



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: **Miss Stacey Upson**
 Represented by: (Self-represented)

Respondent: **Netplay TV Group Limited**
 Represented by: (Mr Martyn Trebert)

Tribunal Members: Mr Peter Woodward (Chairman)
 Mrs Tina Le Poidevin
 Mr Jason Hill

Hearing date(s): **4 October 2016**

Decision of the Tribunal

The Applicant, Miss Stacey Upson, made a complaint of alleged unfair dismissal against the Respondent, Netplay TV Group Limited, on 5 February 2016. The Chairman of the Tribunal appointed to hear the claim, determined that the matter could not proceed to a full hearing before the issue of whether or not the Applicant had the qualifying period of employment in order to bring a complaint had been considered and resolved. This preliminary matter was dealt with at a Pre-Hearing Review, with written submissions from both parties.

Having considered all the evidence presented, whether recorded in the 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 was continuously employed and the complaint for alleged unfair dismissal will now be scheduled for a full Tribunal hearing.

Mr Peter Woodward

 Signature of the Chairman

13 October 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 A complaint of Unfair Dismissal was made by the Applicant, Ms Stacey Upson, against the Respondent, Netplay TV Group Limited (Netplay TV) on 5 February 2016. The Applicant was originally represented by Advocate Andrew Ayres but for the purposes of the Pre-Hearing Review, represented herself. Mr Martyn Trebert represented the Respondent.
- 1.2 The Respondent challenged whether Ms Upson complied with the provisions of the Law and objected to the complaint proceeding to a full hearing on the basis of lack of a qualifying period for the Applicant to bring a complaint.
- 1.3 A Pre-Hearing Review, held on 4 October 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 10 August 2016; these Directions were as follows:

"The Chairman agreed with the parties that in order to carry out the process in a cost effective and timely manner, this matter will now be dealt with in two stages. In the first instance there will be a Pre-Hearing Review and the Tribunal will consider written representations from both parties in order to determine whether the Applicant meets the qualifying period as required under Section 15(1) of the Employment Protection (Guernsey) Law 1998 as amended "the qualifying period".

If the Tribunal determines that the Applicant meets the requirement of "the qualifying period" the complaint will be heard at a full hearing at a date to be determined.

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.

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 Mrs Caroline Latham, the Chairman initially appointed to hear the claim. They were adopted by the replacement Chairman, Mr Peter Woodward.

As a consequence of these Directions documents submitted by the parties, ER1 and EE1, were composed as follows:

- Written submissions by both representatives
- Witness statements on the preliminary issues and judgments from prior proceedings of the English Employment Appeals Tribunal (EAT)

2.0 Facts Found

- 2.1 The Applicant commenced employment with the Respondent as a roulette spinner. A contract of employment was issued to the Applicant on 1 December 2009.
- 2.2 At the time of the events reported in this judgment the Applicant was directly managed by Miss Shanine Levrier and the Managing Director of Netplay TV was Mr Martyn Trebert.
- 2.3 The Applicant submitted a doctor's letter dated 22 August 2016. This stated "*I can confirm that I saw Miss Upson in surgery on 20th August 2015 when she was suffering from anxiety and stress related to a grievance at work. She was signed off until her return to work on 19th September 2015.*".
- 2.4 On 3 September 2015 the Applicant sent an email to Martyn Trebert stating "*I have been victimized and bullied by this person on numerous occasions which you have not taken appropriate action for so I am forced to constructively dismiss myself after seeking legal advice*" (Page 1.1, ER1 refers).
- 2.7 The Respondent claims that this email definitively ended the Applicant's period of continuous employment and that a new period of employment started later, on 18 September 2015 with an Effective Date of Termination in November 2015.
- 2.8 Evidence provided by both parties confirms that email exchanges took place between the parties on 4 and 5 September 2015 and that a meeting took place between Martyn Trebert and the Applicant on 9 September 2015. (Pages 1.2 to 1.5, ER1 refer).
- 2.9 Following this meeting the Respondent issued a letter to the Applicant on 11 September, primarily concerned with responses to grievances raised by the Applicant but confirming in the final paragraph that the Respondent would like the Applicant to return to work. It stated "*I would like to put all the current issues behind us and try to find a way forward that is acceptable and fair for all parties. We would hope that you will accept that we are not taking any further action on this grievance. At the meeting you expressed a wish to come back to work. I welcome this and would like you to come back to work and start afresh working within the guidelines and code of conduct with our support and*

guidance.” (Page 1.6, ER1 refers).

