Employment and Discrimination Tribunal

Form ET3 (05/16)

Case No ED0/ 029/18

THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr John Carter
Represented by: Advocate Thomas Crawfourd

Respondent: Jacksons (CI) Limited
Represented by: Advocate Mike Preston

Tribunal Members: Ms Helen Martin (Chairperson)
Advocate Jason Hill
Mr George Jennings

Hearing date(s): **09 April - 12 April 2019**

30 May 2019

Decision of the Tribunal

The Applicant made a claim of unfair dismissal based upon his having alleged that the reason (or the principal reason if more than one) for his dismissal was his allegation that he was dismissed for asserting a statutory right, namely health and safety concerns in accordance with Section 11 of The Employment Protection (Guernsey) Law.

Having considered all of the evidence submitted by and the representations of the parties, whether specifically recorded in this judgment or not, the claim for unfair dismissal under the provisions of The Employment Protection (Guernsey) Law, 1998 is dismissed and the Tribunal makes no award.

The Applicant is therefore unable to take advantage of section 15 (2) (a) of the 1998 Law to disapply the requirement that he has a minimum qualifying period of not less than one year of employment to claim the right not to be unfairly dismissed. The Applicant had less than one year of continuous employment at the effective date of termination of his employment and so, in the circumstances, the Applicant's claim is dismissed.

H S Martin — 29 July 2019

…….. — ……..
Signature of the Chairman — 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, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.

FORM: ET3A

The Legislation referred to in this document is as follows:
The Employment Protection (Guernsey) Law, 1998, as amended (the "Law")

The authorities referred to in this document are as follows:

Tedeschi V Hosiden Besson Limited (1996) Lexis Citation 2398
Oudahar V Esporta Group Limited (2011) IRLR 730
Help V Guernsey Trade Windows Limited, 14 March 2018

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mr John Carter was represented by Advocate Tom Crawfourd and gave both oral and documentary evidence under Oath (ET1, EE1, EE2, EE3 refers).

1.2 The Applicant did not call any witnesses.

1.3 The Respondent, Jacksons (C I) Limited, was represented by Advocate Mike Preston and gave both oral and documentary evidence (ET2, ER1, ER2 refers).

1.4 The Respondent called the following witnesses:

- Mr Onno Termeulen
- Mr Andrew Bibby
- Mr Martyn Le Page

1.5 Mr Onno Termeulen, Mr Andrew Bibby and Mr Martyn Le Page gave witness testimony under Oath.

1.6 The Tribunal called Mr Robert Bachelor as a witness of the Tribunal. Mr Batchelor gave testimony under Oath.

1.7 The Applicant claimed that he had been 'automatically' unfairly dismissed within the meaning of section 11 (1)(c) and (1)(e) of the Employment Protection (Guernsey) Law, 1998 as amended. The Applicant did not have the qualifying period of one year to claim unfair dismissal. Therefore, the burden of proof was on the Applicant to prove that his dismissal was for the health and safety reason of either raising unsafe conditions and/or taking steps to protect himself from the alleged danger.

1.8 The Respondent resisted the complaint, asserting that the Applicant had been dismissed fairly on the grounds of (in)capability due to ill health. The Respondent asserted that it also dismissed the Applicant because it discovered during his absences that he was covertly taking preparatory steps to leave the island. The Respondent asserted that this resulted in a loss of trust and confidence in him and demonstrated that he was not committed to the role that he had been employed to do.

1.9 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not.

2.0 Summary of Evidence

2.1 The Applicant commenced employment with the Respondent on 03 July 2017 pursuant to an undated contract of employment.

2.2 The Respondent is a motor trader comprised of three departments (Sales, Services and Parts) and at the time of Mr Carter's dismissal employed approximately 70 staff.

2.3 The Applicant was dismissed on the grounds of (in)capability on 4 May 2018 and paid in lieu of notice.

2.4 As a senior manager the Applicant worked whatever hours were necessary to discharge his duties and was well remunerated for doing so.

2.5 The Respondent sent the Applicant home for two days of paid leave in January 2018. The Applicant took only one day of the paid leave offered to him, albeit working from home for the period granted.

2.6 The Applicant was signed off work for two weeks on 01 March 2018 on the grounds of supraventricular tachycardia/investigations and thereafter until 26 March 2018 by a further medical certificate dated 16 March 2018 on grounds of cardiac investigations.

2.7 During the Applicant's return to work interview with his line manager Mr Termeulen the need to take regular breaks and proper lunch breaks to aid his recovery was discussed. Mr Termeulen granted this support and encouraged the Applicant to pass on some of his workload to colleagues and share tasks.

2.8 The Applicant was taken ill again on 27 March 2018 after just over a day back at work during a visit to his cardiologist and was transferred to the Alexandra Hospital in Manchester for treatment and investigation.

2.9 The Applicant underwent an operation on 28 March 2018 and was signed off work for three weeks by medical certificate dated 03 April 2018 on the grounds of post-operative recovery.

