



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

Applicant: Mr Peter Davies
Represented by: Advocate Rachel Donaldson

Respondent: Freelance (CI) Limited
Represented by: Advocate Natalie Sullivan

Tribunal Members: Mrs Tina Le Poidevin (Chair)
Ms Georgette Scott Mr Roger Brookfield

Hearing date(s): 3 and 4 March 2016 and 6 October 2016

Decision of the Tribunal

The Applicant, Mr Peter Davies, 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 it was, therefore, not a genuine redundancy and, if redundancy could be substantiated by the Respondent in accordance with the Law, the Applicant claimed that the correct procedure was not followed in relation to him. The Respondent contested these claims.

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 found that the Respondent did not prove the reason for dismissal, therefore under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.

The Tribunal considered whether there were any circumstances which might argue for a reduction in the award in accordance with Section 23(2) of the Law. The Tribunal found that the aforementioned award of £14,025.00 shall be reduced by £7,012.50 as the Applicant did not engage at all in the Respondent’s process and by a further £300.00 which is equivalent to the goodwill payment made by the Respondent to the Applicant.

Amount of Award: £6,712.50

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

Mrs Tina Le Poidevin
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Signature of the Chairman

11 November 2016
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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 Peter Davies, 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 it was, therefore, not a genuine redundancy and, in the alternative, if redundancy could be substantiated by the Respondent in accordance with the Law, the Applicant claimed that the correct procedure was not followed in relation to him.
- 1.2 The Respondent, Freelance (CI) Limited, contested the claim on the basis that this was a true redundancy and a fair procedure had been followed.
- 1.3 The Respondent submitted a claim for costs under The Employment Protection (Recoverable Costs) Order, 2006 amounting to £100.00 for witness preparation, £500.00 for witness loss of earnings, £1,200.00 for the attendance of an expert witness and £1,369.90 in respect of travel, board and lodging for witness attendance from Jersey.
- 1.4 The Applicant contested the claim for costs.
- 1.5 The Applicant gave both oral and written evidence and was represented by Advocate Rachel Donaldson.
- 1.6 Written evidence was provided by the following witness for the Applicant:

Mr Matthew Prevel
- 1.7 The Applicant called the following witnesses who gave both oral and written evidence:

Mr Peter Huw Davies
Mr Paul Luxton
- 1.8 Bundles marked EE1, EE2, EE3, EE4, EE5, EE6 and EE7 were submitted in evidence by the Applicant.
- 1.9 The Respondent was represented by Advocate Natalie Sullivan.

1.10 The Respondent called the following witnesses who gave both oral and written evidence:

Ms Hayley Buesnel
Mr Gordon Bush
Mr Martin Gurren

1.11 Bundles marked ER1, ER2, ER3, ER4, ER5 and ER6 were submitted in evidence by the Respondent.

2.0 Facts Found

2.1 The Respondent is a new and used car sales business operating franchises for a number of car manufacturers in Jersey and Guernsey.

2.2 The Guernsey arm of the business was established in March 2000.

2.3 The Applicant was employed by the Respondent as a Used Car Sales Manager between 15 February 2008 and 7 July 2015.

2.4 The Applicant did not have a job description for his role as a Used Car Sales Manager.

2.5 The Applicant's duties and responsibilities were to buy and price stock, prepare vehicles (such as arranging servicing and paintwork), upload advertisements and data onto the website, manage the salesmen working beneath him, target management, sell cars, collect cars from the docks and deal with customers.

2.6 The Respondent struggled financially following the global financial crisis in 2008 and by 2014 was at serious risk of failure so in October 2014 external consultancy services were engaged to undertake a business review.

2.7 As a result of this review, the Respondent consolidated the Guernsey and Jersey business operations to save costs and the Applicant was subsequently provided with a new contract, effective from 1 January 2015, which was signed by him on 10 January 2015.

2.8 The Respondent's policy in respect of redundancy is referred to within this contract as being contained in the Staff Handbook.

