



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Paul Luxton
Represented by: Self-represented

Respondent: Freelance (C.I.) Limited
Represented by: Advocate Natalie Sullivan

Tribunal Members: Ms Helen Hubbard (Chair)
Ms Georgette Scott Ms Alison Girollet

Hearing date(s): 26 February 2016 and 14 November 2016

Decision of the Tribunal

The Applicant, Mr Paul Luxton, claimed that he had been unfairly dismissed on the grounds of redundancy within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended as his particular type of work had continued and an unfair redundancy procedure had been followed. The Respondent contested these claims and asserted that the Applicant had been dismissed fairly on the grounds of redundancy and as an alternative asserted that the Applicant had been fairly dismissed on the grounds of some other substantial reason.

Having considered all of 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 determined that the Applicant had been unfairly dismissed under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended.

The Respondent’s claim for costs under Section 2 of the Employment Protection (Recoverable Costs) Order, 2006 is dismissed.

Amount of Award: £16,714.65

Ms Helen Hubbard
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Signature of the Chairman

16 January 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 Employment Protection (Guernsey) Law, 1998, as amended (the Law)

Extended Reasons

1.0 Introduction

1.1 The Applicant, Mr Paul Luxton, represented himself and gave both oral and written evidence under Oath. The Applicant was supported by form ET1 and document bundles marked EE1 and EE2.

1.2 The Respondent, Freelance (C.I.) Limited, was represented by Advocate Natalie Sullivan. The Respondent was supported by form ET2 and document bundle marked ER1 and additional documents ER2, ER3, ER4 and ER5.

1.3 The Respondent called the following witnesses who gave both oral and written evidence under Affirmation:

- Miss Hayley Buesnel, Finance Director
- Mr Gordon Bush, Consultant, Auto Credit Limited

1.4 The Respondent submitted a claim for costs under the Employment Protection (Recoverable Costs) Order, 2006, amounting to £2,471.97. The costs claim included an application for:

- Preparation
- Witness loss of earnings
- Expert witness time (Mr Gordon Bush)
- Travel, board and lodging for both witnesses to attend, travelling from Jersey to Guernsey

1.5 The Applicant did not call any witnesses.

1.6 The Applicant, Mr Paul Luxton, claimed that he had been unfairly dismissed on the grounds of redundancy within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, as his particular type of work had continued and an unfair redundancy procedure had been followed.

1.7 The Respondent, Freelance (C.I.) Limited, contested the claim for unfair dismissal and asserted Mr Luxton had been dismissed by reason of genuine redundancy and that a fair procedure had been followed.

2.0 Facts found

2.1 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not.

- 2.2 The Respondent is a new and used car sales business operating franchises for a number of car manufacturers in Jersey and Guernsey. In 2015 the Respondent employed 29 staff in Guernsey and 37 in Jersey.
- 2.3 The Applicant was employed as a Vauxhall Sales Specialist from 1 December 2004 until 13 August 2015.
- 2.4 External consultancy services were engaged to undertake a business review in October 2014 as a result of the financial impact of the global financial crisis and the serious risk of failure of the business.
- 2.5 As a result of the business review, the Respondent consolidated the Guernsey and Jersey operations to reduce costs and the Applicant was provided with a new contract, effective from 1 January 2015, which was signed by him on 10 January 2015.
- 2.6 The Respondent's contract of employment refers to the Company redundancy policy in the staff handbook (ER2 refers).
- 2.7 The selection criteria included in the Company redundancy policy within the staff handbook are identified as:
- Holders of jobs no longer required;
 - High performers will be retained in preference to low performers and, subject to performance, long servers in preference to short servers;
 - Other criteria as appropriate, for example special skills, potential, flexibility etc.
- 2.8 Following advice received from external consultancy Auto Credit Limited, the Respondent determined that the business should be restructured and a new operational programme known as the 'Freelance Way' be introduced. One of the Directors of Freelance (C.I.) Limited, Robert Cornelius, informed the staff verbally that individual discussions would be arranged with the Guernsey Sales staff.
- 2.9 On 19 June 2015 a meeting was held with the Guernsey Sales Department employees and a letter signed by Hayley Buesnel (Finance Director) and Martin Gurren (Managing Director) was provided to the attendees, including the Applicant. This letter advised the Applicant that his position could become redundant and advised him that he could apply for any of the new job positions that were on offer.
- 2.10 The Respondent assigned responsibility to Miss Buesnel to manage the restructuring process. On 22 June 2015 the Applicant was advised in an open meeting involving Ms Hayley Buesnel, the Managing Director Mr Martin Gurren and the Applicant's colleagues in the Sales Department, that due to

the restructure of the Company they should apply for any of the new positions.

