



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

APPLICANT: Mr Gary Ward
Represented by: Ms Rachel Richardson

RESPONDENT: Brecqhou Development Limited
Represented by: Ms Carly Parrott

Tribunal Members: Mr Peter Woodward (Chairman)
Mr George Jennings
Mr Andrew Vernon

Hearing date(s): Tuesday 21 June 2016

Decision of the Tribunal

The Applicant, Mr Gary Ward, made a complaint of alleged unfair dismissal against the Respondent, Brecqhou Development Limited, on 16 February 2016. The Chairman of the Tribunal appointed to hear the claim, determined that the claim could not proceed to a full hearing before issues of Jurisdiction and the Effective Date of Termination of employment had been considered and resolved. These preliminary matters were dealt with at a Pre-Hearing Review, with written submissions from both parties. The Respondent conceded that the Tribunal had Jurisdiction but contested the Effective Date of Termination.

Having considered all the evidence presented, whether recorded in this judgment or not and the representations of both parties and having due regard to all the circumstances, the Tribunal finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant’s Effective Date of Termination was 5 December 2015. The Applicant submitted his complaint on 16 February 2016 and therefore complied with Section 17(1) (a) of the Law, in that it was submitted within the prescribed time limit. The complaint will now be scheduled for a full Tribunal hearing.

Mr Peter Woodward
.....
Signature of the Chairman

1 July 2016
.....
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.

The Legislation referred to in this document is as follows:

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

Extended Reasons**1.0 Introduction**

1.1 The complaint was made by the Applicant Mr Gary Ward against Brecqhou Development Limited on 16 February 2016; Ms Rachel Richardson, Senior Associate, Carey Olsen, represented the Applicant.

1.2 The Respondent, Brecqhou Development Limited, challenged whether Mr Ward has complied with the provisions of the Law and objected to the complaint proceeding to a full hearing; Ms Carly Parrott, Senior Associate, Mourant Ozannes, represented the Respondent.

1.3 A Pre-Hearing Review, held on 21 June 2016, was conducted to review documentation submitted in separate bundles by the two parties; (ER1 and EE1). These submissions were made in response to the 'Directions' issued after a Case Management Meeting held on 3 May 2016; these Directions were as follows:

"As there were preliminary issues to consider in relation to the Applicant's eligibility or otherwise to claim in accordance with Section 17(1) of the Law (as raised by the Respondent's Representative) and Section 4(1) (as raised by the Chairman) the Chairman ordered that:

1. *A full Tribunal would be convened to determine the following issues at a Pre-Hearing Review:
 - a) *Whether or not the Applicant's claim was filed within the three months' time limit as prescribed by the Law*
 - b) *Whether or not the claim fell within the jurisdiction of Guernsey as prescribed by the Law**
2. *Both Representatives would provide documentary evidence to the Secretary to the Tribunal by **12.00 midday on Tuesday 7 June 2016** (copying such evidence to the other party and providing the Secretary to the Tribunal with **four** copies appropriately paginated and indexed) to support their assertions in relation to the two preliminary issues referred to above.*
3. *The parties will be advised of the constitution of the Tribunal and the date of the Pre-Hearing Review in due course.*

4. *The Tribunal's decision as to whether or not the claim for unfair dismissal will be heard will be conveyed to the parties in writing following the Pre-Hearing Review.*
5. *Should the Tribunal determine that the Applicant is eligible to claim, a further Case Management Meeting will be held to deal with remaining administrative issues."*

These Directions were issued by the Chairman appointed to hear the claim, Mrs Tina Le Poidevin. They were adopted by the replacement Chairman, Mr Peter Woodward.