2.9 The Selection Criteria noted within the Redundancy Policy notes 'The following criteria will be taken into account when selecting staff for redundancy:-

- 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.'
- 2.10 Reference to additional information on the Company's policies in respect of employment are also referred to within this contract as being located in the Staff Handbook.
- 2.11 In 2015 the Respondent employed 29 staff in Guernsey and 37 in Jersey, making a total of 66 staff.
- 2.12 By May 2015 the Respondent realised that the changes had been insufficient and the business and staff were still at risk.
- 2.13 One of the Respondent's Directors, Robert Cornelius, verbally advised the staff that the Company had assigned Auto Credit Limited to perform a business review and, as such, individual discussions would be arranged with the Guernsey sales staff.
- 2.14 Following advice from the external consultancy services, the Respondent decided to restructure the business.
- 2.15 The restructure was to affect the Guernsey Sales department which consisted of seven staff, namely:
- 1 Sales Manager,
 - 1 Used Car Sales Manager (the Applicant),
 - 4 Sales Specialists, and
 - 1 Used Car Salesman.
- 2.16 On 19 June 2015 a meeting was held with the Guernsey Sales department staff and a letter signed by Hayley Buesnel (Finance Director) and Martin Gurren (Managing Director) was provided to the attendees, including the Applicant. This letter:
- conveyed the Respondent's decision to restructure the Guernsey sales department;
 - advised the Applicant that he would be able to apply for any of the managerial positions and below; and
 - advised the Applicant that his position could become redundant.
- 2.17 Copies of the Respondent's Staff Handbook and Redundancy Policy were not included with the letter or distributed at the meeting.

- 2.18 The Respondent tasked Ms Buesnel, to manage the restructuring/redundancy process.
- 2.19 On 22 June 2015 the Applicant was advised in a meeting with his fellow Sales Manager, the Finance Director and Managing Director that their Sales Manager jobs were being made redundant due to the restructuring of the Company and they would need to apply for any of the new positions.
- 2.20 On 23 June 2015 the Applicant and his six colleagues received an email from the Finance Director providing them with an update about the new positions, stating that details would be provided by close of play on Friday 26 June and that the plan was to conduct interviews on 6 July.
- 2.21 On 26 June 2015 the Finance Director emailed the structure chart to the Applicant and his six colleagues reminding them that interviews would be held on 6 July and that they needed to contact her by email or telephone to let her know which roles they wanted to apply for.
- 2.22 There were seven positions noted within the proposed new structure, namely:
- 1 Sales Controller,
 - 1 Finance Controller, and
 - 5 Sales Executives.
- 2.23 As the Finance Director had not heard from the Applicant and one of his colleagues, she emailed them on 1 July 2015 asking them to email or telephone her that day so that she could plan the interview day productively.
- 2.24 The Applicant advised the Finance Director by email on 1 July 2015 of his decision not to apply for any of the positions by email and asked to speak with her to discuss 'the next step'.
- 2.25 A meeting between the Finance Director and the Applicant was scheduled for 6 July 2015 as the Applicant wanted to discuss the details of his redundancy as he had not been given any information.
- 2.26 This meeting did not take place as planned but the Finance Director emailed the Applicant saying that she would telephone him the following day.
- 2.27 On 7 July 2015 the Applicant and the Finance Director discussed the terms of the Applicant's redundancy by telephone and this was followed up by an email from the Finance Director to the Applicant that day setting out what had been discussed.
- 2.28 The Applicant was advised in this email of 7 July 2015 that he did not have to work his contractual notice and could leave that day, which he did.

2.29 The Sales team structure immediately after the restructure notes seven posts reporting to the Sales Director and General Sales Manager, namely:

1 Sales Controller and Finance Controller,
1 Senior Sales Executive and Toyota & Nissan Specialist,
1 Senior Sales Executive and Used Car Specialist, and
4 Sales Executives.

2.30 The most recent Sales team structure notes seven posts reporting to the Sales Director and General Manager, namely:

1 Sales Controller,
1 Finance Controller,
1 Senior Sales Executive and Toyota and Nissan Specialist, and
4 Sales Executives.