- 2.10 On 14 September the Applicant emailed the Respondent stating she had cancelled her sick note and was able to return to work immediately. (Page 1.7, ER1 refers).
- 2.11 The Applicant repeated her assertion in a subsequent email that she was fit to return to work on 16 September 2015. The Applicant stated in this email: *“The stress at work has now ceased so technically I could be able to work sooner than the note advises due to changes in circumstances at work.”* In response to an email from Martyn Trebert she committed to obtain formal medical confirmation that the certificate was rescinded.
- 2.12 The Respondent states “re-employment” of the Applicant occurred on Friday, 18 September 2015. Both parties confirm the Applicant attended her place of work for a training event on that date and was then rostered for a normal work shift on 22 September 2015.
- 2.13 The Tribunal notes an email exchange between two Netplay TV employees that confirmed on 18 September 2015 the Respondent was in possession of a sick note which confirmed the Applicant was unfit for work on 3 September 2015; it stated: *“I have a copy of her current sick note, which states it runs from 3rd September for 4 weeks.”*

3.0 The Law

- 3.1 The Schedule to the Employment Protection (Guernsey) Law, 1998, 34(1), sets out how a period of “Continuous Employment” should be determined. Paragraph 2(1)(b) states *“An employee’s period of continuous employment....ends with the day by reference to which the length of the employee’s period of continuous employment is to be ascertained for the purposes of the provision.”*
- 3.2 Paragraph 3(1) of the Schedule: *“Any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment.”*
- 3.3 Paragraph 3(2)(a) of the Schedule states: *“Subject to sub-paragraph (3), any week (not within sub-paragraph (1)) during the whole or part of which an employee is - incapable of work in consequence of sickness or injury..... counts in computing the employee’s period of employment.”*
- 3.4 Section 34 of the Law “Interpretation” states that in this Law “week” means, in relation to an employee whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day, and, in relation to any other employee, a week ending with Saturday”.

4.0 Conclusions:

- 4.1 The Tribunal accepts that the Applicant sent an email on 3 September 2015 stating she had been *“forced to constructively dismiss myself after seeking legal advice”* and repeated her belief on later dates that she had constructively dismissed herself; the issue is whether that claim had the effect of ending her period of continuous employment in September 2015.
- 4.3 A careful examination of the Applicant’s email of 3 September 2015 and written documentation sent by the Respondent between 3 September 2015 and 11 September 2015 does not confirm any direct statement accepting the Applicant’s dismissal. These communications seem to deal with the issues raised in a formal grievance submitted by the Applicant on or around 20 August 2015 and the very concentrated attempts by Martyn Trebert to mediate these issues to a successful conclusion. In accordance with the Schedule to the Law, the end of the working week, during which the 11 September fell, was Saturday, 12 September 2015.
- 4.4 Both parties agree that the Applicant attended her workplace on 18 September 2015 to undergo training and the Respondent’s documentation clearly states its belief that her *“re-employment”* occurred on 18 September. These events occurred in the week ending Saturday 19 September 2015.
- 4.5 The Respondent did not issue a new contract of employment, in conformance with the *“Conditions of Employment (Guernsey) Law, 1985”*, to the Applicant. The Respondent’s letter of 11 September 2015 cannot be construed as a contract of employment as it does not even reference the elements of ‘offer and consideration’ without which a document cannot purport to be a contract of employment.
- 4.6 It would seem, on the balance of probabilities that, in accordance with paragraph 3(1) of the Schedule to the Law, the period 3 September 2015 to 18 September 2015 was a period in which the employee’s relations with her employer were governed by the continuing contract of employment that commenced on 1 December 2009.
- 4.7 Turning to consideration of the application of paragraph 3(2)(a) of the Schedule in relation to this issue, the Law is clear that the whole or part of any week during which time the employee is incapable of working, as a result of sickness, counts towards a period of continuous employment, although it should be noted that such a period is limited by the Law to a period of no more than 26 weeks.

- 4.8 Furthermore and in any event, paragraph 3(2)(a) of the Schedule is engaged in the following way: the Applicant presented evidence that the sick note was issued by her doctor on 20 August 2015 and applied to a period ending on 19 September 2015. The Respondent did not demur from this and, indeed, included evidence in its submissions that indicated a sick note, dated 3 September 2015, existed, covering the Applicant until 1 October 2015. In the event the Applicant returned to her workplace well before that date, presumably with the formal agreement of her doctor.
- 4.9 The Tribunal concludes, therefore, that there was no break in the Applicant's continuity of employment in September 2015.

5.0 Decision

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 was continuously employed during September 2015 and the complaint for alleged unfair dismissal will now be scheduled for a full Tribunal hearing.

Mr Peter Woodward
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Signature of the Chairman

13 October 2016
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Date