



THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

APPLICANT: Mrs Susan Farnham
Represented by: (Self-represented)

RESPONDENT: Graham Scott & Co Limited
Represented by: Mr Mark Scott

Tribunal Members: Mr Peter Woodward (Chairman)
Mr George Jennings
Mrs Christine le Lievre

Hearing date(s): 13 May 2016

Decision of the Tribunal

The Applicant, Mrs Susan Farnham, made complaints of alleged unfair dismissal and sex discrimination.

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 unfairly dismissed. In respect of this decision the Tribunal awards the Applicant **£5,569.44**.

In relation to the claim of sex discrimination, under the provision of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, the Applicant was discriminated against. In respect of this decision the Tribunal awards the Applicant **£2,771.22**.

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

27 May 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);
The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005

Extended Reasons

1.0 Introduction

The Applicant, Mrs Susan Farnham, represented herself and gave evidence on her own behalf. She submitted document bundle EE1 and was supported by Miss Clare De La Haye.

The Respondent, Graham Scott & Co Limited, was represented by Mr Mark Scott, joint owner, who gave evidence on its behalf. Document bundle ER1 was submitted and Mrs Liza Scott was called to give evidence.

Mrs Farnham made complaints of alleged unfair dismissal and sex discrimination.

Both parties agreed that the Applicant had been in receipt of gross earnings for the 26 weeks prior to the Effective Date of Termination of £5,569.44.

2.0 Facts Found

- 2.1 The Respondent is a provider of soft furnishings, upholstery and similar products. It is jointly managed by Mr Mark Scott and Mrs Liza Scott.
- 2.2 Included in the Applicant's bundle of documentation was a copy of the Applicant's signed contract of employment dated 19 January 2015; her employment commenced on 27 June 1989 and terminated on 25 December 2015.
- 2.3 Mrs Farnham was employed as an accounts administrator and was a member of a three person 'front of house' team who dealt with customers in the Company showroom. Her primary role was the preparation of estimates and use of the Sage accounting system. At the time of her dismissal there were a further six members of staff, including Mr and Mrs Scott, performing sales and workshop duties.
- 2.4 The Respondent experienced increased Internet based competition in 2015 from outside of Guernsey and consequently a reduced order book. This required a reduction in hours worked by both front of house and workshop staff to match the current order book and maintain some level of profitability.
- 2.5 At the time of her dismissal the Applicant was contracted to work four days per week, Monday to Thursday; 18 hours per week in school term time and

15 hours per week during school holidays. Her two colleagues in the front of house team were both female and were contracted to work on a full time basis of 40 hours per week.

- 2.6 The Applicant sent an email at 11.09 am on 11 November 2015 to Mr Mark Scott, Mrs Liza Scott and also to Mr Graham Scott who previously ran the Company, alleging that Mr Mark Scott had dismissed her the previous evening. (ER1 Section 7 refers).
- 2.7 The Respondent replied to this email at 6.33 pm on 11 November 2015 denying that he had dismissed the Applicant and stating that all the options she had proposed for reducing worked hours were not viable; concluding the only option was to make the Applicant redundant, noting she would be paid until the last full week of the year.

3.0 Mr Mark Scott

- 3.1 Mr Scott read from a witness statement (ER1 refers).
- 3.2 Prior to meeting with the front of house team on the morning of Monday 9 November 2015 Mr Scott consulted the Commerce and Employment advisory service and read the code of practice on conducting redundancies.
- 3.3 On the 9 November Mr Scott went into the office and explained, to the Applicant and her two colleagues, the difficult trading situation and asked if they would be prepared to reduce their working hours; he also questioned if any of the team were currently considering taking employment with an alternative employer. He told the team members that he wished to save 20 worked hours in total per week whilst still maintaining shop-opening hours of 8.00 am to 5.30 pm.
- 3.4 The Applicant spoke to Mrs Scott later in day informing her that she would reduce her working time by four hours per week and her two colleagues would reduce their working time by five hours per week; a total reduction of 14 worked hours per week. This was confirmed in a text from the Applicant on 10 November 2015 at 4.49 pm.
- 3.5 Mr Scott thought this reduction was sufficient and was ready to accept it but then spoke to the Applicant's two colleagues who told him that they were not prepared to accept a reduction in hours. Mr Scott asked the employees to put their decisions in writing; this they subsequently did and Mr Scott stated that he did not force these employees to write the letters or tell them what to write. (ER1 Section 2 refers).
- 3.6 At 6.00 pm on the evening of 10 November 2015 Mrs Scott texted the Applicant asking whether Mr Scott could telephone her that evening as he would not be in the office the following morning. Mr Scott then called the

Applicant, during the call she suggested that one of the full time employees should be made redundant; the Applicant volunteered that she would work 9.00 am till 2.30 pm and together with the other full time employee would cover the required shop opening hours.