1.4 An initial exchange of bundles was made between the parties on 7 June 2016 and then subsequently they exchanged further supplementary submissions. In consequence the bundles ER1 and EE1 were both composed as follows:

- Written submissions by the both representatives
- Supplementary written submissions by both representatives
- Witness statements on the preliminary issues
- Judgments from prior proceedings of the Guernsey Tribunal and rulings by the English Employment Appeals Tribunal (EAT) and the English Court of Appeal

1.5 The written submission from Ms Parrott included the following statement:

"The Respondent concedes that the claim falls within the jurisdiction of Guernsey and that the Applicant ordinarily worked in Guernsey. The Applicant was based in Guernsey and the performance of his duties emanated from Guernsey. The Respondent therefore does not make any submissions in relation to this issue."

Thus the Tribunal had no further need to consider section 4(1) of the Law.

1.6 The Tribunal therefore set aside the jurisdictional issue and gave sole consideration as to whether the claim was filed in accordance with section 17 (1) [subsections (a) and (b)]; this section of the Law states:

'Time limit for presenting complaints.

17. (1) The Tribunal shall not hear and determine a complaint under section 16(1) unless it is presented to the Secretary –

(a) within a period of three months beginning on –

- (i) the effective date of termination, or*
- (ii) in the case of a complaint under section 16(1)(c) [or (d)], the date of the act or failure to act to which the complaint*

relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further time as the Tribunal (constituted by a single member of the Panel) may, on the application of the complainant presented to the Secretary, allow in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented.'

2.0 Facts Found

- 2.1 The Applicant commenced employment with the Respondent on 25 August 1997 and was employed as a Senior Boat Manager/Marine Operations Manager.
- 2.2 In October 2015 a decision was taken by the Respondent to scale down its marine operations and in consequence make a number of employees redundant.
- 2.3 The Applicant was advised by Mr Aidan Monaghan on the morning of 5 November 2015 that his role was being made redundant.
- 2.4 The redundancy was confirmed in a letter dated 5 November 2015, the letter stated the following:

*“Dear Gary
Notice concerning end of contract
Following our telephone conversation 10.30am on Thursday 05 November this letter is to inform you that regrettably we will be ending your employment with Brecqhou Island Development please consider this letter as the start of a months’ notice, in accordance with our verbal agreement your employment will cease on 05 December and you will be paid up until the 31 December in form of a severance payment.”* (EE1 Tab 9 refers).
- 2.5 On Monday 9 November 2015 Mr Monaghan rang Mr Ward. These two parties dispute the content of this phone call. However, as a result of this phone call Mr Ward cleared his desk and did not carry out any further duties.
- 2.6 There is no written record of the telephone conversation of 9 November 2015; Mr Ward did not receive a confirmatory letter.
- 2.7 The Applicant was paid his net salary for the month of November 2015 on 17 November 2015 and a payslip was issued to the Applicant dated 30 November 2015 detailing social security contributions and tax deductions. (ER1 Tab A refers).

- 2.8 The Applicant received a further payslip dated 31 December 2015 with a monthly salary paid gross without any tax deductions or social security contributions. (ER1 Tab A refers).
- 2.9 An email received by Ms Richardson on 9 March 2016 from a Customer Services Officer with Guernsey Social Security confirmed that the Respondent made contributions on behalf of the Applicant up until and including week 48 2015 (26 November 2015 to 2 December 2015). This email further confirmed that the Applicant commenced new employment with Siteweld Limited on 7 December 2015. (Tab 13 EE1 refers).

3.0 Authorities submitted by the parties

- 3.1 Both the Applicant and the Respondent submitted past judgments given in Guernsey and in England. The Tribunal reviewed all the authorities and have concluded that the judgments in Chapman v Letherby & Christopher Ltd. (1981) IRLR 440 EAT and M-Choice Ltd. v UKEAT/0227/11/DA provided particular guidance.

4.0 Witness Statement Mr Aidan Monaghan

- 4.1 Mr Monaghan is the Island Manager of Brecqhou Development Limited.
- 4.2 On 9 November 2015 Mr Monaghan telephoned Mr Ward and confirmed his final day of employment was being brought forward to that date. Mr Ward accepted the earlier termination of his employment and responded that he “knew this was coming”.
- 4.3 Mr Monaghan stated he was absolutely comfortable that he had been clear and definite in his communication with Mr Ward and that he had understood that his employment was terminated on that day.
- 4.4 Mr Ward telephoned Valley Computers on 9 November 2015 asking for all company software to be removed from his computer. This confirmed to Mr Monaghan that the Applicant had accepted his employment had been terminated on that date.