2.10 The Applicant was notified that his sick pay would reduce to half pay from 12 April 2018 in accordance with the Respondent's staff handbook by an undated letter received by the Applicant on 20 April 2018 from Paul Kell (Group Operations Director) including an instruction that if he wanted to return to work before 23 April 2018 he would be required to provide a report from his Doctor stating that he was fit enough to return to work.

2.11 On the Applicant's return to work on 23 April 2018 he informed his line manager Mr Termeulen in his return to work interview that he needed to take time to exercise every hour and take lunch breaks. The Respondent granted the support identified and

as far as practicable enforced it along with several Respondent identified supportive actions including encouraging him to work no more than his contractual hours; encouraging him to take regular breaks, relieving him of work, sharing tasks and reminding him to go home and eat at sensible times.

2.12 During the Applicant's absence the Respondent cleared the back log of the Applicant's work and paid him over and above his strict contractual entitlement to sick pay when he resisted the transition to half pay in accordance with the staff handbook.

2.13 After returning to work on 23 April 2018 the Applicant remained in work for just over a week before he was again absent for illness from which he never returned.

2.14 On 24 April 2018 the Applicant attended a daily review meeting with Mr Bibby, Mr Le Page and Mr Termeulen concerning the dip in results.

2.15 Mr Termeulen sent the Applicant an email on 29 April 2018 in which he provided the Applicant with a seven-point daily task list ("Task for this week & going forward") in addition to instructions about how he should be going about dealing with expense controls and improving goodwill in May. (ER1, Tab 34 refers).

2.16 The Applicant was admitted to hospital on the evening of 30 April 2018 until 02 May 2018.

2.17 The Respondent's immediate line manager Mr Termeulen took advice on 30 April 2018 regarding his concerns about the Applicant and determined in conjunction with Mr Bibby on 02 May 2018 that he should be dismissed for the reason of (in)capability due to ill health and offered a severance deal.

2.18 The Applicant communicated by text message with Mr Termeulen on 01 May 2018 concerning his bonus payment and Mr Termeulen replied by text message that he had organised the Applicant's bonus payment for the month ending March 2018. This was subsequently not paid to Mr Carter due to his extended absence in March and the business results that were later received in accordance with the staff handbook that states that the company ex gratia bonus scheme is made "at the absolute discretion of the Company." (EE1, P.65 refers).

2.19 The Applicant hand delivered a medical certificate to Mr Termeulen dated 02 May 2018 signed by his cardiologist which stated that he was signed off work for four weeks on the grounds of anxiety and cardiac rehabilitation.

2.20 Upon receipt of the Applicant's fourth medical certificate of 02 May 2018 for a further 4 weeks absence due to illness, the Respondent averred that a decision was made to dismiss the Applicant and that the dismissal was implemented thereafter because the Applicant was not fit for the role he was employed to do and its business could no longer sustain the absence resulting from his ill health.

2.21 The Applicant restated the adjustments he would need to return to work by email dated 03 May 2018 to Mr Termeulen ((EE1, Tab 41 refers), and that without such adjustments his health and safety would be compromised.

2.22 The Applicant's employment was terminated by letter dated 04 May 2018 which Mr Termeulen sent to the Applicant by email at 13.46.

2.23 In doing so, Mr Termeulen stated that the Respondent was concerned by the Applicant's current health condition and did not feel that he would be able to fulfil his duties to the standard it required on a sustainable basis so that it had reluctantly made the decision to terminate his employment on grounds of (in)capability due to ill health.

3.0 The Law

3.1 The Law referred to in this section is The Employment Protection (Guernsey) Law, 1998, as amended.

3.2 Section 3 of the 1998 Law grants, subject to certain express qualifications, the right to an employee not to be unfairly dismissed by his employer. Section 6 of the 1998 Law provides that, in general, the employer has the burden of proving the reason (or principal reason if more than one) for the dismissal and that it was 'fair' within the meaning of Section 6 (2).

3.3 Pursuant to section 15 (1) of the 1998 Law, the right not to be unfairly dismissed granted by section 3 does not apply unless the employee was continuously employed for a period of not less than one year ending with the effective date of termination. That qualifying period does not apply, however, to the dismissal of an employee if it is shown that the reason (or principal reason if more than one) was, amongst others, specified in Section 11. The burden of proof in such cases is upon the Applicant and the standard of proof is on the balance of probabilities (see Help v Guernsey Trade Windows Ltd., 14 March 2018, paragraph 3.8).

