



**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**Applicant:** Miss Ellie Rihoy  
**Represented by:** Mr Kevin Mauger

**Respondent:** Aqua-star Limited  
**Represented by:** Mr Geoff Willson

**Tribunal Members:** Ms Helen Martin (Chair)  
Mr Jason Hill  
Mrs Christine Le Lievre

**Hearing date(s):** 13 May 2017

**Decision of the Tribunal**

The Applicant, Miss Ellie Rihoy, claimed that the Respondent had discriminated against her as defined in the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005.

Having reviewed and duly considered all the evidence submitted and the representations of all parties to the hearing, whether specifically recorded in this judgment or not, the claim of Sex Discrimination under the provisions of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 is dismissed and the Tribunal makes no award.

Ms Helen Martin  
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Signature of the Chairman

5 July 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.

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

The Sex Discrimination (Employment)(Guernsey) Ordinance, 2005

**Extended reasons****1.0 Introduction**

- 1.1 The Applicant, Miss Ellie Rihoy, made a complaint of sex discrimination.
- 1.2 The Respondent, Aqua-star Limited, resisted the complaint of sex discrimination.
- 1.3 Miss Rihoy was represented by Mr Kevin Mauger and gave evidence on her own behalf. Mr Kevin Mauger also gave evidence for the Applicant. The Applicant submitted document bundles EE1 and EE2.
- 1.4 The Respondent was represented by Mr Geoff Willson, Managing Director of Aqua-star Limited. The Respondent submitted document bundles ER1, ER2, ER3, ER4, ER5 and ER6. Mr Willson gave evidence for the Respondent. The Respondent also called the following witnesses:
  - Mr Carl Rive, Works Production Manager
  - Mr Lee Le Poidevin, Supervisor

**2.0 Summary of Evidence**

- 2.1 The Applicant enquired about the job at Aqua-star Limited by telephone and spoke to Mr Rive, Works Production Manager. She recalled that during this telephone conversation Mr Rive made a "sexist comment" (see attachment to ET1). She elaborated on this in a letter dated 17 October 2016, written on her behalf by Mr Mauger to Aqua-star; the letter stated that Mr Rive had said "You do realise this is a boat building job". In an email dated 24 October 2016, the Applicant asserted that she had made an error in the letter of 17 October 2016 and the actual words used by Mr Rive were "You do realise this is a boat building company and associated with men".
- 2.2 The Applicant was engaged by Aqua-star Limited on a trial work placement for an initial two-week period commencing 3 October 2016. The Applicant did not have a written contract of employment.
- 2.3 Aqua-star Limited is a small local boat building business that has a long track record of hiring trainee boat builders from the job centre. After a two-week trial period trainees receive a written contract of employment and undergo a further three-month evaluation or probationary period. New trainees are hired from the job centre once or twice a year.

- 2.4 Mr Rive interviewed the Applicant and agreed the Applicant's start date and that she would be paired with another employee who would train and guide her on the job. The Works Production Manager, Mr Rive and Supervisor, Mr Le Poidevin, both informed the Tribunal that the two-week trial period had been made clear to the Applicant.
- 2.5 The Applicant alleged that the job was permanent because the job advert stated full time at the top of it. The position that the Applicant applied for was left blank on her application form (ER2 refers). The Applicant alleged that the two-week trial period was not explained to her. The Applicant claimed that she was informed by Mr Rive that her wages would go up after two weeks and that she had asked if she had 'got the job' at the end of the first week (EE1, page 2, Applicant's witness statement refers).
- 2.6 The Applicant was late for work on three occasions during the two-week trial period (ER3 refers) and used her mobile phone repeatedly, contrary to the Company policy that this was not permissible for health and safety reasons. The policy about the prohibition of use of mobile phones was displayed on the Company notice board. The Respondent alleged that the Applicant was observed to show a lack of interest during the six days that she worked at Aqua-star Limited and was noted as 'sitting around' which was considered as a 'problem' by the Managing Director, Mr Willson.
- 2.7 The Applicant had named, a relative and Mr Kevin Mauger, her boyfriend at the time of the Tribunal hearing, as her referees on her CV to support her job application. During her two-week trial period the Respondent contacted the Applicant's former employer and alleged that the employer had a very negative view of the Applicant. The Respondent alleged that this feedback was the final factor that led to the decision not to issue a contract of employment to the Applicant and/or continue to employ the Applicant on an ongoing basis.
- 2.8 The Applicant was not spoken to about her conduct or 'work ethic' whilst working at Aqua-star Limited.
- 2.9 The Applicant was absent due to illness for four days of the two-week trial period following a period of dizziness in the workplace and submitted a medical certificate to the Respondent. The Applicant obtained a second medical certificate, at the behest of Mr Rive, on Thursday 13 October 2016 and was scheduled to return to work on Monday 17 October 2016.
- 2.10 The Applicant's trial period of employment was ended towards the end of the two-week trial period on 13 October 2016 (ER1, page 3 refers). The Respondent alleged that this was due to an assessment of her work ethic.
- 2.11 Mr Mauger asked Mr Rive for the reason why the Applicant's employment was not continued, during a subsequent visit to the Applicant's workplace.

Mr Mauger had arrived unannounced at the workplace and had to be escorted off the premises after the exchange. The Respondent alleged that Mr Mauger's behaviour had been inappropriate and threatening. Mr Mauger asserted that his assumption was that the only reason that the Applicant's employment ended was because she was female and that her 'dream job' had been taken from her. Mr Rive responded to Mr Mauger's enquiry about the decision not to continue the Applicant's employment by stating "she was not suitable."