- 3.7 Mr Scott texted the Applicant later that evening to confirm if the offer of 9.00 am till 2.30 pm would be for five days a week all year round. The Applicant said this was not possible but she still had the solution to save 14 hours per week. Mr Scott responded by text saying that this would be acceptable as long as there was showroom cover from 8.00 am till 5.30 pm for five days a week. (ER1 Section 4 refers).
- 3.8 Further texts were exchanged on 11 November 2015 but Mr Scott came to the conclusion that that the option of dropping hours, as proposed by Mrs Farnham, was never going to happen as the other two employees would not agree to reduce their hours.
- 3.9 Mr and Mrs Scott considered other options put forward by the Applicant including dismissing a full time employee and then hiring a part time employee to work Monday to Thursday afternoons and all day Friday; but they thought it would be very difficult to recruit anybody to such a work pattern. They concluded their only option was to make Mrs Farnham redundant.

4.0 Mrs Liza Scott

- 4.1 Mrs Scott read from a witness statement, (ER1 refers).
- 4.2 Her statement was limited to confirmation that, as a director of the Respondent, all the decisions leading to the redundancy of the Applicant were made jointly by Mr Mark Scott and herself.

5.0 Mrs Susan Farnham

- 5.1 Mrs Farnham read from a witness statement, (EE1 refers).
- 5.2 Mrs Farnham informed the Tribunal that on 9 November 2015 Mr Scott walked into the office, "looking angry" and told the three front of house team members that the Company did not have enough work and consequently needed to cut hours. He then looked directly at the Applicant and added "or take voluntary redundancy". He told the employees that they had two days to think about this problem and then left the premises. The Applicant informed the Tribunal that this meeting lasted less than two minutes.
- 5.3 The Applicant decided that in the absence of any precise information she should consult with Mrs Scott for guidance. Apparently Mrs Scott did not

- have any clear idea as to what was required but said she would guess at a 15 to 20 hours reduction per week being required from the three employees.
- 5.4 Given this guidance Mrs Farnham then discussed with her two colleagues what they might offer in the way of reduced hours. Whilst none of them thought they could afford such reductions they came to a mutual agreement that the Applicant would offer a four hours per week reduction by leaving one hour earlier on each of the four days she worked and her colleagues would both drop one worked hour per day. In total this would offer the Respondent a saving of 14 hours per week.
- 5.5 When Mr Scott returned to the office the Applicant asked him to inform her as the exact reduction in hours he was seeking. He informed her that he was paying for over 100 hours per week and he needed to lower this to 80 hours per week.
- 5.6 The Applicant informed the Tribunal that his assumption on hours worked was incorrect. Dependent on whether it was school term time or school holidays the hours worked by the team were either 98 or 95. Thus the offered reduction of 14 hours would result in either 84 hours per week or 81 hours per week.
- 5.7 Mr Scott refused to accept the offered 14 hours reduction and when she related this back to her two colleagues they refused to offer any further concession. (EE1 Section 15 refers).
- 5.8 During the afternoon of Monday 9 November 2015 the Applicant contacted the Employment Relations Service at Commerce and Employment and asked for advice. She was informed that as long as the Respondent followed correct guidelines he was entitled to manage the Company as he thought fit; the Applicant was advised to help the Respondent as much as possible and to look for other solutions that might result in monetary savings.
- 5.9 On returning to work on the morning of Tuesday 10 November 2015 there was no change in the respective positions of the other employees or the Respondent. Neither of the other employees, nor she, the Applicant, was prepared to make any further voluntary concessions. In view of this the Applicant took the initiative to contact potential customers in the hope of securing further orders and posted an advert on social media to offer, for sale, excess fabric currently in stock, these actions being supported by Mrs Scott.
- 5.10 The Applicant informed Mrs Scott that none of the employees was prepared to offer further reductions and Mrs Scott confirmed to the Applicant that the Respondent would notify them the following day, Wednesday 11 November, as to what would happen.