<u>Dismissal in health and safety cases.</u>

(1) The dismissal of an employee by an employer shall be regarded for the purposes of this Part of this Law as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee –

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, carried out, or proposed to carry out, any such activities;

(b) being a representative of workers on matters of health and safety at work, or a member of a safety committee –

(i) in accordance with arrangements established under or by virtue of any enactment or other statutory provision; or

(ii) by reason of being acknowledged as such by the employer, performed, or proposed to perform, any functions as such a representative or a member of such a committee;

(c) being an employee at a place where –

(i) there was no such representative or safety committee; or

(ii) there was such a representative or safety committee, but it was not reasonably practicable for the employee to raise the matter by those means,

brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety;

(d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work; or

(e) in circumstances of danger which he reasonably believed to be serious and imminent, took, or proposed to take, appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1) (e), the question of whether any steps which an employee took, or proposed to take, were appropriate shall be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal) for the dismissal of an employee was that specified in subsection (1) (e), the dismissal shall not be regarded as having been unfair if the employer shows that it was, or would have been, so negligent for the employee to take steps which he took, or proposed to take, that a reasonable employer might have dismissed him for taking, or proposing to take, them.

4.0 Mr John Carter

4.1 Mr Carter stated that his role as Service manager involved managing a team of 12 technicians, up to 5 service advisors and one administration clerk and that his main task was to maximise revenue, achieve bottom line profit expectation (above budget performance) and ensure that customer satisfaction was above the national average. Customer complaints, budget compliance on expenditure and reported sales and forecasted expected sales, expenses and net profit and dealer standard compliance were all included in the role.

4.2 Mr Carter told the Tribunal that the culture at Jacksons (C I) Limited was the most "commercially ruthless and callous" in his work experience. He further asserted that Mr Termeulen and Mr Bibby were very hard taskmasters who were extremely demanding.

4.3 Mr Carter stated that his contractual hours were 45 hours per week but that he was expected to work additional hours in order to ensure the proper performance of his duties. Mr Carter told the Tribunal that he worked a 75-hour working week and had an exceptionally heavy workload.

4.4 Mr Carter told the Tribunal that other factors contributed to his workload including the expectation that he would help move cars out of hours, provide cover for service advisors and recruiting new staff out of hours.

4.5 Mr Carter asserted that he was bombarded with telephone calls, emails and SMS text messages from Mr Termeulen outside of work at unsociable hours and during holidays and sickness periods. Mr Carter stated that the unremitting demands and long hours had put him under enormous strain and stress and that starting sometime around November 2017 he had had various discussions with Mr Termeulen and Mr Bibby about his fatigue and health issues and that he was working too many hours.

4.6 During Mr Carter's absence due to illness he used a company car to travel to Southampton in the middle of March. Mr Carter told the Tribunal that he had sought consent to take the car to the UK from the company by email but that he had not received a reply.

4.7 Mr Carter reserved a one-bedroom apartment at le Mallard Complex from July 2018 which was subsequently extended to 12 September 2018 and told the Tribunal that his wife planned to return to Thailand in May 2018 with their dogs to visit her brothers for several months who were very sick.

4.8 On 26 April 2018 Mr Carter received his April pay slip showing that he had not been paid for a bonus in March 2018. Although he had been off sick for most of March, Mr Carter asserted that he had still contributed to the management of the Service Department remotely by phone and email in order to keep a tight rein on its operating results.

4.9 On the morning of 27 April 2018 Mr Carter emailed Mr Termeulen to express his concerns and clearly mentioned his stress and heart palpitations (EE1, p141). During the same day, Mr Carter provided cover for a driver which meant washing at least 3 cars and driving about 8 cars back to their owners. Mr Carter stated that he asked Mr Termeulen for help with the driving to no avail.

4.10 When Mr Carter received an email on the afternoon of Sunday 29 April 2018 from Mr Termeulen entitled "Tasks for this week & going forward" (ER1, Tab refers) and he interpreted it as a deliberate intention to cause him to breakdown.

4.11 On 30 April 2018 Mr Carter informed Mr Termeulen that he could not achieve the tasks he had set out in his email within the timeframe given as he had to recover and be allowed to return to work on a phased basis with adjustments in the interests of protecting his health. Mr Carter asserted that Mr Termeulen declined his request for a phased back to work position and confirmed that he needed a fully fit manager for his role. Mr Carter stated that the return to work interview with Mr Termeulen was nothing more than a paperwork exercise and that he had no recollection of any senior manager assisting with his workload.

4.12 Mr Carter asserted that he was not aware of the Health and Safety Committee and that Mr Le Page had not told him that he was a member of it. Under cross examination Mr Carter asserted that he had never met the external Health and Safety representative, Mr Kennedy and that Health and Safety issues were dealt with exclusively by Mr Termeulen.

4.13 Mr Carter stated that Mr Temeulen had texted him later to inform him that he had organised the bonus payment for March.

4.14 In the second return to work interview on 23 April 2018 (ER1, Tab 27 refers), Mr Termeulen invited Mr Carter to complete sections himself but Mr Carter said under cross examination that he had felt very intimidated and stressed by the meeting and that the questions were "somewhat alien" and that he had had no training on how to fill in the form.

4.15 On Wednesday 02 May 2018 Mr Carter was signed off work for a further 4 weeks.

4.16 On 03 May 2018 Mr Carter sought legal advice over the phone and was advised to write to his employer expressing his concerns about health and safety. Mr Carter sent an email to Mr Termeulen at the end of the day on 03 May 2018 expressing his concern about the adjustments that were needed to assist his return to work upon the expiry of his medical certificate.