2.31 On 30 September 2015 the Respondent advertised a vacant position of Used Vehicle Sales Specialist in the Guernsey Press. This job was not offered to the Applicant.

3.0 The Law

3.1 According to the Employment Protection (Guernsey) Law, 1998, as amended, Section 5(2) of the Law notes 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 notes 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) notes “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 notes “Where the employer has fulfilled the requirements of subsection (1), then, subject to the provisions of sections 8 to 14 and 15I, the determination of the question whether the dismissal was fair or unfair, having regard to 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 the substantial merits of the case”.

3.4 Section 31(9) of the Law notes “A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any

proceedings; but in any proceedings under this Law before the Tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of the code appears to the Tribunal to be relevant to any question arising in the proceedings (including, without limitation, any question as to whether an employer has acted reasonably or unreasonably for the purposes of section 6(3) that provision shall be taken into account in determining that question”.

- 3.5 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”.
- 3.6 Section 22(1) of the Law notes “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, “ and Section 23(2) of the Law notes “where in relation to such a complaint the 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 Summary of Parties’ main submissions

Applicant

- 4.1 The Applicant claimed that this was not a genuine redundancy situation as:
- The restructuring of a department did not automatically create a redundancy situation.
 - The restructuring did not result in the closure of the business, the closure of a particular workplace or section of the workplace, the requirements of the business for employees to carry out the work of a particular kind to cease or diminish, or the business needing fewer employees to carry out the work of a particular kind.
 - The number of staff employed within the Sales department did not reduce as a result of the restructure.

- Whilst the Applicant's job title no longer existed in the new structure, the duties and work he was required to do, namely buying and pricing stock, preparing vehicles (such as arranging servicing and paintwork), uploading adverts and data to the website, managing the salesmen working beneath him, target management, selling cars, collecting cars from the docks and dealing with customers, were still duties required of the Respondent's employees within the Sales department.
- The only change that had been adopted by employees within the Sales department following the restructure was merely the 'approach' with the introduction of 'The Freelance Way' and a change of 'approach' to work of a particular kind required to be carried out by employees did not fall within the definition of a genuine redundancy situation in the Law.
- The position of Used Vehicle Sales Specialist as advertised in the Guernsey Press on 30 September 2015 was not offered to the Applicant and had this been on offer, he would have applied for it.

4.2 The Applicant also claimed that the Respondent did not apply a fair and reasonable redundancy procedure as the Respondent failed to:

- ensure that its employees knew and understood the redundancy procedure;
- establish a genuine redundancy situation;
- minimize or avoid redundancy through retraining and redeployment;
- establish selection criteria which was objective and verifiable or follow such criteria;
- consult with its employees about redundancy before the notice was issued and maintain effective and regular communication with the Applicant;
- consider suitable alternative employment;
- keep notes of meetings and telephone calls that took place with the Applicant, other senior members of staff and the Commerce & Employment Department;
- follow the contractual redundancy procedure.

4.3 The Applicant claimed that there were no notes prepared by management during the course of the redundancy process.

4.4 The Applicant claimed that his decision not to apply for any of the roles was due to the Sales Manager and Used Car Sales Manager being consolidated to create the new Sales Controller role, that the role itself had an estimated working week of 90 hours and the pay details for that and any of the other roles on offer were not available to him. He also thought he would have been unsuccessful in any event as he thought the Company was trying to get rid of him.

- 4.5 The Applicant claimed that certain joint meetings and email correspondence should have been provided in confidence.
- 4.6 The Applicant claimed that there was insufficient time between him being warned of potential redundancy and his redundancy, having been warned on 19 June 2015 and informed on 22 June 2015 that his job was redundant.

