



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Brian Allen
Unrepresented

Respondent: Regency Bedding Limited
Represented by: Ms Katherine Raison

Tribunal Members: Ms Helen Martin (Chairperson)
Advocate Jason Hill
Mr Andrew Vernon

Hearing date(s): 01 August 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 and that he was constructively dismissed as a result of this breach of Section 11 of the Law.

Having considered all 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.

Ms H S Martin
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Signature of the Chairman

11 October 2019
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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 Legislation referred to in this document is as follows:

FORM: ET3A

The Employment Protection (Guernsey) Law, 1998, as amended (the "Law")

The authorities referred to in this document are as follows:

Oudahar V Esporta Group Limited (2011) IRLR 730
Help V Guernsey Trade Windows Limited, 14 March 2018
Hamilton V Solomon and Wu Limited (2018)

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr Brian Allen represented himself and gave both oral and documentary evidence under Oath (ET1, EE1, EE2, EE3, EE4, EE5 refers).
- 1.2 The Applicant did not call any witnesses.
- 1.3 The Respondent, Regency Bedding was represented by Ms Katherine Raison and gave both oral and documentary evidence (ET2, ER1, ER2 refers).
- 1.4 The Respondent called the following witnesses:
 - Mr Ben Swan
 - Mr Paul Luxon
 - Mr Steve Hill

Mr Swan gave witness testimony under Oath. Mr Hill and Mr Luxton gave witness testimony under Affirmation.
- 1.5 The Tribunal called Mr Garry Gauvain as a witness of the Tribunal. Mr Gauvain gave testimony under Oath.
- 1.6 The Applicant claimed that he had been constructively dismissed within the meaning of section 5(2)(c) of the Law and that the dismissal was automatically unfair under section 11 of the Employment Protection (Guernsey) Law, 1998 as amended, for asserting a statutory right under section 11(1)(c), (d) or (e). 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 he was constructively dismissed and that it was for the health and safety reason of either raising unsafe conditions and/or taking steps to protect himself from the alleged danger.
- 1.7 The Respondent resisted the complaint, asserting that the Applicant had not been dismissed but that he had resigned from his position.
- 1.8 Both the Applicant and Respondent made an application for costs under The Employment Protection (Recoverable Costs) order, 2006.

- 1.9 The Tribunal was conscious that the Applicant was not legally represented during the hearing and 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 the case they wish to present.
- 1.10 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 02 July 2018 pursuant to a contract of employment and was subject to a 9-month probationary period.
- 2.2 The Respondent is a bed and furniture retailer.
- 2.3 The Applicant resigned from his employment in an email dated 30 October 2018.
- 2.4 The Applicant claimed that he sustained an accident at work on Monday 22 October 2018 which had subsequently caused him long term health issues caused by kneeling for an extended period on 22 October 2018 without the safety provision of kneeling pads.
- 2.5 The Applicant claimed that he had had to work alone in the store on two occasions and had failed to take breaks.
- 2.6 The Applicant claimed he had been bullied which had resulted in depression, anxiety and a 'TIA' or mini stroke.
- 2.7 In his resignation letter email dated 30 October 2018 (EE3 refers), the Applicant claimed that he had been constructively dismissed.
- 2.8 The Respondent claimed that the Applicant was not entitled to bring a claim for unfair dismissal because he was only employed for 16 weeks and denied that he was constructively dismissed and as such entitled to terminate his employment contract without notice by reason of the Respondent's conduct.
- 2.9 The Respondent denied that there were any health and safety issues and asserted that there was no requirement for the Applicant to kneel for long periods. The Respondent had asked the Applicant to assemble one child's cabin bed from a flat pack.

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).

Dismissal in health and safety cases.

(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, 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 Brian Allen

- 4.1 The Applicant requested that his opening statement should also be taken as his witness statement (EE2 refers).
- 4.2 The Applicant told the Tribunal that there were 3 elements to his claim. The first was the alleged accident at work on Monday 22 October 2018. The alleged injury at work resulted from the Applicant's allegation that he was required to kneel for long periods in order to construct a flat packed child's bed unit. The Applicant claimed that he should have received supervision and/or safety advice and adequate equipment in the form of kneeling pads. The second element identified by the Applicant was the lack of rest breaks during Saturdays when there was no designated lunch hour and the requirement to work alone all day on two separate occasions. The third part the Applicant's claim was the allegation that he had been subject to bullying and intimidation from the Respondent resulting in anxiety and depression culminating in a mini-stroke or TIA that he claimed was brought on by stress related issues from his employment and the problems he subsequently experienced in seeking to claim unemployment benefit.
- 4.3 The Applicant resigned by email on 30 October, 2018 claiming that he had been constructively dismissed because of the cumulative bad treatment towards him including the lack of health and safety equipment to protect him from injury and the attempt by the Respondent to revise his contract of employment after he joined.
- 4.4 The Applicant disputed that the injury he claimed he had suffered at work should be classed as sickness in accordance with his contract of employment.