4.17 On 4 May 2018 Mr Carter received a letter by email from Mr Termeulen terminating his employment on the grounds of (in) capability due to ill health.

5.0 Mr Termeulen

5.1 As Head of Business Mr Termeulen is responsible for making sure the Company's three departments (Sales, Service and Parts) meet budgetary requirements and comply with internal processes to ensure best customer satisfaction. Mr Termeulen was Mr Carter's direct line manager.

5.2 Under the Health and Safety policy any employee with a health and safety concern is directed to raise it with their line manager or any member of management. Mr Termeulen told the Tribunal that the company had a health and safety committee which at the time of Mr Carter's employment was comprised of himself, Martyn Le Page, Bob Cataroche and Gary de Jersey. Health and Safety matters were covered in the weekly operations meetings and Mr Termeulen asserted that Mr Carter could have raised any concerns that he had with his own or others' working arrangements at these times.

5.3 Mr Termeulen said that the company had a health and safety representative named Lee Kennedy from an external consultancy practice and that Mr Kennedy conducted quarterly site meetings at all of the Group sites in addition to undertaking a comprehensive health and safety audit when he visits the Company in Guernsey which is submitted to each General Manager. Mr Kennedy visited the Company four times during Mr Carter's employment and Mr Termeulen said that Mr Carter could have raised any concerns he had with his own or others' working arrangements at these times. In complete contradiction to Mr Carter's evidence, Mr Termeulen stated that Mr Carter had

met Mr Kennedy and that he witnessed the conversation between them himself and that Mr Kennedy had confirmed he had met Mr Carter subsequently in an email (EE1, Tab 49 refers).

5.4 Mr Termeulen said that Mr Carter had completed a medical questionnaire at the outset of his employment and that the questionnaire expressly states that employees should contact HR if they have any problems with their health in their future employment.

5.5 Mr Termeulen fully accepted that Mr Carter worked over his contractual hours but stated that this was a matter of choice and that there was no obligation upon any individual to work additional hours. Mr Termeulen asserted that it was Mr Carter and not the Company that imposed such hours. However, Mr Termeulen denied that Mr Carter worked 75 hours a week as he had alleged.

5.6 The company had no set lunch breaks but staff, including Mr Carter, took regular breaks and were expected to manage their own time. Mr Termeulen stated that it was left up to the individuals when they took their lunch break.

5.7 Mr Termeulen said that he did not recall Mr Carter reporting any possible health issues in his first eight months of his employment other than a dull ache in his wrist and some breathing difficulties.

5.8 Mr Termeulen took steps to reduce Mr Carter's workload by taking him off the Saturday rota and personally taking on his daily reporting tasks on top of his own workload which was about 2.5 hours per day. Mr Termeulen also mentored Mr Carter to avoid duplicating systems and follow the normal company processes as well as delegating tasks to his team.

5.9 It became evident by January 2018 that Mr Carter was not managing the department effectively and that he was taking on too much himself. As a result, Mr Termeulen enforced a short period of paid leave to enable Mr Carter to focus on his wife who had been unwell.

5.10 During the first period of absence due to illness in March 2018 Mr Termeulen expressed surprise to discover on 19 March 2018 that Mr Carter was queuing to go onto the ferry in his allocated company car. The car was packed full of loose clothing and Mr Carter's wife was asleep in the passenger seat. Mr Termeulen enquired if Mr Carter was well enough to drive. Mr Termeulen said he found Mr Carter evasive and was presented with two medical certificates by him at the ferry terminal.

5.11 Mr Termeulen said that the medical certificates were silent as to whether his impairment affected his work.

5.12 During his return to work interview on 26 March 2018 Mr Termeulen told Mr Carter that if he found he couldn't do anything he should let him know what he could personally take off him, reinforced the need to delegate and share tasks and explained that the backlog of his work had been cleared. Mr Termeulen denied that he had refused to allow a phased return to work as alleged by the Applicant because no set hours or specific hours were tabled. It was agreed that he could start on the base pattern of 9.30/10.00 am to 4.00/5.00pm on Monday to Friday with regular breaks and no more than his

contracted hours of 45 hours per week. Mr Termeulen also emphasised that those hours could be 'tweaked' if he felt it was too much. Mr Termeulen said that he had agreed to Mr Carter walking 250 steps per hour and actively encouraged him to take regular breaks and eat earlier and more healthily.

5.13 The production of Mr Carter's KPI's and cash reconciliations was continued by Mr Termeulen on his return to work; Martyn Le Page produced reports for the Directors and the Saturday rota no longer required oversight by Mr Carter. In addition, Mr Termeulen invited Mr Carter to inform him what he could do and could not do as it presented itself so that he could further adjust the workload if necessary.