- 5.11 Mr Scott returned to the office at lunchtime on 10 November 2015 and the Applicant put it to him that in addition to the 14 hour reduction there was an opportunity for the staff to try to create more business opportunities but this suggestion was not taken any further by the Respondent.
- 5.12 Prior to leaving the office on 10 November Mr Scott commented to the Applicant that she would want to know his decision before she went home; however in the event he did not communicate any decision.
- 5.13 At about 6.10 pm on the evening of 10 November 2015 Mr Scott telephoned the Applicant at her home. During this call Mr Scott informed the Applicant that he was going to have to let her go and make her redundant. He stated he would put this in writing by Friday 17 November 2015 as "Friday is the day you have to give notice" (Contract of Employment, ER1 Section 9 refers), he added that she did not need to attend work anymore but the Company would pay her until Christmas.
- 5.14 Mrs Farnham found this decision very distressing and told him she thought this decision was unfair. Mr Scott responded by telling Mrs Farnham that having part timers did not work anymore and he needed full time staff.
- 5.15 Mrs Farnham challenged the recent decision that Mr Scott had made, to take on a full time member of staff for front of house. This individual only had four months' service with the Company whereas the Applicant had 26 years; it seemed to the Applicant that Mr Scott was offended that she should make such a challenge.
- 5.16 Mrs Farnham reminded Mr Scott that a total of 14 hours might be saved given her discussions with other work colleagues. Mr Scott responded that he had never said anything about saving hours and that the Applicant should not have spoken with her colleagues on this subject. He told her that he had come into the shop on Monday and told her two colleagues to go part time or he would have to make the Applicant redundant. The Applicant found this totally contradicted her understanding of discussions with Mr and Mrs Scott on the morning of 9 November 2015.
- 5.17 The Applicant then suggested that, given the reduced workload, if she worked longer hours and he retained one of the full time employees, his desired coverage could be achieved, that is, shop open and manned from 8.00 am to 5.30 pm; Mr Scott would not listen or discuss how this option might work.
- 5.18 As the telephone discussion drew to a close Mrs Farnham asked Mr Scott how he had scored her on the 'redundancy grid' but he was not prepared to discuss this. His sole requirement seemed to be that the Applicant must work a five-day week, an impossibility given her family care responsibilities, which he understood very well.

- 5.19 At 7.00 pm on the evening of 10 November 2015 Mr Scott sent a telephone text in which he queried whether the Applicant's offer to work 9.00 am till 2.30 pm would be for five days a week all year round. The Applicant responded by text informing Mr Scott that she was too upset to think clearly; in a subsequent text she stated: *"I have found a solution to save 14 hours and instead you sack me for the same 14 hours the three of us offered you"*. Mr Scott responded: *"OK the 14 hours is acceptable as long as we have cover from 8 till 5.30 5 days a week"*.
- 5.20 At 7.30 am the following morning, Wednesday 11 November, (ER1 Section 6 refers) Mr Scott sent another text to the Applicant stating *"it was not easy for us. Like we said if you can get us cover 8 till 5.30 Monday to Friday that's great we can keep everyone"*.
- 5.21 On 11 November 2016 the Applicant did not attend work, as instructed by the Respondent and shortly after 11.00 am sent an email to the Respondent. In this email she stated that the Respondent had dismissed her the previous evening. The Respondent replied by email at 6.33 pm on the same day stating that she had not been dismissed the previous evening but there was in fact no option other than to make her redundant. (ER1 Section 7 Refers).
- 5.22 At 10.53 am on 12 November the Applicant sent Mr Scott an email stating that it would appear she was being dismissed by reason of redundancy and that all offers made by her to avoid this situation had been refused and any offer the Respondent had made to her, he had known she could not accept. She requested confirmation that Respondent was making her redundant and asked what the pool for selection was for this decision and what had been the selection criteria?
- 5.23 At 11.41 am on Thursday 12 November the Respondent replied by email stating that the Applicant was being made redundant due to lack of work and over-staffing of the office. He made no response to the questions on pool for selection and criteria; Mr Scott stated that he had looked into all the solutions offered by the Applicant and they would not meet the primary criteria that the shop must be covered from 8.00 am till 5.30 pm five days a week. No provision was made in this communication for the Applicant to appeal against this decision.
- 5.24 On 13 November 2015 at 6.30 pm the Applicant received a hand delivered letter in her post box signed by Mr and Mrs Scott reiterating her redundancy with four weeks' notice, confirming pay would continue until the last full week of December 2015 and that she was not required to come to work. The Tribunal notes that no provision was made in this communication for the Applicant to appeal against this decision.

