



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mrs Victoria Ogden
Represented by: Self Represented

Respondent: The States of Guernsey (Acting by and through the Policy & Resources Committee)
Represented by: Advocate Emily Bamber

Tribunal Members: Mrs Paula Brierley (Chair)
Mrs Christine Le Lievre
Mr Andrew Vernon

Hearing date(s): 11 and 12 August 2021

Decision of the Tribunal

The Applicant made a complaint of constructive unfair 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 her employment in circumstances that did not give rise to constructive dismissal. In the circumstances, the Applicant’s claim is dismissed. The Tribunal made no order for costs.

Mrs P Brierley
.....
Signature of the Chair

22 October 2021
.....
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 Protection (Recoverable Costs) Order, 2006

Extended Reasons**1. Introduction**

- 1.1. The Applicant, Victoria Ogden, was employed from 3 January 2017 by the Respondent. From 19 February 2018 she was employed as a Practice Development Lead of Theatres (Specialist Team Leader & Theatre Co-Ordinator) at Health and Social Care (HSC).
- 1.2. The Applicant represented herself and gave both oral and documentary evidence under Affirmation.
- 1.3. The Respondent, The States of Guernsey (Acting by and through the Policy and Resources Committee) was represented by Advocate Emily Bamber.
- 1.4. In the ET1 Application form dated 2 July 2020, received at the Employment Relations Service on 3 July 2020, the Applicant claimed she had been unfairly constructively dismissed with effect from 21 April 2020.
- 1.5. The Respondent denied that the Applicant was dismissed; they alleged that she tendered her resignation, further that the Applicant was given the opportunity to rescind her resignation but refused and reaffirmed her resignation.
- 1.6. The burden of proof rested on the Applicant to prove, on the balance of probabilities, that a dismissal had occurred.
- 1.7. The Tribunal, consisting of three members, met on Wednesday 11 and Thursday 12 August 2021 to hear and determine the Applicant's complaint. All the material submitted by the parties has been taken into account by the Tribunal, whether specifically referred to in this judgement or not.
- 1.8. The parties relied on a joint bundle prepared by the Respondent, ET3 which was supplemented by ER2, ER3, EE2, EE3, EE4, EE5. The Parties also submitted written closing statements.
- 1.9. The Applicant called the following witness:-
 - John Dale Ogden
- 1.10. The Respondent called the following witnesses:-
 - Lynne Duckworth (HR Manager)
 - Mary Carre (Applicant's Line Manager)
 - Claire Rigler (Mary Carre's Line Manager)
- 1.11. The Tribunal was conscious that the Applicant (who had the assistance of a McKenzie friend throughout the hearing) was not legally represented and was anxious to make sure that all necessary steps were taken to ensure that both sides had a fair hearing. The Tribunal took FORM: ET3A ED033/19 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 carefully to the parties throughout the proceedings and to explore potential arguments and lines of questioning that they could have advanced. That being said, 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.

- 1.12. The Applicant also made an Application for Costs under the Employment Protection (Recoverable Costs) Order, 2006 (EE6 refers)

2. Background

- 2.1. When the Applicant opened her case to the Tribunal she said that she relied on the following to demonstrate the Respondent had fundamentally breached her contract of employment which left her with no choice but to resign (EE5 12 refers):

- I. Failing to act in accordance with medical advice and occupational health recommendations to her direct detriment;
- II. Failure to adequately support her in the workplace and prevent her from feeling isolated, alone and unwanted which led to a medical incident as described at (EE5 para 12b ii);
- III. Critically, theatre staff unlawfully accessing her personal medical records and her line manager either intentionally or recklessly providing inaccurate and untruthful information to her occupational health consultant.

The Applicant further noted that the final straw had been the denial of her sabbatical request which she had made in an attempt to extract herself from the untenable position in which she found herself.

- 2.2. During evidence the Applicant explained how very important both sport and work were to her as these enabled her to cope (stabilising factors) with her mental wellbeing.
- 2.3. A second major medical incident occurred at work on 24 October 2019 and the detail of this is documented in file notes in the joint bundle G44 and G45.
- 2.4. Mary Carre said she was “dumbfounded” to receive a call from the Applicant on 25 October 2019, the day after the major medical incident which took place at work, during which the Applicant was asking what she wanted her to work on Monday. According to the file note that Mary Carre had put together following the call, she noted that the Applicant had become agitated during the call when Mary said she wanted OH to be involved. Mary said she regretted using the words “bullied her way back to work” as this inflamed the call. She said she had been extremely upset by the conversation and felt let down by the discharging team given the nature and location of the incident.