- 2.11 The Applicant and his six colleagues received an email from Miss Buesnel furnishing them with an update about the new positions and confirming that details would be provided by the close of business on Friday 26 June and that the plan was to conduct interviews on 6 July 2015.
- 2.12 Miss Buesnel emailed the new structure chart to the Applicant and his six colleagues on 26 June 2015 and reminded them to contact her to advise which roles they wished to apply for. There were seven positions identified within the proposed new structure:
- 1 Sales Controller
 - 1 Finance Controller
 - 5 Sales Executives
- 2.13 The Applicant emailed management to express his intention to apply for the Sales Executive and Finance Controller roles. The Respondent emailed the Applicant to propose an interview would be held on 6 July 2015 at 12.00 and the Applicant confirmed his acceptance by return.
- 2.14 The Applicant was interviewed on 6 July 2015 by Mr Gordon Bush from Auto Credit Limited and Miss Buesnel.
- 2.15 Miss Buesnel and Mr Bush held a meeting with the Applicant on 13 July 2015 to communicate that he had been unsuccessful in his application for both roles. It was explained that the Applicant's current role was redundant and that as he had not been successful in the applications for a new role, the Respondent had no option but to dismiss him with immediate effect. The Applicant did not return to work after 13 July 2015 by mutual consent.
- 2.16 The Applicant was paid one month's salary in lieu of notice and accrued holiday pay. It was agreed later that a goodwill payment equal to one month's contractual pay would be made, representing commission accrued to his termination date and consistent with his entitlements. The Respondent allowed the Applicant to use his Company car until the end of his notice period.
- 2.17 After the Applicant sought written confirmation of his redundancy terms from Miss Buesnel, a formal letter confirming his dismissal was sent by post to the Applicant, dated 16 July 2015. In this letter, the Applicant was offered the right of appeal to the Managing Director Mr Martin Gurren.
- 2.18 Mr Gurren sent an email to the Applicant on 10 September 2015 confirming the Applicant's redundancy and stating that the Company had followed the

Commerce and Employment Code of Practice in relation to 'Handling Redundancy.'

- 2.19 The Applicant met with Mr Gurren to complain that he had been unfairly dismissed on 15 September 2016.

3.0 The Law

- 3.1 According to the Employment Protection (Guernsey) Law, 1998, as amended, Section 5(2) of the Law states that an employee shall be treated as dismissed by his employer if *"the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice."*
- 3.2 In determining whether the dismissal of an employee was fair or unfair, Section 6(1) of the Law states that *"it shall be for the employer to show a) what was the reason (or, if there was more than one, the principal reason) for the dismissal; and b) "that it was a reason falling within subsection (2) and Section 6(2) states "For the purposes of subsection (1)(b), a reason falling within this subsection is a reason which.....(c) was that the employee was redundant."*
- 3.3 Section 6(3) of the Law states *"Where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of Sections 8 to 14 and (15L), the determination of the question whether the dismissal was fair or unfair, having regard for the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and substantial merits of the case."*
- 3.4 Section 34(3) of the Law notes that *"an employee who is dismissed shall be taken to be dismissed by reason of "redundancy" if the dismissal is attributable wholly or mainly to-*
- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or*
 - (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed have ceased or diminished or are expected to cease or diminish."*

- 3.5 Section 22(1) of the Law states *“Subject to the provisions of section 23, the amount of an award of compensation for unfair dismissal is a sum equal to - ... (a) six month’s pay...”*

Section 22(2) *“For the purposes of subsection (1), the amount of a month’s pay or (as the case may be) a week’s pay –*

(a) Shall be an amount equal to the complainant’s average monthly pay during the six month period immediately preceding the effective date of termination or (where the complainant was paid on a weekly basis) his average weekly pay during the 26 week period immediately preceding that date.

(b) in a case where, in the opinion of the Tribunal, the basis set out in paragraph (a) for calculating the amount of a month’s pay or (as the case may be) a week’s pay is inappropriate, shall be calculated on such other basis as the Tribunal may consider to be just and equitable in the circumstances of the case.”

- 3.6 Section 23(2) *“Where in relation to such a complaint a Tribunal considers that, by reason of any circumstances other than those mentioned in subsection (1), it would be just and equitable to reduce the amount of the award of compensation for unfair dismissal to any extent, the Tribunal shall, subject to subsection (3) (and subsection 4), reduce that amount accordingly”.*

4.0 Conclusion

- 4.1 The burden of proof lies with the Respondent to demonstrate to the Tribunal that the dismissal was for a fair reason and that it acted reasonably in treating it as a sufficient reason for dismissing the employee.
- 4.2 The Respondent asserted that the reason for the dismissal was for redundancy and this was confirmed to the Applicant by the Respondent in a letter dated 16 July 2015 referencing redundancy pay. The Respondent claimed, at the Tribunal hearing, as an alternative, that the Applicant had been dismissed for ‘some other substantial reason’. This alternative reason for the Applicant’s dismissal was not communicated to the Applicant as part of the internal procedure that was followed prior to dismissal.
- 4.3 The Tribunal determined that the Respondent failed to ensure that the Applicant knew and understood the Company redundancy policy. The Applicant was not furnished with a copy of the contractual redundancy policy during the internal process in relation to restructuring the Company and the staff handbook had not been provided to the Applicant when he signed a new contract of employment on 10 January 2015.