5.14 Mr Termeulen said that any comment about the company's performance was a collective comment and was not directed at Mr Carter who had been absent previously at that stage for seven weeks and that the email about the Task List was intended to assist and delegate certain tasks (ER1, Tab 34 refers). Mr Termeulen said that he was "definitely not" imposing pressure and that any suggestion of this was "a totally incorrect" statement.

5.15 The taking of cars to the docks was not a task that Mr Carter was required to do as a member of senior management and Mr Termeulen said that he was "dismayed" that Mr Carter had volunteered to do so and told him that a dock run was not a sensible use of his limited energies and that he should cut them out. Mr Termeulen stated that Mr Carter had chosen to move cars of his own volition. Under cross examination, Mr Termeulen accepted that there was a heavy workload and that Mr Carter had had a tough job but that "there is a balance" to this perspective and that he continued to check and provide support mechanisms regarding the re-prioritization of work.

5.16 Following the forwarding of emails that had been redirected to Mr Termeulen he found emails from 23 April 2018 showing that Mr Carter was planning to leave Guernsey. These emails showed that he was arranging a deep clean of his house, a move to a hotel for him alone, the inoculation of his dogs in anticipation of their return to Thailand and specific reference to his wife's return to Thailand. Whilst this did not mean that Mr Carter was necessarily going to leave Guernsey, Mr Termeulen strongly suspected he was planning to do so. The discovery of these covert plans resulted in Mr Termeulen losing trust and confidence in Mr Carter's commitment to his role and led to him contacting external HR Consultants on 30 April 2018 to discuss options in relation to his continued employment. Mr Termeulen's favoured option was dismissal on the grounds of (in) capability. Mr Termeulen was concerned that Mr Carter may take off at any point to move to Thailand and that this represented a potentially unsustainable risk to the Company. Mr Termeulen was also concerned that the role as agreed on his return to work was too much for him and denied vehemently that there was a heated discussion about him requiring a fully fit manager for the role. Mr Termeulen offered Mr Carter some time out and offered to pay him in full rather than apply the company's sickness policy on reduced pay. Mr Termeulen stated that Mr Carter left later that day albeit somewhat unwillingly as his text message had showed.

5.17 With regard to the allegation that he had bombarded Mr Carter with phone calls and text messages during his absence, Mr Termeulen denied doing so and provided a list of

calls and text messages between their phones from 1 April to 31 May 2018. (ER1, Tab 48, P172 refers).

5.18 Mr Termeulen denied requiring a medical certificate when Mr Carter was hospitalised for a short period in early May and asserted that Mr Carter offered to deliver it to him.

5.19 Under cross examination, Mr Termeulen stated that he had agreed to flexible working hours and therefore a phased return to work over a 3 month period during the return to work interview and that he accepted that it may be necessary to readjust this plan depending on further medical reviews.

5.20 Mr Termeulen asserted that he became increasingly concerned that Mr Carter was going "off piste" and doing things that he was not required/asked to do and that he had called Martin Buckland at Law at Work on 30 April 2018 to discuss his concerns. During this conversation, Mr Termeulen told Mr Buckland that out of the options presented to him he would consider a compromise agreement to bring the relationship to a close and allow the business to move on quickly. (ER1, Tab 36 refers).

5.21 On 02 May 2018 Mr Termeulen contacted HR to report that Mr Carter would be absent for a further 4 weeks and informed them that the business could not sustain the ongoing absence of the Head of one of its core departments and requested a briefing note to be sent to him, Paul Kell and Andrew Bibby with regard to dismissing Mr Carter so that the company could make an informed decision.

5.22 Upon receipt of the email laying out the HR advice (ER1, Tab 39 refers) received from Martin Buckland on 02 May 2018 at 13.35 copied to Andrew Bibby and Paul Kell, Mr Termeulen discussed the matter with Mr Bibby and both concurred that the best option to protect the Company's interests was to terminate Mr Carter's employment under a severance deal as it was becoming impossible for the company to carry on without its Service Manager. Mr Termeulen needed the final approval of the Group Operation's Director, Paul Kell who he chased for a response in which he also agreed to the termination of employment under a severance deal.

5.23 Later during the same day Mr Termeulen received the medical certificate from Mr Carter who dropped by dated from 02 May 2018 for 4 weeks for 'anxiety due to psychological adjustment to cardiac condition and work-related stress.' (ER1, Tab 38).

5.24 On the evening of 03 May 2018, Mr Termeulen received an email from Mr Carter copied to a third party stating that he had *(1) 'brought to the Company's attention by reasonable means, circumstances connected with my work which I reasonably believe could be harmful, or potential(ly) harmful to my health and safety and (2) that the Company require me to work without work adjustments.' (ER1, tab 41 refers).* Mr Termeulen said that he had already made the decision to dismiss Mr Carter as his immediate line manager on 02 May 2018 but that he had not communicated this to Mr Carter when he had dropped off his medical certificate because the company needed to follow due process before communication. Under cross examination, Mr Termeulen said that he did not send the email from Mr Carter (ER1 Tab 41) to Mr Kell.

