

**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**Applicant:** Mrs Katrina Khan  
Represented by: Advocate Thomas Crawford

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

**Tribunal Members:** Ms Christine Le Lievre (Chairman)  
Mrs Paula Brierley  
Ms Alison Girollet

**Pre-Hearing Review Date:** 25 August 2017

**Decision of the Tribunal**

The Applicant made a complaint of alleged unfair (constructive) dismissal against the States of Guernsey (acting by and through the Policy and Resources Committee), on 24 January 2017, setting out details of a disclosure made by her to her employer. Following a case management meeting the parties failed to produce an agreed statement of facts in relation to evidence for the full hearing. In addition to the ET1 Application form, the Applicant submitted a further statement dated 3 July 2017 and sought to have the Respondent disclose to the Applicant a copy of an independent investigator's report, relating to the subsequent investigation. These preliminary matters were addressed at a Pre-Hearing Review when a full Tribunal considered written submissions only from both parties.

Having considered the representations of both parties and having due regard to all the circumstances the Tribunal determined that it will not admit as evidence at the full hearing:

1. The Applicant's second statement dated 3 July 2017 or
2. The independent investigator's report.

In addition, following consideration of the parties' submissions, no other specific details relating to service users will be admitted as evidence.

Ms Christine Le Lievre  
.....  
Signature of the Chairman

6 October 2017  
.....  
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, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

**FORM: ET3A (05/16)**

**The Legislation referred to in this document is as follows:**

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

The Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, as amended

**The legal authorities referred to in this document are as follows:**

Oudahar v Esporta Group Ltd (EAT [2011] I.C.R. 1406  
Masiak v City Restaurants (UK) Limited [1998] WL1120677  
Tedeschi v Hoisden Besson EAT 959/95

**Extended Reasons**

**1.0 Introduction**

- 1.1 The Applicant, Katrina Khan, is represented by Advocate Thomas Crawford. The Respondent, States of Guernsey (acting by and through the Policy and Resources Committee) is represented by Advocate Emily Bamber.
- 1.2 The Applicant was employed by the States of Guernsey, in the position of Social Worker, by the Committee for Health and Social Care.
- 1.3 The Applicant's employment started on 6 June 2016, and the parties subsequently agreed it ended on 28 October 2016, and does not therefore meet the qualifying period of one year to bring a claim under Section 15(1) of the Law.
- 1.4 The Applicant, in an ET1 Application form dated 24 January 2017, claims she was unfairly (constructively) dismissed having made a whistle-blowing disclosure (the Disclosure) to her employer on 11 October 2016; and puts her claim forward in relation to a health and safety reason, an automatically unfair reason, under Section 11(1)(e) of the Employment Protection (Guernsey) Law, 1998, as amended (the Law). The Respondent refutes the claim.

**2.0 Summary**

- 2.1 At a Case Management Meeting (CMM1) held on 17 May 2017, the Chairman determined it was not necessary for the details of the Applicant's Disclosure to be admitted as evidence at a hearing. This based on: the Applicant's 'Details of Complaint' included with the ET1; and in particular information concerning service users outlined at paragraph 8 (a) to (i), setting out details of her Disclosure. Advocate Crawford expressed concern that the Applicant would not consequently be able to demonstrate her reasonable belief that there was an element of danger that was serious and imminent. The Representatives agreed to produce a 'statement of agreed facts' in preparation for a further CMM.
- 2.2 At a second case management meeting (CMM2), it was noted the Representatives had not been able to agree a statement of facts. In an email, dated 26 June 2017 13:04 (referred to at Tab 8, third paragraph of the Applicant's first submission to the Pre-Hearing Review), from Advocate Bamber to Advocate Crawford, it is noted "the Respondent will not concede that there

were circumstances of danger” and states “Your client is put to strict proof in that regard.”

2.3 The Applicant had, in the interim, submitted a ‘second statement’, dated 3 July 2017, (Tab 10 of the Applicant’s first submission), giving further specific details of the concerns that caused her to make the Disclosure. In addition, she sought to have the Respondent disclose to the Applicant a copy of the Independent Investigator’s Report (the Report), and that the Report be brought into evidence.

2.4 At CMM2, it was agreed that the issues would be considered at a Pre-Hearing Review based on written submissions only.