3. The Law

- 3.1. It is for the Applicant to prove, on the balance of probabilities, that: (1) there was a fundamental breach of the contract of employment by the Respondent; (2) the Respondent's breach caused the Applicant to resign from her employment; and (3) the Applicant did not delay too long before resigning thus affirming the contract and losing the right to claim unfair dismissal.

4. Facts Found

The following timeline is taken from EE4 the version submitted by the Applicant.

- 4.1. 3 January 2017 the Applicant commenced employment with the Respondent as a Theatre Practitioner.
- 4.2. 1 March 2017 Applicant upgraded to Team Leader.
- 4.3. 19 February 2018 Applicant appointed to role of Specialist Team Leader and Theatre Co-Ordinator.
- 4.4. 15 May 2019 the Applicant was signed off work until 19 May 2019 with "Acute Sciatic flareup – awaiting surgery".
- 4.5. 20 May 2019 Applicant returned to work up until her operation on 25 June 2019.
- 4.6. Applicant met Mary Carre (Applicant's Line Manager) and Claire Toynton (Theatre Team Leader) to discuss the surgery and work arrangements including time off required for surgery and return to work.
- 4.7. 24 June 2019 Sickness absence commenced.
- 4.8. 25 June 2019 The Applicant had surgery on her back and a sickness certificate was issued until 29 July 2019 with advice to "avoid lifting, twisting and deep bending for three months from the surgery date".
- 4.9. 4 July 2019 Email from Applicant cc'ing Mary Carre noting that she had met with Mary the day before and agreed a return to work on Monday 29 July 2019 and that she would remain on light duties for a further 2 months subject to confirmation by Occupational Health (joint bundle F37 refers).
- 4.10. 17 July 2019 Applicant emailed Mary Carre concerning the Occupational Health referral reminding Mary that she would be back on 29 July 2019.
- 4.11. 19 July 2019 Mary Carre responds saying that the referral had been made and that the Occupational Health usually came back quickly. She confirmed her understanding that the Applicant would be back on 29 July 2019.
- 4.12. 24 July 2019 Occupational Health responded with an appointment for 1 August 2019 (Joint Bundle E7 refers)
- 4.13. 22 – 29 July 2019 An email exchange between Applicant and Claire Rigler in which the Applicant voiced concerns that her Occupational Health meeting would not be in time for her planned return to work on 29 July 2019. When Claire responded back to the Applicant with a suggested approach, the Applicant emails to say that she had an extended sickness certificate for up to the Occupational Health appointment of 1 August 2019. (Joint Bundle G55 refers).
- 4.14. 1 August 2019 Occupational Health appointment takes place and a report is drawn up. (Joint bundle E7 refers)
- 4.15. 7 August 2019 Applicant is examined by GP and sickness certificate is given retrospectively from 29 July up to 14 August.

- 4.16. 8 August 2019 the Applicant experiences a major medical incident and is admitted to Intensive Care Unit.
- 4.17. 12 August 2019 Sickness Certificate issued by ICU consultant for 1 month. Sickness certificate notes “completely unknown timeframe for return to work”.
- 4.18. 19 August 2019 Applicant is discharged from hospital.
- 4.19. 20 August 2019 Messages between Applicant and Mary Carre on Facebook. Mary subsequently telephoned the Applicant at home at 9.30 am. (Joint bundle F35 – F36 refers.)
- 4.20. 30 August 2019 Mary Carre emailed Occupational Health stating that she felt there were some issues that need to be resolved prior to the Applicant returning to work safely. (Joint bundle G54 refers.)
- 4.21. 2 September 2019 Sickness certificate signing Applicant off work until 24 September 2019 due to “lumbar discectomy depression”.
- 4.22. 19 September 2019 Applicant emailed Mary Carre stating that from her medical advisers’ points of view they were happy for her to return to work (Joint bundle E31 refers)
- 4.23. 20 September 2019 the email discussion continued regarding the Applicant returning to work. Mary Carre asked the Applicant not to return to work until she, Mary, was back in and had a chance to read the OH report and discuss the options with the Applicant. Mary Carre further noted that, if necessary, the Applicant would need to get an extension to her sickness certificate. Mary Carre was due back from holiday on 2 October 2019.
- 4.24. 24 September 2019 Applicant’s appointment with Occupational Health took place and the report noted that the underlying issues were not work related, a phased return to work was recommended and that the Applicant was fit to return to both clinical and non-clinical elements of her role. (Joint bundle E16 refers) Medical certificate also expired on this date.
- 4.25. 25 September 2019 the Applicant tried to contact Claire Rigler by telephone and email to discuss immediate return to work given Occupational Health conclusion as per report of 24 September 2019.
- 4.26. 26 September 2019 Claire Rigler telephones Applicant following Applicant’s request to discuss return to work. Claire permits the Applicant to return to work in a non-clinical capacity that afternoon.
- 4.27. 27 September to 1 October 2019, Applicant was off Island at a netball tournament.
- 4.28. 3 October 2019 Applicant went on compassionate leave for the week.
- 4.29. 7 October 2019 Applicant returned to work on a phased return planned for 4 weeks to include clinical work. With a normal shift pattern to resume on 5th week following return. (Joint bundle G48 refers)
- 4.30. 21 October 2019 Applicant at work.
- 4.31. 22 October 2019 last day Applicant worked at PEH. Occupational Health report noted that the Applicant had not improved, noting that the Applicant felt isolated at work and would also benefit from an ergonomically sound workstation. The report notes that it is not recommended to increase the Applicant’s hours above the current 75% at that time.
- 4.32. 23 October 2019 Applicant is rostered to be on a day off.