Respondent

- 4.7 The Respondent claimed that the Applicant's dismissal was fair as:
- It undertook two comprehensive business reviews and sought external advice as to how to best manage the business going forward;
 - The business had to be restructured because of grave financial difficulty and all sales staff, including the Applicant, were selected for redundancy;
 - A suite of entirely new sales roles was offered to the seven staff affected, with enough new roles for them all;
 - The Respondent followed the correct process, acting reasonably and fairly towards the Applicant throughout, including giving him appropriate notice and opportunities for new roles;
 - The Applicant chose redundancy and did not engage with the process, apply for any of the new roles, raise any queries apart from his redundancy terms, did not appeal and it was clear in his evidence that his priority was money.
- 4.8 Prior to the restructure each individual salesman operated a 'cradle to grave' sales service whereas, following the restructure, the new sales functions were separated out and spread across a broad and co-ordinated team, providing a more comprehensive offering, business diversity, improved customer and partner relationships, better internal co-ordination, efficiency, management and increased profitability.
- 4.9 Post restructure the team operated under an entirely new sales process known as "The Freelance Way" and a comprehensive training programme had been rolled out and was still continuing.
- 4.10 The business still sold cars but the previous sales roles, including the Applicant's role of 'Used Car Sales Manager' no longer existed and the 'particular kind of work' that the individual salesmen, including the Applicant, used to perform, i.e. the 'cradle to grave' service, has ceased or diminished.
- 4.11 The Applicant chose from the outset not to participate in the restructuring process. He did not engage, make any enquiry about any of the roles or

apply for any of them. He also did not raise any concerns and the only enquiry he made was about his redundancy terms.

- 4.12 The Respondent encouraged the Applicant to reconsider but could not force him to participate if he did not want to.
- 4.13 The Respondent was surprised about the Applicant's decision as it had expected him to participate but since the Applicant's original role had been abolished, the Respondent had no option but to complete the Applicant's dismissal.
- 4.14 The Respondent denied that it did not apply a fair and reasonable redundancy procedure in that it:
- consulted with the Applicant and all staff throughout the process and made senior management and the external consultant, Mr Bush, available for any queries, concerns or comments, but the Applicant chose not to make contact.
 - warned the Applicant (and all affected staff) formally by letter on 19 June 2015.
 - established the process and criteria by reference to the pool it had selected, the pre-existing redundancy policy, the interview process with standardized questions for each employee (although the latter was not applicable to the Applicant because he did not apply or interview for any jobs) and took the advice and guidance of AutoCredit and the Commerce and Employment Department.
 - gave the Applicant the opportunity to apply for any of the new roles, told him which roles it thought he might be suitable for and was receptive to any other ideas but the Applicant did not offer any.
- 4.15 The 'pool for selection' for redundancy was identified as being all seven staff in the Sales department. All sales roles were to be made redundant (regardless of length of service, performance or potential) but the Respondent expected to be able to re-employ all of the staff in the new sales roles.
- 4.16 The Respondent did not prefer another member of staff over the Applicant and did not apply selection criteria contrary to the Handbook.
- 4.17 It was not possible or practical to retain the Applicant's role and restructure the department around him.
- 4.18 Alternatives to redundancy were offered to the Applicant by way of the new roles on offer following the restructure but he did not want to apply for any of these roles.

- 4.19 The Respondent treated all staff equally by offering the same opportunities as his colleagues in the sales team.
- 4.20 The Respondent provided external consultants' reports and contemporaneous updates to its shareholder.
- 4.21 The Applicant was provided with adequate information and a reasonable time period in which to consider matters.
- 4.22 The Applicant's contract referred directly to the Staff Handbook which was available upon request but the Applicant did not seek this out.
- 4.23 The Applicant's claim that his decision not to apply for any of the roles was due to the Sales Manager and Used Car Sales Manager being consolidated to create the new Sales Controller role and that the role itself had an estimated working week of 90 hours had not been evidenced by him.
- 4.24 The Applicant's claim that his decision not to apply was also influenced by the lack of pay details being provided to him was also denied as the pay was deliberately negotiable and was subsequently negotiated by the successful applicants.
- 4.25 The Respondent thought carefully about the way it communicated to the Applicant and his colleagues in terms of holding joint meetings and issuing email correspondence, whilst weighing up various competing interests and considered it acted reasonably in the circumstances.
- 4.26 The Respondent considered that it provided sufficient time between warning the Applicant of potential redundancy on 19 June 2015 and his redundancy on 22 June 2015, given the gravity of the Respondent's financial difficulties and the need to act quickly.
- 4.27 Ms Buesnel corresponded via email and letter with the Applicant as it was the most efficient and effective way for her in the circumstances.
- 4.28 The Respondent reminded the Applicant of the ability to appeal against the redundancy but he did not appeal.
- 4.29 The only reason the role of 'Used Car Salesman' was advertised externally was that it remained unfilled by existing staff.
- 4.30 Training for the new roles was offered and is still being provided on an ongoing basis as this is critical to ensure the effectiveness of the restructure.