2.5 The Tribunal, consisting of three members, met on Friday, 25 August 2017 and conducted a Pre-Hearing Review based upon all the documents and authorities put before it in the Applicant’s two written submissions from Advocate Crawford, and two written submissions from Advocate Bamber for the Respondent.

The issues to be considered were whether or not the following could be brought into evidence:

2.5.1 The Applicant’s second statement, dated 3 July 2017, detailing information about service users, as referred to in her Disclosure, and concerning what the Applicant claims were circumstances of danger under Section 11(1)(e) of the Law.

2.5.2 The Independent Investigator’s Report compiled at the request of the Respondent, as a result of, and following the Applicant’s Disclosure.

2.6 In its first and second written submissions the Respondent resists the complaint of unfair dismissal and asserts that in the absence of protective legislation the Applicant is seeking to bring a whistle-blowing claim under the auspices of legislative Health & Safety protection. The Respondent argues this is to construe the Health & Safety protection beyond its intended purpose as the Applicant does not have sufficient qualifying service. The Respondent contends the substance of any whistle-blowing is beyond the jurisdiction of the Tribunal to consider.

2.7 The Respondent asserts the Report “is not relevant as it is a retrospective document written after the Applicant’s employment ended;” and “does not therefore concern the Applicant’s employment materially, if at all” (second written submission paragraph 9).

2.8 Whilst not within the points of reference for the Pre-Hearing Review, the Tribunal noted the Applicant’s allegations that the Respondent pressured her to

resign (Applicant's first witness statement, dated 16 June 2017, Tab 16 beginning paragraphs 16 – 57 of the Applicant's first submission).

### **3.0 Legal submissions of the parties**

- 3.1 In the Applicant's first written submission, Advocate Crawford relies on Section 11 of the Employment Protection (Guernsey) Law, 1998, as amended, "*Dismissal in health and safety*", and suggests (at paragraph 13) the correct approach to be followed under Section 11(1)(e) of the Law, is as set out in the equivalent Section, 100(1)(e) of the Employment Rights Act 1996 (the Act),(Tab 14). Advocate Crawford refers to the case of *Oudahar v Esporta Group Ltd* (EAT [2011] I.C.R. 1406 that the Tribunal should first consider whether or not there were circumstances of danger which were serious and imminent (paragraphs 24 to 31 at Tab 7 of the Applicant's first submission).
- 3.2 Advocate Crawford points out (Applicant's first submission, paragraph 16), Section 11(2) of the Law mirrors Section 100(2) of the Act, and refers to the case of *Masiak v City Restaurants (UK) Limited* [1998] WL1120677 (Tab 15 paragraph 18) that '*other persons*' extends not just to employees but also members of the public; and contends that it is appropriate for the Tribunal to adopt the principles in *Masiak* in connection with Sections 11(1)(e) and 11(2) of the Law.
- 3.3 The Respondent argues *Oudahar* and *Masiak* are of limited assistance to the Tribunal as in each case the employee was dismissed; and the Respondent denies that the Applicant was dismissed (paragraph 13 of the Respondent's first written submission).
- 3.4 The Respondent submits (second written submission paragraph 8) there is however benefit to considering *Masiak* (Tab 15 final three paragraphs on page 3, Applicant's first submission) where the EAT directed consideration of the issues in the following order:
- whether the employee had been dismissed? and if so
  - did his claim for wrongful dismissal succeed and
  - was he dismissed for a reason under Section 100(1)(e) of the Act, and if so, to what remedy was he entitled?
- 3.5 Referring to the Employment and Discrimination Tribunal (Guernsey) Ordinance, 2005, as amended; the Respondent states (first written submission paragraphs 23 and 24 and second submission paragraph 9) "the Tribunal does not have the statutory power to examine the substantive elements of the Applicant's disclosure as they are beyond the '*relevant enactments*' from which the Tribunal derives its statutory power ...." and argues (the Report) is "beyond the jurisdiction of the Tribunal as it examines the substantive elements of the Applicant's disclosure".