5.0 Witness Statement Mr Gary Ward

- 5.1 Mr Ward confirmed in his evidence that Mr Monaghan had phoned him on 9 November 2015 and he was told he should clear his desk, hand over his keys and go home.
- 5.2 The call was very short and Mr Ward did not argue or ask any questions. He assumed he was being placed on garden leave, this being entirely the normal practice with his employer given its very high stress on maintaining privacy on the Island. Mr Ward was aware that this had happened to past

employees; he stated that they were always sent home as soon as they had been dismissed, regardless of their notice periods or actual date of termination of employment.

5.3 At no point in their telephone discussion did Mr Monaghan tell him that his 'end date' had been brought forward. He was firmly of the opinion that his final date of contractual engagement was 5 December 2015.

5.4 Mr Monaghan did not confirm their discussion in writing.

6.0 Witness Statement Mr Timothy Martel

6.1 Mr Martel is a director at Siteweld Limited and met the Applicant at a social event in November 2015. Once he became aware that Mr Ward was serving his notice he offered employment in his company to the Applicant.

6.2 Further discussions occurred between Mr Martel and the Applicant on 1 December 2015. The witness had the distinct memory that the Applicant told him that he could not start employment until after 5 December 2015 as he still had a few days left under his employment with the Respondent.

6.3 The Applicant commenced employment with Siteweld Limited on 7 December 2015.

7.0 Witness Statement Ms Laure Abeille-Brown

7.1 The witness was employed by the Respondent as their Marketing and Sales Manager between 3 December 2012 and 6 November 2015 and was well acquainted with the Applicant.

7.2 The witness became aware that the Applicant was to be made redundant on 5 November 2015.

7.3 Ms Abeille-Brown subsequently met the Applicant later in November and he informed her that he had secured a job with Siteweld but could not commence employment with them until early December because he was still technically employed by the Respondent.

7.4 The witness stated that she did not find it odd that the Applicant was not asked to work his notice period. From her previous experience with the Respondent she was aware the Respondent had a policy of not requiring staff to continue working whilst serving their notice. She stated "rarely, if ever, do they let people come back into the office to work between dismissal and their official termination date".

8.0 Witness Statement Daniel James Masterman

- 8.1 Mr Masterman is an engineer by trade and worked on the Respondent's company boats for approximately two years whilst the Applicant worked as Senior Boat Master. He became aware that the Applicant was to be made redundant on 5 November 2015.
- 8.2 Mr Masterman met with the Applicant approximately two weeks after the 5 November 2015 and was informed by him that he had found a new job. During this conversation the Applicant told him that he still had some time to go before his notice period was due to end.

9.0 Witness Statement Ms Sandra Harrisson

- 9.1 The witness was the Accounts Manager for the Respondent between August 2008 and 31 December 2015.
- 9.2 She met the Applicant in his office on 5 November 2015 and was told by him that he had been made redundant but still had a month to go. Later in the morning Aiden Monaghan confirmed to her that the Applicant, together with a number of his colleagues, was "being stood down" but would be paid until the end of the year.

10.0 Conclusions

- 10.1 Section 17(1) subsection (b) of the Law provides a mechanism for an extension of the three month period for making a complaint in the event that it was not reasonably practical to present a complaint in that three month period. The Applicant's submission confirms that he had no significant constraint; thus in the event that the Tribunal upheld 9 November 2015 as the Effective Date of Termination of employment, the complaint would be adjudged out of time.
- 10.2 In summary the Applicant must rely on Section 17(1) subsection (a) for his complaint to proceed. The evidence must persuade the Tribunal that, on the balance of probabilities, the Effective Date of Termination was 5 December 2015, not 9 November 2015.
- 10.3 Both parties agreed that a telephone discussion took place on 9 November. They disagree as to the content of this conversation. Mr Monaghan states he was quite clear that he had confirmed to the Applicant that his final day of employment was "being brought forward to today". Mr Ward had responded that he "knew this was coming". Mr Ward contended that he had expected to be told that he would be placed on what he understood to be 'garden leave' for the rest of his notice period; he had observed this practice with other colleagues who had left the Respondent's employment prior to him.