5.0 Conclusion

5.1 The burden of proof in this case lies with the Respondent who must show the reason for dismissal and if the reason was that it was a genuine redundancy, it must also show that the redundancy process was fair.

5.2 In order to determine whether a redundancy (within the meaning of the Law) is fair or unfair an employer must first demonstrate that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

5.3 In determining this part of the issue, a three-stage test has been applied, namely:

Had the employer ceased, or intended to cease, to carry on the business for the purposes of which the employee was employed, or had it ceased, or intended to cease, to carry on that business in the place where the employee was employed?

Whilst there appears to have been a genuine economic reason for the Respondent to restructure, this did not result in the closure of the Respondent's business, a particular workplace or section of the workplace. Stage 1 of the test is, therefore, not satisfied.

If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

The restructure of the Respondent's business did not result in the cessation or diminution of work previously undertaken by the Applicant and the Respondent is still engaged in the business of buying and selling used cars. There was also no reduction in the number of staff required in the Sales department following the restructure. Stage 2 of the test is, therefore, not satisfied.

If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

It was not the cessation or diminution of the work that caused the Applicant's dismissal. The evidence led the Tribunal to conclude that the Applicant's dismissal resulted from changes to the **approach** to the work previously undertaken by the Applicant. Stage 3 of the test is, therefore, not satisfied.

5.4 A number of documents were produced in evidence, all of which have been read and considered even if they have not been specifically referred to within this document and, based on all the written and oral evidence presented, the

Tribunal has concluded that this was not a genuine redundancy within the meaning of Section 34(3) of the Law.

- 5.5 The Respondent may have believed that the restructure had resulted in a true redundancy situation but it did not prove that this was a genuine redundancy.
- 5.6 The evidence placed before the Tribunal has led it to conclude that the Applicant's dismissal was unfair.
- 5.7 Much evidence was heard in relation to the process followed by the Respondent and, had the Tribunal found this to be a genuine redundancy, it would still have determined that the dismissal was unfair on the basis of procedural flaws which included the Respondent's failure to:
- adequately consult with the Applicant about redundancy before a decision was made
 - ensure that the Applicant knew and understood the redundancy procedure
 - minimise or avoid redundancy through retraining and redeployment
 - keep notes of meetings and telephone calls that took place with the Applicant
 - offer the Applicant the Used Car Sales Manager role that was subsequently advertised in the Guernsey Press
 - provide adequate resourcing to support the restructuring process
- 5.8 In determining the amount of the award in favour of the Applicant, the Tribunal has, however, taken into account his complete lack of engagement with the Respondent in that he did not apply for or explore the details of the roles or training on offer following the restructure and he did not exercise his right of appeal against the dismissal decision and, had he engaged, the outcome may well have been different. In this regard, the Tribunal has decided to significantly reduce the award.

6.0 Decision

- 6.1 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 found that, under the provisions of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was unfairly dismissed.
- 6.2 The Tribunal considered whether there were any circumstances which might argue for a reduction in the award in accordance with Section 23(2) of the Law. The Tribunal found that the aforementioned award of £14,025.00 shall be reduced by £7,012.50 as the Applicant did not engage at all in the

Respondent's process and by a further £300.00 which is equivalent to the goodwill payment made by the Respondent to the Applicant.

6.3 **Amount of Award: £6,712.50.**

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

Mrs Tina Le Poidevin
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Signature of the Chairman

11 November 2016
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Date