- 4.33. 24 October 2019 Applicant's first rostered anaesthetic shift. Applicant experiences another serious medical incident at work prior to starting her shift. Applicant admitted to hospital.
- 4.34. 25 October 2019 Applicant discharged from hospital. Applicant telephoned Mary Carre to discuss her intended return to work on Monday 28 October 2019. Mary "dumbfounded" at receiving the call from the Applicant. Mary Carre said that she wanted Occupational Health involvement as outlined in the joint bundle at G45.
- 4.35. 26 October 2019 Applicant messages Claire Rigler stating that she had just spoken with Mary Carre and that Mary had implied that the Applicant had bullied Claire so that she, the Applicant, could get back to work. The Applicant states that she is so upset by work. Claire states that she will contact the Applicant on Monday (29 October 2019) to discuss but that the employer is supportive and not to worry about her job. (Joint bundle F27 – F28 refers)
- 4.36. 28 October 2019 the Applicant's sick leave recommences signed off for 2 weeks. (Joint bundle E24 refers)
- 4.37. 7 November 2019 the Applicant has a medical certificate signing her off for the remainder of the year. (Joint bundle E25 refers)
- 4.38. 26 November 2019 the Applicant emails the Chief Nurse/Director of Governance regarding concerns and conduct shown towards her by Mary Carre. The Chief Nurse responds that the best person to respond is Claire Rigler's line manager (Joint bundle, F19 and F18 refers).
- 4.39. 10 December 2019 Occupational Health review takes place and the report dated the same day states the Applicant is ready to return to work on a phased return. The report also recommends a case conference to discuss "workplace issues" at which meeting Dr Junker will also be present, suggested dates 14 or 15 January (Joint bundle E26 refers)
- 4.40. 17 December 2019 the Applicant has a meeting with her union representative, Bob Lanning. In an email Bob Lanning advises that during the case conference meeting the Applicant should still raise her concerns even though her line manager was not due to attend (but the line managers above her would be attending). Bob Lanning also says that HR should be advising on either putting in a formal grievance unless they were to offer "some form of mediation". The Applicant also receives a letter from Payroll recalculating her sickness entitlement to take into account the phased return to work. The last day of full pay amended from 16 December to 2 January 2020. (Joint bundle, F15A and F16 refers)
- 4.41. 2 January 2020 Applicant declared fit to return for work. Applicant emails payroll to say she has returned and is taking 3 weeks annual leave.
- 4.42. 14 January 2020 the case conference takes place and is attended by Dr Junker, the Applicant, Applicant's husband, Head of Acute Nursing, Claire Rigler (Lead Nurse Surgical) and the HR Manager. The Applicant read her prepared document (Joint bundle G37 refers). The Applicant said that she could not work under Mary Carre until her issues which she raised had been resolved. The Applicant put forward some suggestions for alternative roles. The roles were not considered possible for various reasons, but it was noted that Mary Carre was due to be out for several weeks therefore the Applicant would have a temporary change in line management. The Applicant