- 10.4 The Tribunal is very familiar with employers from various sectors of Guernsey employers using garden leave to protect confidentiality when an employee is serving notice after communication of a dismissal; in the circumstances it does not seem unreasonable for Mr Ward to make the assumption that he too was on garden leave.
- 10.5 The Respondent did not make any record of his telephone conversation of 9 November 2015 or send a letter that would supersede the original letter stating that the Applicant's employment would cease on 5 December 2015. This was a major omission of process by the Respondent.
- 10.6 The Tribunal reviewed the authorities submitted by both parties and gives some weight to the judgment in *Chapman v Letherby & Christopher Ltd.* (1981) IRLR 440 EAT.

The judgment considered how Tribunals should construe letters of dismissal. It stated:

"Where an employer relies on a notice served by him as having a particular meaning he should be required to demonstrate that it unambiguously has that meaning. If the employer can rely on ambiguities being resolved in his favour, the employee may be left in doubt as to where he stands"

- 10.7 The authority provided by the Respondent *M-Choice Ltd. V* UAEAT/0227/11/DA was also given weight by the Tribunal:

"Where an employee is dismissed whilst he or she is working out their notice the date of ending their employment is brought forward from the date on which their notice would have expired to the date on which they were summarily dismissed, even if the effect of that is to leave the employee without the necessary period of continuous service to present a complaint of unfair dismissal".

The complaint currently being considered is not about a period of continuous service but the right of an employer to advance the date dismissal within a notice period, provided this is done lawfully, is accepted in Guernsey. However there is still a duty on the employer to communicate such a dismissal in clear and unambiguous terms.

- 10.8 The Applicant has submitted four corroborative witness statements, from colleagues and his new employer, that are supportive of the view that whatever Mr Monaghan told Mr Ward it was not received with clarity. Mr Ward had not unambiguously understood he was freed from contractual constraints after 9 November 2015. Mr Ward apparently delayed the start of his new employment because he believed himself still to be employed until

5 December 2015. The Tribunal acknowledges that the 'Linked In' entry for Mr Ward, submitted by the Respondent, states that Mr Ward referred to his employment having included November 2015 but not December 2015; the Tribunal concluded many subscribers to 'Linked In' make general statements as to past periods of employment and does not give this evidence any significant weight.

10.9 The Applicant is not required to convince the Tribunal beyond all reasonable doubt that his date of termination was not varied, however on the balance of probabilities the evidence is very persuasive that the Applicant's Effective Date of Termination was not varied by the actions of the Respondent on 9 November 2015.

10.10 Finally, whilst not decisive in isolation, the November payslip and the evidence from the Guernsey Social Security department are also indicative of a continuing contract of employment that had not been changed on 9 November 2015.

10.11 In communicating a dismissal there is very clear obligation on the employer that the terms of the dismissal and the period of notice be clearly communicated. If an employer subsequently seeks to alter its original communication then it would seem that this should be done with clarity and be communicated unambiguously. Having considered all the submissions the Tribunal considers that the Respondent fell well short of meeting this test.

11.0 Decision

11.1 Having considered all the evidence presented, whether recorded in this judgment or not and the representations of both parties and having due regard to all the circumstances, the Tribunal finds that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant's Effective Date of Termination was 5 December 2015. The Applicant submitted his complaint on 16 February 2016 and therefore complied with section 17(1)(a) of the Law. The complaint will now be scheduled for a full Tribunal hearing.

Mr Peter Woodward
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Signature of the Chairman

1 July 2016
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Date