#### 4.0 The Law

- 4.1 The Tribunal finds there is no specific statutory protection for whistle-blowing in Guernsey.
- 4.2 In Oudahar (Tab 7 paragraph 29 of the Applicant's first submission), the Tribunal notes the statutory provision directs the Tribunal to consider the employee's state of mind at the time and it is not necessary for the employer to agree with the employee.
- 4.3 In Masiak (Tab 15 page 2 penultimate paragraph) the EAT finds that 'other persons' in Section 100(1)(e) of the Act, extends to members of the public.
- 4.4 The Employment Protection (Guernsey) Law, 1998, as amended, Section 11(1)(e) and 11(2), does not place the burden of proof on the Applicant to prove that circumstances of danger existed but only that the Applicant '*reasonably believed*' they existed; and protects not only employees but includes 'other persons' and for matters to be judged in all the circumstances:

**"Dismissal in health and safety cases.**

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

*(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".*

- 4.5 The Tribunal refers to the tests identified by the EAT In *Tedeschi v Hoisden Besson*; that is, four requirements which need to be fulfilled in order to make a health and safety claim under Section 100 of the Act which is equivalent to Section 11 of The Employment Protection (Guernsey) Law, 1998, as amended.

It must be established that:

- 4.5.1 the employee reasonably believes that circumstances connected with his or her work are harmful or potentially harmful to health and safety
- 4.5.2 it is not reasonably practical for the employee to raise the matter through a representative or safety committee

4.5.3 in the circumstances, the employee has raised the matter by reasonable means; and

4.5.4 the fact the employee has raised the health and safety question is the reason or principal reason for dismissal.

## **5.0 Facts Found**

5.1 The Applicant accepted an offer of employment from the Respondent, relocated to Guernsey with her family under a five-year housing licence, and commenced employment as a Social Worker on 6 June 2016.

5.2 The Applicant made a Disclosure to her employer on 11 October 2016, as detailed in her ET1 and second statement (Tabs 2 and 10, first submission), referring to information concerning service users that she was concerned about in the course of her work. No notes were made at the meeting.

5.3 By its actions, the Tribunal finds the Respondent acted appropriately, as would a reasonable employer, by informing the Applicant, at the time of her Disclosure, that the matter would be investigated. The Tribunal noted that following the Applicant's resignation in October 2016, on the same day the Respondent informed the Applicant the investigation would be held by an Independent Investigator (ET1 paragraph 28 and Witness Statement dated 16 June 2017 Tab 16 paragraph 62), and the Applicant was informed of the results in February 2017.

5.4 The Applicant did not return to work following her Disclosure.

5.5 The Applicant resigned on 25 October 2016 (Tab 16 paragraph 57).

5.6 At CMM2, the representatives agreed the Applicant's employment ended on 28 October 2016.

5.7 The Applicant seeks admission of the Independent Investigator's Report (Applicant's first written submission paragraph 1 (b)) "on the basis that its apparent conclusion is to be relied upon by the Respondent in disputing that circumstances of danger existed."

5.8 The Respondent (second written submission paragraph 9), states it does not seek to rely upon the Report and (at paragraph 10) states it relies on an undated letter (enclosed with the Respondent's second submission) to the Applicant from the Whistle-blowing Officer, Head of Assurance, States of Guernsey. In an email, dated 26 June 2017 at 13:04, (Tab 8 paragraph 3) the Respondent states the letter was "sent on or about 16 February 2017". The letter states the purpose is to provide the Applicant with "a summary of the outcome of the investigation relating to the matters you (*the Applicant*) raised

under the States of Guernsey Whistle-blowing Policy”; and refers to the findings of the Independent Investigator’s Report.

**6.0 Conclusion**

6.1 Having considered all the evidence presented, the representations of both parties, and with due regard to all the circumstances, whether referred to in this judgment or not, and also its application of the tests referred to in *Tedeschi v Hoisden Besson*; the Tribunal determined it is not appropriate to identify or refer to service users through evidence in relation to this particular complaint.

6.2 The Independent Investigator’s Report refers to the substantive elements of the Applicant’s disclosure and was reported following the end of the Applicant’s employment.

**7.0 Decision**

7.1 Having considered the representations of both parties and having due regard to all the circumstances the Tribunal determined that it will not admit as evidence at the full hearing:

1. The Applicant’s second statement dated 3 July 2017, or
2. the Independent Investigator’s Report.

In addition, following consideration of the parties’ submissions no other specific details relating to service users will be admitted as evidence.

Ms Christine Le Lievre  
.....  
Signature of the Chairman

6 October 2016  
.....  
Date