- 4.4 As recognised by the Guernsey Code of Practice, 'Handling Redundancy,' redundancies will likely cause employees distress and accordingly employers' should provide all employees affected by potential redundancies with ample warning and an opportunity to be consulted. The Respondent failed to adequately resource the restructuring process and the Tribunal determined that the consultation with the Applicant was of an insufficient standard. The Respondent had invested in engaging consultants Auto Credit Limited to advise them in relation to the restructure. The Tribunal concluded that the redundancy consultation process offered to the Applicant fell outside the band of reasonable responses open to an employer with the size and administrative resources of the Respondent. The Tribunal preferred the evidence of the Applicant in relation to the lack of individual consultation with him and, in any event, it was noted by the Tribunal that the Respondent had failed to keep any notes of consultation meetings with the Applicant.
- 4.5 The Tribunal concluded that the Respondent did not apply objective and fair selection criteria to the selection for redundancy. Notably the Applicant's past performance and long service was not taken into account in accordance with the Company's contractual redundancy policy. The Tribunal noted in relation to performance that the Applicant had not received an appraisal for his role or a job description in over 10 years and that in spite of the global downturn his sales were the highest to date in the six months leading up to his dismissal. The selection criteria were not made transparent to the Applicant prior to the interview and the selection for redundancy was regarded by the Tribunal as secretive and largely subjective. In particular, the evidence from Mr Bush of Auto Credit Limited suggested that the Applicant was deselected at least in part because of his perceived negative attitude during the interview. The Tribunal concluded that selecting the Applicant for redundancy based solely on his performance during one interview that was undertaken for the two roles that he applied for was fundamentally unfair. Importantly, there was no evidence that the Respondent had sought to avoid redundancies by retraining or redeployment.
- 4.6 In determining whether there was a genuine redundancy and therefore a lawful reason for dismissal the Tribunal considered whether there was a cessation in the Applicant's work or a reduction in the need to carry out the work of a particular kind that the Applicant was employed to deliver. The Tribunal noted that the Respondent would continue to sell Vauxhall cars post the restructure. Importantly, the Tribunal regarded the newly drawn generic job description for the new sales roles as not sufficiently different to the role that the Applicant had fulfilled without a job description for over 10 years. The Tribunal found that the Applicant's work had not ceased and was not intended to cease and moreover, that the number of staff who worked in the Sales Department where the Applicant worked, as a result of a restructure of the Department and introduction of the 'Freelance Way', were not reduced or intended to be reduced. Evidence was presented to the Tribunal to verify that there was no reduction in the number of staff required in the Sales

Department following the restructure. The four different structure charts that were produced by the Respondent in evidence were challenged by the Tribunal and served to demonstrate, at best, a confused and flawed restructuring process. The Tribunal preferred the evidence of the Applicant in relation to the email and structure chart that he said he received anonymously and which had been circulated to the other sales staff on the day his employment ended on 13 July 2015. The email memo and structure chart outlined the intent to employ extra staff in the Department which ultimately led to an increase in headcount from seven to nine in the Sales Department.

- 4.6.1 The expectation of the Tribunal was, that in the situation of genuine redundancy, alternative roles would be considered and all reasonable steps would be taken to avoid or minimise redundancy. There was no evidence that consideration of alternatives had been taken into account by the Respondent, other than in relation to the two roles that the Applicant had applied for. The Tribunal found that the Respondent failed to offer the Applicant a broadly equivalent role that was subsequently advertised externally by a recruitment agency.
- 4.7 The Tribunal noted that the Applicant did not formally appeal against the decision to make him redundant and accepted that the Applicant did not regard the appeal process as sufficiently independent because, as Managing Director, Mr Gurren had been involved in decisions in relation to the restructuring process.
- 4.8 In conclusion, The Tribunal determined that the Applicant was not dismissed by reason of genuine redundancy. The Tribunal concluded that a sham redundancy procedure had been enacted by the Respondent as part of 'expediting' an internal restructuring process.
- 4.9 The Tribunal considered whether there was another potentially lawful reason for the dismissal of the Applicant as the Respondent had offered an alternative reason for the dismissal for 'some other substantial reason' in its pleadings to the Tribunal. The Tribunal found that the alternative reason of 'some other substantial reason' contradicted the letter to the Applicant on 16 July 2015 from the Respondent confirming that the Company was not in a position to pay any redundancy money and the email from Mr Gurren to the Applicant on 10 September 2015 confirming that "it was ... which ultimately resulted in your *redundancy*" and therefore rejected this reason.

5.0 Decision

- 5.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.

5.2 The Tribunal carefully considered Section 22(2) (b) of the Law and determined that in the light of all of the circumstances in relation to this case, it was not appropriate to reduce the award to the Applicant.

5.3 The Tribunal considered the costs claim by the Respondent and rejected the application in relation to assigning Mr Gordon Bush to the capacity of an expert witness because he was not independent and was involved in the selection process. The other applications for preparation, loss of earnings and travel, board and lodging were all dismissed by the Tribunal as inappropriate in the light of the conclusions in this judgment.

6.0 Award

6.1 When calculating the award under Section 22(2) (a) of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant's pay during the six months prior to the termination of employment was £16,714.65.

6.2 An award of £16,714.65 is made.

Ms Helen Hubbard
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Signature of the Chairman

16 January 2017
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Date