of success*". Accordingly, I dismiss the application to strike out the complaint whether in part or in its entirety.

J Hill

09 June 2021

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Signature of the Chair

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Date