5.25 Mr Termeulen stated that the assertions in the email (ER1, Tab 41) were untrue and that during Mr Carter's illnesses he had simply been handing in medical certificates reporting in the facts of the duration and reason for his sickness absence. Further Mr Termeulen stated that those medical practitioners certified through the medical certificates when Mr Carter was fit to return to work and none of them had included comments regarding adjustments to ease his return to work.

5.26 In addition, Mr Termeulen asserted that Mr Carter on his return to work on 26 March 2018 and 23 April 2018 had not alleged his work could be harmful and that all the measures he sought were granted together with additional support from himself and others.

5.27 Overall Mr Termeulen considered the email (ER1, Tab 41) a blatant attempt by Mr Carter to manoeuvre himself into a position to sue the Company on fictitious grounds. Copying a third party was indicative from his perspective of an employee plotting a contentious exit in which he hoped to be paid off. At the end of the email Mr Carter stated he fully intended to resume his duties in May 2018 whilst Mr Termeulen believed that he was covertly relocating his family to Thailand.

5.28 On the morning of 04 May 2018 Mr Termeulen contacted HR concerning the drafting of the termination letter and without prejudice document. Mr Termeulen confirmed in his telephone call to Martin Buckland from Law at Work on 4 May 2018 that no Health and Safety issues or concerns had been brought to his attention. Mr Termeulen said that he dismissed Mr Carter because the company could no longer wait for him to recover and needed a permanent Service Manager who could attend work. Mr Termeulen stated that the decision was not related to health and safety as Mr Carter alleged and that Mr Carter had not previously asserted that his working conditions imperilled his health, as alleged.

6.0 Mr Andrew Bibby

6.1 Mr Bibby told the Tribunal that he had been employed for 3 years at Jacksons (C.I) Limited initially as Aftersales Manager then as Aftersales Director. Mr Bibby said that he was responsible for anything to do with aftersales, service and parts including financial budgets and customer satisfaction.

6.2 Mr Bibby described Mr Carter as knowledgeable and able and commented that he would describe his personal relationship with him as good.

6.3 Mr Bibby stated that no discussions had taken place with Mr Carter about his health around November 2017 and that he had sent him home on paid leave in January 2018 to look after his wife who was sick as a purely compassionate gesture. In Mr Bibby's view Mr Carter's workload was becoming unmanageable because he struggled to delegate.

6.4 During Mr Carter's absence in March Mr Bibby supervised the clearing of the back log of jobs in the service department and arranged for staff to share out the workload with a rota for lunch breaks.

6.5 Mr Bibby stated that neither he nor Mr Termeulen had authorised the use of the company car to take Mr Carter and his wife to Southampton and that he was particularly surprised at this because Mr Carter had recently conducted an investigation into an

employee's misconduct for taking a car off island without authority; not least because of the insurance requirements.

6.6 With regard to the March bonus payment, Mr Bibby said he decided that he would not award it to Mr Carter because he had made no material contribution to the department's targeted budget for that month which was under 100% and in accordance with the company's staff handbook it was a discretionary bonus scheme.

6.7 Mr Bibby said that Mr Termeulen had updated him that Mr Carter would walk on site every hour and rest when he was tired and work no more than his contracted hours.

6.8 Mr Bibby said that staff had confirmed that they had overheard Mr Carter arranging flights to Thailand and arranging temporary accommodation at the Mallard hotel.

6.9 On 02 May 2018 Mr Bibby agreed with Mr Termeulen that the best option was to terminate Mr Carter's employment under a severance deal because the Company needed a Service Manager in post.

6.10 Late on 03 May, Mr Bibby received the same email as Mr Termeulen from Mr Carter copied to a third party (ER1, tab 41 refers). Mr Bibby said that Mr Carter had not raised unsafe working conditions with him and had never once alleged that his work could be harmful to his health. Mr Bibby added that Mr Carter could not have been in danger as he was not at work for most of March and April.

6.11 Mr Bibby told the Tribunal that the termination of employment was by reason of his incapacity and lack of trust and nothing to do with fictious arguments that he had whistle blown on some health and safety issues.

7.0 Mr Martyn Le Page

7.1 Mr Le Page told the Tribunal that he had recently left Jacksons (CI) Limited after 35 years and that he had been employed as Parts manager for the last 9 years.

7.2 Mr Le Page described his professional relationship with Mr Carter as difficult because Mr Carter deviated from the company standards and processes and kept independently ordering his own parts; instead of going through the system which had repercussions on customer expectations and costs.

7.3 Mr Le Page said that Mr Carter did not start work before 7.00am as he had claimed because he started at 7.00am and Mr Carter started at 7.30-7.45 am and confirmed that Mr Carter had taken breaks contrary to his evidence that he had not done so. Mr Le Page said that Mr Termeulen did not schedule ad hoc meetings at lunchtime as had been claimed by Mr Carter and that if he had he would know or be in them.