4.5 The Applicant claimed that he had been discriminated against for not learning the computer system in 8 weeks and making minor errors.

4.6 The Applicant claimed in his ET1 form that the 'final straw' leading to his claim for constructive dismissal was the "tone and attitude Mr Swan expressed when he told me that I would not be receiving any wages whilst I was signed off from the Dr....".

5.0 Mr Brian Swan

5.1 Mr Swan, the Managing Director of Regency Bedding, told the Tribunal that he took the Health and Safety of all the employees very seriously and that he was familiar with the Health and Safety requirements of each role.

5.2 Mr Swan said that Mr Allen had not raised any health and safety concerns during his employment.

5.3 Mr Swan explained that colleagues were almost never alone in the building due to the activities of the Manufacturing and Logistics team.

5.4 The alleged knee injury claimed by the Applicant was disputed by Mr Swan who told the Tribunal that no injury was reported to his line manager or to himself until two days after it allegedly occurred.

5.5 Mr Swan said he was satisfied that the Applicant's line manager Mr Hill provided adequate supervision and support for his assembly duties particularly given Mr Allen's assertion that he was familiar with flat pack furniture assembly in both his interviews. Mr Swan said that chairs are accessible throughout the showroom and construction benches are available in the factory.

5.6 Mr Swan said there was no need to spend 8 hours on one's knees for the flat pack assembly and that he disputed that that was what had happened on the day of the alleged accident.

5.7 Mr Swan told the Tribunal that section 6 of the Health and Safety at Work (General) (Guernsey) Ordinance, 1987 stated that 'employees are required to take reasonable care of themselves and others who may be affected by the way they work' and that even though the requirement to spend hours on his knees was strongly disputed there were reasonable steps that Mr Allen could have taken to protect himself and raise concerns with management but that he had wilfully had chosen not to do either.

6.0 Steve Hill

6.1 Mr Hill said that had asked Mr Allen to assemble a Barcelona Sleep Station which is a mid-high single bed with a desk and storage such as shelving and a cupboard on Monday 22 October 2018.

6.2 The boxes required for the assembly were carried down by Mr Luxton and Mr Hill and Mr Hill said that he asked the Applicant if he required any help and that he had

responded that he was happy to give it a go and would call them if any help was needed.

6.3 Mr Hill said that he and Mr Luxton checked on the Applicant frequently and other than advising on certain points he had said he was happy to carry on as he needed to learn.

6.4 Mr Hill said that he saw the Applicant serving several customers throughout the day and observed that he had also had several tea breaks and his hour lunch break.

6.5 At the close of business the bed unit was almost complete and the Applicant did not mention any injury or discomfort before he left. In addition, Mr Hill said he was moving at his usual pace.

6.6 Regarding his allegation of working alone, Mr Hill said that this only happened on one occasion and that the Applicant was asked first if he was happy to do so and had confirmed that he was. Mr Hill had advised the applicant to just focus on the customers and not to worry about any other jobs. Mr Hill said he called several times during the day to see how he was getting on and that the Applicant had confirmed that he was fine.

6.7 Mr Hill explained that the sales room is never so busy that it is not possible to take coffee breaks and have lunch without too much interruption.

6.8 Mr Hill said that the factory staff were downstairs and available to help if needed.

7.0 Mr Paul Luxton

7.1 Mr Luxton gave witness testimony that reaffirmed Mr Hill's testimony about the events on Monday 22 October 2018.

7.2 Mr Luxton said that it had taken him and Mr Hill approximately 20 minutes the next day to complete the assembly of the Barcelona Sleep station.

7.3 Under cross examination, Mr Luxton told the Tribunal that if the Applicant had said his knees were hurting when he was assembling the flat pack furniture on 22 October 2018, he would have told him to stop.

8.0 Mr Garry Gauvain – witness to the Tribunal

8.1 Mr Gauvain had been factory supervisor at Regency bedding for 32 years.

8.2 Mr Gauvain told the Tribunal it was not unsafe for the sales team to work alone in his opinion and that there was a bench in the factory that anyone could use to assist with assembly of flat packed furniture.