6.0 The Law

6.1 The relevant section of the law in considering the complaint of sex discrimination is noted below:

Section 6.1 The Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 states as follows:

Direct and Indirect discrimination against women

1 (1) In any circumstances relevant for the provision of Part II of this Ordinance a person discriminates against a women if:-

- (a) on the ground of her sex he treats her less favourably than he treats a man, or*
- (b) he applies to her a provision, criterion or practice which he applies , or would apply equally to a man but-*
 - (i) which is such that it would be to the detriment of a considerably larger proportion of women than of men*

Only a limited number of complaints have been heard by the Guernsey Tribunal since the Ordinance came into force, however, the recent Appeal Judgment '*Immuno Biotech Limited V Lucia Pagliarone*' 27 April 2016, handed down by Richard James McMahon, Esquire, Deputy Bailiff, gives valuable guidance. In this judgment there are references to a number of UK appeal decisions including '*Macdonald v Ministry of Defence*' (2003) UKHL34. The Deputy Bailiff has given guidance that it is appropriate, if not essential in some cases, for the Tribunal to consider an actual or hypothetical male comparator when dealing with an allegation of sex discrimination by a female.

In 2008 in '*Blackburn V Chief Constable of West Midlands Police*', Justice Elias, the President of the Employment Appeal Tribunal, ruled that, in considering the disparate impact of a measure on a female versus a male, Tribunals may rely on the 'common knowledge' that women have greater childcare responsibilities than men. In the opinion of the Judge this suggested that a claimant would not necessarily be expected to provide statistical evidence that a provision, criteria or practice places women at a particular disadvantage. Whilst this guidance is not binding in the Guernsey jurisdiction it is persuasive and the Tribunal has chosen to adopt this approach to this particular complaint.

In relation to the complaint of unfair dismissal the relevant section of the Employment Protection (Guernsey) Law, 1998, as amended (the Law) is as follows:

Section 6 General provisions relating to fairness of dismissal:-

Section 6.3

“Where the employer has fulfilled the requirements of subsection (1), then subject to the provisions of section 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 the question shall be determined in accordance with equity and the substantial merits of the case”.

In considering this complaint the Tribunal has taken into account the influential UK ruling in ‘*Polkey V Dayton Services Ltd*’ [1988] AC 344, HL, Lord Bridge stated that “... *in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision on which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation*”.

The judgment included four basic principles of fairness “*which should always be considered*” in situations of redundancy:

1. *The duty to consult the employee*
2. *The duty to warn of redundancy*
3. *The duty to establish fair criteria for the selection of employees*
4. *The duty to explore alternatives to redundancy.*

Accordingly consultation should begin in good time and be completed before any redundancy notice is issued. Consultations must be conducted with an open-minded approach; the employer must not only have this approach but display it too”.

7.0 Conclusion

7.1 At many times during the hearing the Tribunal found the evidence given by Mr Scott to be confusing and contradictory; prime examples of this were his multiple attempts to confirm the correct date upon which one of the front of house team had been hired and his unsuccessful attempt to clarify the full meaning of the various text messages he sent to the Applicant. Unfortunately this lack of clarity would seem to confirm the allegation by the Applicant that during the events of 9 November to 11 November 2015 she experienced periods of confusion and contradiction in her discussions with Mr Scott; this reduced his credibility as a witness.

7.2 It is evident that Mr Scott did try to take advice as to how he should conduct the redundancy process with the front of house team but, by his own

admission he very quickly lost control of the process. Several times during his evidence he told the Tribunal that it “moved so fast” that he could not follow an orderly process; for example it became clear during his testimony that whilst he knew he should prepare some form of objective criteria to evaluate each of the three team members’ skills, knowledge and attributes prior to any decisions, he failed to do so because “issues moved too fast”.

