

THE EMPLOYMENT & DISCRIMINATION TRIBUNAL

Applicant: Miss Francesca Baker

Represented by: Self-represented; did not attend

Respondent: Rainbow Childcare Limited

Represented by: Ms Rachel Richardson; did not attend

Tribunal Members: Mr Jason Hill (Chairman)
Ms Helen Martin
Ms Alison Girollet

Pre Hearing Review date: 13 June 2019

Decision of the Tribunal

The Applicant made a complaint of unfair dismissal.

The Chairman of the Tribunal appointed to hear the claim determined that the claim should not proceed to a full hearing until the Respondent's application that the Tribunal refuse to hear the complaint under Section 19(3) of *The Employment Protection (Guernsey) Law, 1998* had been determined. This preliminary issue was addressed at a Pre-Hearing Review. Both parties were given an opportunity to make written submissions.

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 Law'), the Applicant has failed to comply with a requirement imposed under Section 18(2) of the Law, alternatively that the Applicant's claim is vexatious. The Tribunal therefore decided to exercise its discretion to refuse to hear the complaint.



Signature of the Chairman

Date 14th June 2019

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, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Legislation referred to in this document is as follows:

The Employment Protection (Guernsey) Law, 1998, as amended ('the Law')
The Conditions of Employment (Guernsey) Law, 1985, as amended

The authorities referred to in this document are as follows:

Cotterill v States of Guernsey (Guernsey Royal Court, Judgment 58/2017)
Reynard v Fox [2018] EWHC 443 (Ch)

Extended Reasons**1.0 Introduction**

- 1.1 The Applicant, in an ET1 Application Form dated 26 November 2018, asserts that she was employed by the Respondent from 1 May 2012 to 2 November 2018 and complains that she was unfairly dismissed. The Respondent, in an ET2 Response Form dated 17 December 2018, admits the dates of the Applicant's employment, but denies that she was dismissed (either unfairly or at all).
- 1.2 Following receipt of an application in writing dated 16 April 2019 from the Respondent that the Tribunal refuse to hear the Applicant's complaint, the Chairman of the Tribunal directed that there be a Pre-Hearing Review ('PHR') to determine the Respondent's application and that both parties should be given the opportunity to make written submissions only. In letters dated 17 May 2019 to the parties, the Acting Secretary to the Tribunal set out the timetable for the parties to exchange any documents upon which they wished to rely at the PHR. The Respondent complied with that timetable and provided written submissions to the Tribunal on 30 May 2019; the Applicant has not provided any documents or made any other contact with the Secretary to the Tribunal.
- 1.3 The Tribunal, consisting of three members, met on Thursday, 13 June 2019 and conducted a PHR based upon the ET1 Application, the ET2 Response, the Respondent's application dated 16 April 2019 that the Tribunal refuse to hear the complaint, the Respondent's submissions dated 30 May 2019 and correspondence of various dates passing between the Acting Secretary to the Tribunal and the Applicant. All of that material has been taken into account by the Tribunal, whether specifically referred to in this judgment or not.
- 1.4 The Tribunal was conscious that the Applicant was not legally represented and was anxious to make sure that all necessary steps were taken to ensure that she had a fair hearing. The Tribunal took account of the Deputy Bailiff's general comments in *Cotterill v States of Guernsey* (Guernsey Royal Court, Judgment 58/2017) and in particular those at paragraph 45 concerning the need to give appropriate help to unrepresented parties regarding procedure and possibly also with the case that they wish to present. Accordingly, the Tribunal was prepared to consider the whole of the Applicant's case and,

where appropriate, to try to identify arguments that the Applicant could have advanced so that the merits of the case could be explored without pedantic insistence upon the correct use of procedure. 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 or orders or directions, or excuse non-compliance with them. The exception to that principle being that a special indulgence to a litigant in person might be justified where a rule was hard to find, difficult to understand, or it was ambiguous.

2.0 Factual Summary

2.1 For the purposes of this PHR it is sufficient to highlight only the procedural history since the Applicant commenced her claim. A Case Management Meeting ('CMM') was convened on 15 March 2019. Notice of that CMM having been given to both parties, only the Respondent attended. A second CMM was convened on 3 April 2019 and notice duly sent to both parties. Again, only the Respondent attended. The Applicant gave no explanation for her non-attendance at either CMM.

2.2 On 4 April 2019 the Acting Secretary to the Tribunal sent a request for further information within the meaning of Section 18(2) of the Law to the Applicant asking her to confirm within seven days whether she wished: (1) to withdraw her claim; or (2) continue with her claim and appear at a CMM to obtain directions for the future conduct of the case. The Applicant did not respond to that request and did not supply the requested further information.

2.3 On 16 April 2019 the Respondent applied to the Tribunal to exercise its powers under Section 19(3) of the Law to refuse to hear the Applicant's claim on the basis that the Applicant had failed to comply with a request under Section 18(2) of the Law, alternatively that the claim was frivolous or vexatious. The Chairman decided to determine the respondent's application at a PHR and on 17 May 2019 the Acting Secretary to the Tribunal sent to the parties the timetable for the exchange of any evidence and/or arguments upon which they wished to rely. The Respondent's submissions arrived on 30 May 2019 in compliance with the timetable; the Applicant provided no submissions and made no other contact with the Acting Secretary.

3.0 Legal submissions of the parties

3.1 In summary, the Respondent's submissions in relation to its Section 19(3) application are as follows:

- (1) The Tribunal does not have jurisdiction to hear 'failure to supply payslip' complaints.