7.4 The Health and Safety Committee had been in operation for years according to Mr Le Page and he was a member of it although latterly health and safety matters had been handled in the weekly operations meeting. Mr Le Page said that Mr Carter attended these meetings and would have heard and contributed to health and safety matters. Mr Le Page said that Mr Carter could have raised any concerns that he had with his own or

others' unsafe working arrangements at these times. In addition, Mr Le Page stated that Mr Carter could also have raised any health and safety issues with the Health and Safety representative Lee Kennedy.

7.5 Mr Le Page recalled that they had all stepped up to assist Mr Carter after he returned to work. Mr Le Page had prepared the end of day reports for Mr Carter and planning of both departments including checking of technicians' times cards for their salaries – usually the Service Manager's job. As a result, he did not think that Mr Carter was in danger of over working. Mr Le Page said that he regarded Mr Carter's contribution in his role as ineffectual and that Mr Carter had not raised any health and safety concerns with him.

8.0 Mr Robert Batchelor – witness to the Tribunal

8.1 Mr Batchelor said that he had known Mr Carter for 20 years and that they had both worked for the same group of companies previously. Mr Batchelor said that Mr Carter had hired him as Services Supervisor since October 2017 and that he had reported to Mr Carter in this role.

8.2 Mr Batchelor said that it was well known at Jemco, Mr Carter's previous employer that Mr Carter had been unwell a month prior to his employment finishing and that he had been under the impression that he had suffered a mini stroke based on feedback from both Mr Carter and Hamish, the Jemco After Sales Director.

8.3 Regarding Mr Carter's workload, Mr Batchelor described it as "very demanding" although he did not know the details. Mr Batchelor explained that he would pass on updates about Mr Carter's health to Mr Termeulen whilst his colleague was off sick and that he had gained the impression that Mr Termeulen was not contacting Mr Carter whilst he was absent.

8.4 Mr Batchelor said that he found Mr Termeulen to be compassionate about his personal situation and that he did not know anyone who disliked him.

9.0 Conclusion

9.1 Section 11 (1) (c) provides that an employee is ***automatically*** unfairly dismissed if the reason, or principal reason for dismissal is if he (or she): brought to the employer's attention, by reasonable means, circumstances connected with his (or her) work, which he (or she) reasonably believed to be harmful to health or potentially harmful to health and safety in a place of work either in the absence of a health and safety committee or in circumstances where there was a health and safety representative or committee and where it was not reasonably practicable to raise the matter by those means. *The reasonableness of the employer's action in dismissing is not a matter which is taken into consideration by the Tribunal in dismissals that fall under this section of the Law* and the right not to be dismissed if an employee complains about or refuses to work in unsafe conditions applies to all employees regardless of their length of service.

9.2 As the Applicant did not have enough qualifying service to bring an ordinary unfair dismissal claim the *burden of proof* was on the Applicant to show an *automatically* unfair reason for dismissal for which no qualifying service is required.

9.3 The Tribunal was mindful to judge the grounds in Section 11 of the Law by reference to all the circumstances including the Applicant's knowledge and the facilities and advice available to him at the time.

9.4 Regarding the Health and Safety provisions at Jacksons (CI) Limited, the Tribunal found that there was both a Health and Safety Committee although it had merged into reporting into a discrete section within the weekly operations meeting and there was an external Health and Safety representative. Under cross examination by the Tribunal panel it was established that the members of the Health and Safety Committee were displayed on two notice boards in the Respondent's office.

9.5 The Tribunal was persuaded that the Applicant was a senior manager and that it would have been reasonable for the Respondent to expect him to raise any concerns he had about Health and Safety at work with the members of the Health and Safety Committee within the weekly operations meeting and the external Health and Safety representative, Mr Kennedy. Mr Kennedy had found the Applicant unhelpful when he met him, contrasting with the evidence from the Applicant that he had never met Mr Kennedy. The Tribunal was persuaded that it would be reasonable for the Respondent to expect the Applicant as a senior manager to seek to meet with Mr Kennedy <u>if</u> he had any health and safety concerns. The Applicant had not done so and moreover the Tribunal placed considerable weight on the fact that the Applicant had withheld letters from his Doctors that he could have chosen to submit to his employer to better inform them about his health and that he had not contacted the HR department about any health and safety concerns or lodged a grievance in accordance with the grievance policy in the staff handbook. The Tribunal found that it was reasonably 'practicable' for the Applicant to raise any concerns he may have had about health and safety at work with either the Health and Safety Committee or directly with the Health and Safety representative and therefore based on the substantial merits of the case the claim failed to meet the appropriate standard in relation to the statutory requirement.

9.6 In summing up, the Tribunal found ineluctably that the Applicant was certified fit to return to work by his Doctors and the Respondent was 'reasonably' entitled to rely on this.