- 2.12 The Applicant alleged that the fact that she was referred to as a third party by Mr Rive when he stated that "she was not suitable" and she was present in the room, was evidence that she had been subjected to sex discrimination.

### **3.0 The Law**

- 3.1 The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, Section (1)(a) provides:

*In any circumstances relevant for the purposes of any provision of Part II of this Ordinance, a person discriminates against a woman if.....on the ground of her sex he treats her less favourably than he treats or would treat a man.....*

In Section 6(1) *A person shall not, in relation to employment by him at an establishment in Guernsey, discriminate against a woman –*

*(a) in the arrangements he makes for the purpose of determining who should be offered that employment,*

*(b) subject to the provisions of subsection (3), in the terms on which he offers her that employment (including, without limitation, terms as to the payment of money), or*

*(c) by refusing or deliberately omitting to offer her that employment.*

*(2) Subject to the provisions of subsection (3), a person shall not, in the case of a woman employed by him at an establishment in Guernsey, discriminate against her –*

*(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits (including, without limitation, benefits consisting of the payment of money), facilities or services, or by refusing or deliberately omitting to afford her access to them, or*

*(b) by dismissing her, or subjecting her to any other detriment.*

In Section 63(3):

*A comparison of the cases of persons of different sex...under section 1 (1)...must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.*

- 3.2 Section 44(2) sets out the burden of proof in cases involving allegations of discrimination under Part II or Section 25 or 26 of the 2005 Ordinance:

*Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –*

*(a) has committed an act of discrimination against the complainant which is prohibited by any provision of Part II, or*

*(b) is, by virtue of section 25 or 26, to be treated as having committed such an act of discrimination against the complainant,*

*the Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.*

#### **4.0 Conclusion**

- 4.1 The burden of proof was on the Applicant to prove, on the balance of probabilities, that the Respondent had committed an act of sex discrimination.
- 4.2 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not.
- 4.3 A direct discrimination claim depends on the Tribunal being satisfied that the Applicant was treated less favourably than a man on the ground of her sex. It is for the Tribunal to decide, as a matter of fact, what is less favourable and the fact that an Applicant considers that she has been treated less favourably does not itself establish that there has been less favourable treatment.
- 4.4 In determining this decision, the Tribunal had specific regard to the guidance given by the Deputy Bailiff in **Immuno Biotech Limited v. Lucia Pagliarone** (Royal Court, Judgment 17/2016) and in particular the importance of the provision of Section 1(1)(a) that requires the Tribunal to compare the way the alleged discriminator treats the woman with the way he treats or would treat a man. In summing up, the Tribunal expressly relied on both actual and hypothetical comparators to reach its decision.

- 4.5 The Tribunal preferred the evidence of the Respondent in relation to the established process of hiring new employees on an initial two-week trial period. Furthermore, the Tribunal was persuaded by the Respondent's two highly credible witnesses, Mr Rive and Mr Le Poidevin, that this had been made clear to the Applicant. In addition, the Tribunal noted the fact that the Respondent had not issued a written contract of employment to the Applicant supported the Company's approach to engaging new employees on a short trial period.
- 4.6 The Tribunal was persuaded that the Respondent had genuine reasons not to continue the Applicant's employment beyond the two-week initial trial period that were not related to her sex.
- 4.7 In relation to the comment "she was not suitable" that was made in response to a direct enquiry by Mr Mauger as to why the Applicant's employment had been terminated, the Tribunal did not regard this as inappropriate in the circumstances. The statement was not directed to the Applicant in this context and, importantly, the Tribunal determined that the same response would have been meted out to a male employee in the same circumstances, as a *hypothetical comparator*. Therefore, the Tribunal did not find any evidence, in relation to the statement "she is not suitable", that the Applicant had been treated less favourably than a man would have been in the same context.
- 4.8 The Tribunal noted that the Applicant had been selected for the position at Aqua-star Limited from a pool of applicants that were all male and was persuaded that this was a strong indication that the Respondent was an equal opportunities employer in recruitment. In these circumstances, the alleged comment made by Mr Rive during the initial telephone conversation with the Applicant (ET1, see paragraph 2.1 refers) takes the Applicant's case no further and no weight was attached to it by the Tribunal.
- 4.9 The Tribunal decided that the Applicant was treated no less favourably than other male employees who had failed to meet the required standard during the usual two-week trial period offered by the Respondent. The Tribunal placed weight on evidence from the Respondent concerning multiple male employees, duly considered as *actual comparators* by the Tribunal, who had previously also failed the Aqua-star Limited two-week trial period for similar reasons in relation to their work ethic. In addition, the Tribunal did not regard it as surprising that the Applicant had not received feedback about her work ethic from the Respondent during her six days of work at Aqua-star Limited, due to the limited time the Applicant was present before she was absent due to illness.
- 4.10 The Tribunal concluded, on the balance of probabilities, that the Applicant had not suffered discrimination falling within the statutory definition and

that no inferences could be drawn that the Respondent had treated the Applicant less favourably on the ground of her sex.

**5.0 Decision**

5.1 Having reviewed and duly considered all the evidence submitted and the representations of all parties to the hearing, whether specifically recorded in this judgment or not, the claim of Sex Discrimination under the provisions of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 is dismissed and the Tribunal makes no award.

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