- requested a further 3 weeks off from 3 February 2020. It was agreed at the meeting that a further meeting would be set for Wednesday 22 January 2020 to discuss issues raised. (Joint bundle, G34 and G41 refers)
- 4.43. 15 January 2020 Applicant responds to the HR Manager's meeting request email noting that she is unavailable on the day of the next meeting and that she wanted Bob Lanning to attend, further asking that the HR Manager liaise with Bob Lanning to organise.
- 4.44. 21 January 2020 The Applicant and her husband met with Bob Lanning. During the meeting an email was sent, at 13.45, to the HR Manager (on Bob's behalf (Joint bundle, F15 refers) stating that the Applicant was proposing to either return to work for 3 months and immediately submit a request for a 1 year sabbatical, if that was not possible then she would submit her resignation and would be willing to work her 3 months contractual notice subject to discussions on where she would be working. Further noting that it was felt the meeting scheduled for the next day "would be a waste of time". (Joint bundle F15 refers)
- 4.45. 21 January 2020 at 14.56 the Applicant emailed the HR Manager resigning but saying she would be happy to work her notice period. (Joint bundle, G33 refers) No reasons for the resignation are stated in the email.
- 4.46. 21 January 2020 at 19.28 HR Manager acknowledges and accepts resignation. The HR Manager clarifies "it is not that we do not want you to work your notice but that if it was of assistance". The email further reiterates that the meeting which had been set for the 22 January was to discuss in further detail the Applicant's return to work and the concerns she had raised.
- 4.47. 21 January 2020 at 19.49 the Applicant sent an email from her Hotmail account (she further sent this on 23 January as she was concerned it had not gone through). The email acknowledges the email from the HR Manager noting that she would prefer the option of an exit interview. Also noting that she would like a 'good bye' meal with her colleagues but noting that she would like Mary Carre informed of her resignation prior to her contacting the rest of the staff. (Joint bundle G30 refers)
- 4.48. 21 January 2020 at 19.51 the Applicant sends the exact same email from her outlook to the HR Manager except this email includes a line "My preference would have been sabbatical to allow time for the cultural and safety issues to be addressed" (Joint bundle F14 refers)
- 4.49. 22 January 2020 Senior Data Protection Officer contacted the HR Manager following this, HR Manager emails the Applicant 18.52 to check whether the Applicant wished to rescind her resignation (Joint bundle G28 refers). The HR Manager noted that the DPO had advised the HR Manager of the Applicant raising her concern that her TRAK record had been inappropriately accessed and she had also indicated that depending on the outcome of a review into the concern she might request to rescind her notice. In response to the email the Applicant emailed back at 19.20 to say that she had emailed Bob Lanning for advice and would advise the HR Manager asap.
- 4.50. 23 January 2020 Applicant emailed the HR Manager to say that her resignation should stay "in situ". The Applicant stated "To clarify my comment to Matt was if I had received the information prior to the meeting, it may have changed my decision". (Joint bundle, G25 refers). The Applicant further notes in her email that if Mary was happy to have a formal mediation

with her it would be beneficial “as although you have declined my request for a sabbatical, if I were to come back in the future”. (Joint bundle, G24 refers)

- 4.51. Applicant states in a subsequent email that she would like Mary Carre to be told of her resignation first and then the team so that she can arrange a meal with colleagues. Applicant states that she wants her colleagues to know that she is “going to work in the UK for a while, whilst remaining resident on the island and partaking in overseas emergency charitable work”. The Applicant also states that she would welcome mediation with Mary Carre, further offering dates of availability for an exit interview.
- 4.52. 28 January 2020 HR Manager emails the Applicant 16.00 (Joint bundle, G22 refers) stating “no formal request for a sabbatical has been received”, the Applicant emails back at 16.19 asking for details to make a formal request for a sabbatical.
- 4.53. 31 January 2020 the Applicant goes to the UK and then abroad for three weeks.
- 4.54. 31 January 2020 The HR Manager emails the Applicant in response to her request for information in relation to making a formal request for a sabbatical (Joint bundle, F9B and G19 refers). In the email the HR Manager states that the Applicant’s resignation had been accepted, at the Applicant’s request, management and staff had been advised of the Applicant’s decision and reasons ie that she was going to work in the UK for a while. The HR Manager further explained that sabbaticals were not usually granted for the purpose of taking up other employment meaning that the sabbatical in the Applicant’s case was “highly unlikely” to be agreed.
- 4.55. 31 January 2020 The Applicant responded back saying that she only resigned because Bob Lanning had said that the HR Manager had declined her request for a sabbatical. The HR Manager then telephoned Bob Lanning to discuss (Joint bundle G21 refers).
- 4.56. 4 Feb 2020 the HR Manager emailed the Applicant reiterating that the Applicant had said that she was taking up paid employment in the UK and a sabbatical would not normally be granted.
- 4.57. 5 February 2020 following confirmation from the HR Manager to whom a formal request should be submitted and sending the relevant sections under the Agenda for Change Terms and Conditions Document (whole handbook had been sent to the Applicant on 17 December 2019), the Applicant makes a formal sabbatical request to Head of Acute Nursing Care (Joint bundle, F10 refers).
- 4.58. 10 February 2020 Head of Acute Nursing Care letter refusing the Applicant’s requested sabbatical, with detailed reasons. (Joint Bundle, G15 refers)
- 4.59. 14 February 2020 Senior Data Protection Officer emailed the Applicant to say that the Health and Social Care Data Quality and Business Intelligence Team had undertaken a preliminary review into the Applicant’s concerns regarding the access of her TRAK record and that a further investigation would be carried out by Health and Social Care. (Joint bundle, F9 refers)
- 4.60. 13 March 2020 Applicant’s Exit interview takes place which is documented (Joint bundle G4 (Applicants prep points, G6, G7 & G8 file note of meeting refers). Majority of points raised are management matters. During the exit