9.7 Importantly, the Tribunal found that the submission of medical certificates and request for adjustments by the Applicant did not equate to an assertion of Health and Safety issues or unsafe working conditions. The Applicant had reported sick due to a heart condition and sought and was granted various adjustments by the Respondent on his return to work in addition to further Respondent identified supportive actions. The Tribunal noted that there is no legal requirement to provide reasonable adjustments or any Working Time Regulations under the Law and that the Respondent had taken steps to assist the Applicant's return to work where possible including reallocating some of his daily tasks. The Tribunal noted

that the Applicant's style of working had been a factor in the management of his heavy workload and that at times he had chosen himself to deviate from the adjustments that were put in place. In summing up, the Tribunal noted that the Applicant was in work for 3 days in March and under 7 days in April and therefore the Applicant was largely not present for him to apply and benefit from the adjustments that were agreed.

9.8 Moreover, the Tribunal did not find that the Respondent was unsympathetic about the Applicant's heart condition and found that Mr Termeulen, his line manager, had been supportive and taken on some of the Applicant's work himself to assist the Applicant's return to work.

9.9 The Tribunal found that Mr Termeulen was a highly credible witness and was persuaded that the decision to dismiss the Applicant had been taken by him on 02 May 2018 in conjunction with Mr Bibby having first been considered on 30 April 2018 (ER1, Tab 36 refers). The email received by the Applicant on 03 May 2018 and copied to a third party was regarded by the Tribunal as worded to position a claim against the Respondent on the grounds of health and safety. Importantly it was received after the decision had been taken by Mr Termeulen, the Applicant's line manager, to dismiss the Applicant albeit it remained subject to final sign off by the Group Operations Director, Mr Kell.

9.10 In Tedeschi V Hosiden Besson Limited, the Employment Appeal Tribunal identified four requirements to bring a dismissal within the equivalent section of the Law in the UK. The first is that the employee reasonably believes that circumstances connected with his work are harmful or potentially harmful to health and safety. Secondly, that it is not reasonably practicable for the employee to raise the matter through a representative or health and safety committee. Thirdly that in circumstances where he cannot do it through a representative or safety committee, he has done it by reasonable means. Fourthly, that the fact that he has raised it is the reason or the principal reason why the employee has been dismissed.

9.11 Applying the requirements of Tedeschi V Hosiden Besson Limited to the Applicant's claim under Section 11 of the Law, the Tribunal was persuaded that the Applicant did not meet the required standard of the legal tests identified by the EAT because the Applicant had failed to notify his employer appropriately in accordance with the statute and furthermore the Applicant's email of 03 May 2018, copied to a third party (ER1, Tab 41 refers) was sent *after* the decision to dismiss him was taken by his immediate line manager. In relation to the first criteria the Tribunal was not satisfied on the balance of probabilities that the complaint had been made in good faith in accordance with the strict provisions of Section 11 of the Law. Furthermore, the Tribunal determined that the reason or the principal reason for the dismissal was not related to health and safety.

9.12 In Oudahar V Esporta Group Ltd, the Employment Appeal Tribunal stated that the equivalent section of the Law in the UK should be applied in two stages. Firstly, the Tribunal should consider whether the criteria set out in that provision have been met, as *a matter of fact.* Were there circumstances of danger which the employee

reasonably believed to be serious and imminent and did he take appropriate steps to protect himself from the danger? Or did he take appropriate steps to communicate those circumstances to his employer by appropriate means? If these criteria are not satisfied the Employment Appeal Tribunal stated that the equivalent section of the Law in the UK is not engaged. The Tribunal was not satisfied that as a *matter of fact* the Applicant had met the criteria identified in Oudahar V Esporta Group Limited and the burden of proof was on the Applicant to do so.

9.13 The Tribunal concluded that the Respondent had lost trust and confidence in the Applicant because of the discovery of his use of a company car without approval to travel to the UK whilst he was absent due to illness and the 'genuine belief' that the Applicant was covertly planning to leave the island and move back to Thailand which would potentially expose the Respondent to an unacceptable risk in terms of the sudden loss of a department head and had raised concerns about the Applicant's commitment to the role. In concluding, the Tribunal was persuaded that the principal reason for the dismissal was the disruption caused by the Applicant's extended absence and that the dismissal was for the stated reason of (in) capability due to ill health in order to protect the employer's interests. Importantly, it was not appropriate for the reasonableness of the reason for the dismissal to be taken into consideration by the Tribunal under Section 11 of the Law.

9.14 In conclusion, the Tribunal determined that this claim for unfair dismissal under Section 11 of the Law fails on all counts to reach the appropriate standards of the statutory tests set out in the Law.

10.0 Decision

The Applicant has failed to prove on the balance of probabilities that the reason (or the principal reason if more than one) for his dismissal was his allegation that he was dismissed for asserting a statutory right, namely health and safety concerns in accordance with Section 11 of the Law. The Applicant is therefore unable to take advantage of section 15 (2) (a) of the 1998 Law to disapply the requirement that he has a minimum qualifying period of not less than one year of employment to claim the right not to be unfairly dismissed. The Applicant had less than one year of continuous employment at the effective date of termination of his employment and so, in the circumstances, the Applicant's claim is dismissed.

H S Martin — 29 July 2019

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Signature of the Chairman — 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, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.