- (2) It is not clear whether the Applicant alleges constructive dismissal or unfair dismissal and, in either case, upon what grounds such a claim is based.
- (3) Neither the Applicant nor her representative have made any contact with the Tribunal since filing the ET1 on 28 November 2019.
- (4) The Applicant has informally told other employees at the Respondent's business that the Tribunal proceedings were initiated to recover her final month's pay and since this has been paid she is no longer interested in pursuing the claim.
- (5) The Applicant has failed to engage with the Tribunal despite the Respondent's encouragement.
- (6) The Applicant has failed, without reasonable excuse, to attend two CMMs.
- (7) The Applicant has failed, without reasonable excuse, to respond to the Section 18(2) request for further information.
- (8) The Respondent continues to incur significant legal and managerial costs without good reason.

3.2 Consequently, the Respondent submits that:

- (1) The Applicant's failure to comply with the Section 18(2) request entitles the Tribunal to refuse to hear the complaint by virtue of Section 19(3)(a).
- (2) The Applicant's baseless and illegible claim amounts to a frivolous claim and the Tribunal should refuse to hear the complaint by virtue of Section 19(3)(b).
- (3) The Applicant's continued and deliberate disengagement from the proceedings amount to a vexatious claim and the Tribunal should refuse to hear the complaint by virtue of Section 19(3)(b).

3.3 The Applicant has not submitted anything further after her ET1 and has not entered into any correspondence with the Secretary. In an effort to be as fair to the Applicant as possible, the Tribunal shall have regard to the content of the ET1 and to the letters sent by the Acting Secretary to the Applicant.

4.0 The legal principles to be applied

4.1 Section 19(3) of the Law provides that the Tribunal may refuse to hear and determine a complaint of unfair dismissal: (a) in default of compliance by the Applicant with any provision of, or any requirement imposed under, Section 18(2); or (b) if the application appears to the Tribunal to be frivolous or vexatious. 'Frivolous' means having little or no merit or basis in law; 'vexatious' means subjecting the Respondent, whatever the Applicant's intention, to inconvenience and expense out of all proportion to any likely gain to the Applicant. The burden of proving either of these limbs of Section 19(3) lies upon the Respondent and is on the balance of probabilities.

- 4.2 The power to refuse to hear a complaint is discretionary, as clearly indicated by the use of the word 'may' in Section 19(3). The Tribunal considers that this means that they should apply the principles of fairness and natural justice when deciding whether to exercise that discretion. In particular, natural justice includes the obligations to act fairly, reasonably, rationally, in good faith, without bias and in a judicial manner having given each party the opportunity of adequately stating their case following proper disclosure.
- 4.3 The Respondent submits, *inter alia*, that the Tribunal does not have jurisdiction to hear 'failure to supply payslip' complaints. The Tribunal is mindful of Sections 12(1) and 12(4)(b) of the Law and Section 3A of *The Conditions of Employment (Guernsey) Law, 1985*. Taken together, those sections provide that dismissal of an employee shall be unfair if the reason or principal reason was that the employee alleged that the employer had infringed the employer's obligatory duty to give the employee a statement of pay. Applying the principles in *Cotterill* and *Reynard* (see paragraph 1.4 hereof) the Tribunal considers that a litigant in person referring to 'failure to supply payslips on end of month' as set out in paragraph 10 of the ET1 is sufficient to capture a claim under Section 12(1)(b) of the Law. Whether such a claim is ultimately successful depends, of course, upon the Applicant proving the necessary facts.

5.0 Facts Found

- 5.1 The Tribunal is satisfied, on the balance of probabilities and having considered the various documents before it, that the Respondent has established the following facts:
- (1) The Applicant has failed, without reasonable excuse, to attend the two CMMs held on 15 March 2019 and 3 April 2019.
 - (2) The Applicant has failed, without reasonable excuse, to respond to the Section 18(2) request for further information dated 4 April 2019.
 - (3) The Applicant's disengagement from the proceedings has been continued and deliberate.
 - (4) The Respondent has incurred and continues to incur significant legal and managerial costs without good reason.
 - (5) The Applicant's conduct has subjected the Respondent, whatever the Applicant's intention, to inconvenience and expense out of all proportion to any likely gain to the Applicant and her claim is, therefore, vexatious.
- 5.2 In the premises, the Tribunal finds that the grounds in Sections 19(3)(a) and 19(3)(b) of the Law are made out. The Tribunal must now consider whether they should exercise their discretion to refuse to hear and determine the Applicant's complaint. The Applicant has been given the reasonable opportunity of presenting her case, but has put forward no explanation or

other argument in defence of her conduct and the Tribunal is unable, applying the principles in ***Cotterill*** and ***Reynard*** (see paragraph 1.4 hereof), to identify any that might reasonably be advanced on her behalf. The Tribunal considers it fair and reasonable, therefore, to exercise its discretion under Section 19(3) of the Law and refuses to hear and determine the Applicant's complaint.

6.0 Conclusions

- 6.1 The Applicant has failed to comply with a requirement to provide additional information imposed under Section 18(2) of the Law and, furthermore, the manner in which she has conducted her claim means that her application is vexatious. The Tribunal considers it appropriate, in all the circumstances, to exercise its discretion under Section 19(3) of the Law to refuse to hear the Applicant's complaint of unfair dismissal.



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Signature of the Chairman

14 June 2019

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Date