interview the Applicant accused her line manager of accessing her records, lying about her to OH and calling her a bully.

- 4.61. 9 November 2020 the Senior Data Protection Officer confirms that there had been inappropriate access to the Applicant's TRAK record, also confirming that appropriate action had been taken. The DPO also apologised for the length of time taken, explaining this was due to COVID 19. (Joint bundle, F22 refers)
- 4.62. It was confirmed at the hearing that disciplinary action had been taken in relation to the individuals who had accessed the records, although the names were not disclosed it was confirmed that Mary Carre, the Applicant's line manager, was not one of the individuals.

5. Conclusion

- 5.1. Mary Carre in her capacity as Line Manager and representing the Employer was reasonable in her action of raising the concerns, as she saw them, to Occupational Health in her email of 30 August 2019, in order to fulfil her duty of care.
- 5.2. The Applicant expected Mary to read a lot into her short Facebook message of 20 August 2019 06.20 (Joint bundle F36 refers)
- 5.3. Mary Carre in her capacity as Line Manager and representing the Employer was reasonable in her actions to manage the Applicant's return to work in October.
- 5.4. Mary Carre's use of the words 'bullied her way back to work' was unfortunate, however the Tribunal accepts that she was in a state of shock following the events of 24 October 2019 and in a heated discussion.
- 5.5. In response to the Applicant raising concerns regarding inappropriate access to her medical records, an investigation took place and those responsible were disciplined. The names were not disclosed to the Applicant, but it was confirmed that Mary Carre had not accessed the Applicant's medical records.
- 5.6. The Respondent sought and followed Occupational Health advice at each stage and did their best to accommodate the Applicant's requests whilst balancing the overall requirements of the service and other members of staff. The initial referral unfortunately resulted in the Occupational Health meeting not taking place early enough to allow the Applicant to return to work at the expiry of the original sickness certificate. It is noted that, although the meeting took place on 1 August the additional sick certificate issued by the GP on 7 August went up to 14 August.
- 5.7. The Applicant did not give the Respondent opportunity to look into or attempt to resolve the issues she raised at the meeting of 14 January 2020, before she resigned. The Applicant declined the follow up meeting and resigned without giving any reasons for her resignation in her resignation email.
- 5.8. The Applicant was given the opportunity to rescind her resignation which she declined having had a chance to think about it and seek advice from her union representative. The Applicant, in her email of 23 January 2020 at 21.31 (G24 refers) noted "if I were to come back in the future". This indicates that she did not feel the relationship with the Respondent was irrevocably broken.

5.9. Burden of proof is on the Applicant to persuade the Tribunal of her case, however, the Tribunal has not been persuaded that on the balance of probabilities that the Respondent acted in such a way to cause a fundamental breach of the contract of employment; (2) the Respondent's breach caused the Applicant to resign from her employment (because the tribunal is not persuaded there was a breach); and (3) the Applicant did not delay too long before resigning thus affirming the contract and losing the right to claim unfair dismissal (because the tribunal is not persuaded there was a breach).

6. Decision

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

7. Costs

7.1.1. The Tribunal's power to awards 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.

Mrs P Brierley

22 October 2021

.....
Signature of the Chair

.....
Date