9.0 Findings

- 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. What is less clear under the Law is whether a breach of Section 11 would entitle an employee to resign and claim that he had been constructively dismissed. In assessing this aspect of the claim, the Tribunal determined that it could not be assumed that any breach of health and safety, should it have occurred, would necessarily constitute a fundamental breach of the employee's contract sufficient to claim that he/she had been constructively dismissed and that the determination of this would depend on fact or 'degree' in each case.
- 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. The Tribunal determined that its primary consideration should focus on the alleged breach of an implied contractual term to ensure the health and safety of the employee in relation to Section 11 and examination of whether the alleged breach, if upheld, was *fundamental* as the result of the employer failing to comply with Section 11 of the Law. In relation to the other matters claimed by the Applicant, including the allegations of bullying and intimidation, the Applicant did not have sufficient service to meet the qualifying period of one year to make a claim for constructive unfair dismissal and therefore the Tribunal did not place weight on these elements.
- 9.4 Regarding the Health and Safety provisions at Regency Bedding, the Tribunal was persuaded that the Managing Director, Mr Swan, was knowledgeable about his business and the health and safety requirements in relation to each role.
- 9.5 The Tribunal was persuaded that it would have been reasonable for the Applicant to communicate to his line manager Mr Hill, if he was uncomfortable in any sense assembling the flat pack furniture on 22 October 2018 or regarded himself in imminent or serious danger as required under Section 11(1)(d) of the Law. In summing up, the Tribunal was mindful that when assembling flat pack furniture there is no actual requirement to be on your knees and a lot of assembly can take place standing or sitting down. The Applicant had not informed the Respondent of any health and safety concerns either on 22 October 2018 or before and therefore based on the substantial merits of the case the claim failed to meet the appropriate standard in relation to the statutory requirement under the Law.

9.6 Importantly, the Tribunal noted that the Applicant had not objected to working alone on what was found by the Tribunal to have occurred on one occasion and not two occasions as alleged by the Applicant, nor had he brought it to the attention of management that he had been in any serious or imminent danger in doing so in accordance with Section 11(1)(d).

9.7 Moreover, the majority of the Applicant's ET1 form fails to focus on health and safety issues further demonstrating that this was not the principal reason for the Applicant's resignation. The Tribunal found that the principal reason for the Applicant's resignation was referenced on his ET1 form where he clearly stated that the '*final straw*' was the tone and attitude Mr Swan had expressed when he had communicated to the Applicant that he would not receive any sick pay.

9.8 Whilst the Applicant did telephone the Respondent early on 24 October 2018 and allege that his knees were injured, he did not report any health and safety concerns and the Tribunal did not regard simply informing the Respondent of an injury as sufficient to meet the strict requirements of Section 11 of the Law.

9.9 In concluding, the Tribunal was concerned that when reporting his unease about working alone, the Applicant had done so after he had left the Respondent and in the context of trying to make an employment claim against the Respondent. Section 11 of the Law provides protection to employees who behave *reasonably* in respect of matters concerned with health and safety. The Applicant did not raise the alleged health and safety concerns to the Respondent during his employment to seek to rectify them and only did so in the context of an opportunity for a potential claim against the Respondent. The Tribunal noted that this had resulted in considerable expense for the Respondent and concluded on the balance of probabilities that the claim had been *misguided* and not made in *good faith* in accordance with the strict provisions of Section 11 of the Law.

9.10 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. In *Hamilton V Solomon and Wu Limited*, the Employment Appeal Tribunal goes one step further than in *Oudahar V Esporta Group Limited* and identifies a further criterion whether there are *in fact*, "circumstances of danger" which is an objective test. The Tribunal concluded that there were not circumstances of danger at Regency Bedding that met the strict provisions of Section 11 of the Law.

9.11 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.

9.12 The Tribunal considered the cost applications received from both the Applicant and Respondent extensively and on the balance of probabilities and despite the Tribunal's view that the claim was *misguided*, determined that costs would not be awarded to the Respondent. In making this decision the Tribunal was mindful that the Applicant was not legally represented. In line with the Tribunal's findings, the Applicant's cost application was rejected by the Tribunal.

10.0 Decision

The Applicant 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 and that as a result there had not been a fundamental breach of his contract of employment sufficient that he could consider himself constructively dismissed. 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.

Ms H S Martin
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Signature of the Chairman

11th October 2019
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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, Edward T Wheadon House, The Truchot, St Peter Port, Guernsey, GY1 3WH.