- 7.3 Both parties agreed that the communication by Mr Scott on the morning of 9 November 2015 of the need for reduced hours, with the implication of potential redundancy, was undertaken in no more than two to three minutes. This cannot be considered as the reasonable actions of a reasonable employer who should have set aside time to communicate a significant and employment changing decision. Given that the Applicant had served 26 years with the Company she deserved more than such a cursory communication.
- 7.4 Much of the subsequent communication between Mark and Liza Scott and the team members was conducted by text. Whilst the Tribunal is very well aware that the use of this media may serve to assist communication it would seem that the immediacy of communications back and forth reduced the opportunity for both the Applicant and the Respondent to take time for reflection and enable a more meaningful period of consultation.
- 7.5 Clearly Mr Scott hoped that the three members of the team would find the requisite savings in worked hours but, when it became apparent that the hoped for reductions would be resisted, Mr Scott did not convene a further team meeting. In his evidence he told the Tribunal that he did not consider it fair to the Applicant that she should participate in such a meeting and he decided she should stay at home. The Tribunal can only conclude from the evidence that Mr Scott thought such a meeting would be conflictual and unproductive. In the opinion of the Tribunal this further closed down any reasonable opportunity for a meaningful consultation.
- 7.6 The Tribunal was persuaded by the Applicant’s evidence, stated on two separate occasions, that during a telephone discussion with Mr Scott on the evening of 10 November 2015, he told her that he would have to let her go and make her redundant. Mr Scott did not contest these statements. Despite a subsequent email sent by the Respondent on 11 November 2015 denying that the Applicant was dismissed the Tribunal prefers the Applicant’s evidence. The Tribunal concludes that nothing other than an act of dismissal could have been construed.
- 7.7 Subsequent texts between the Respondent and the Applicant later that evening and early the following morning seem to indicate that Mr Scott was asking the Applicant to deliver a joint solution agreed with her colleagues and if she could then all would be OK. This might have been an acceptable request to the Applicant before the phone call but given the nature of that

discussion it is difficult to imagine that how she could have proceeded with this request.

- 7.8 The Applicant claimed that her two colleagues were under significant pressure to prepare and sign letters that stated they would not reduce from a 40-hour working week; Mr Scott denied this. The Tribunal notes that in section 9 EE1 a text from one of these employees to the Applicant states she was pressurised; the Tribunal prefers the Applicant's evidence on this issue.
- 7.9 The Tribunal has applied the four basic principles to the evidence as set out in '*Polkey V Dayton Services*'. In the opinion of the Tribunal the duty to consult by the Respondent was conducted in a confusing and peremptory manner and the duty to warn of redundancy was discharged by woefully incompetent communications. Mrs Farnham was warned of possible redundancy on the morning of 9 November and by the evening of 10 November 2015 she was informed in a telephone call that she would be made redundant. The duty to establish fair criteria for the selection of employees for redundancy was never attempted and the responsibility to find alternatives to redundancy was apparently delegated to the Applicant. Finally the Respondent did not offer the Applicant any opportunity to appeal the decision to dismiss.
- 7.10 The Tribunal does not doubt that Mr Scott needed to find savings and the Tribunal is conscious that the Respondent does not enjoy the support of an HR department or the sophistication of support staff, found in larger organisations but he and Mrs Scott had the responsibility to conduct a fair and measured redundancy process. This did not take place and no appeal was offered. The Tribunal finds this dismissal to be unfair.
- 7.11 Turning to the allegation of sex discrimination the Tribunal heard uncontested evidence from the Applicant that in a telephone discussion between herself and Mr Scott on the evening of 10 November 2015 Mr Scott stated that "*part timers don't work for us anymore, we need full time*". The Tribunal re-examined her recollection of this phrase and her recollection was again not contested the Respondent.
- 7.12 The Applicant's two colleagues in the front of house team were both female and both were on full time contracts of employment working 40 hours per week. Thus there is no immediate male comparator within this team. In this situation the Tribunal has assumed a hypothetical male employee performing the same administrative duties as the Applicant. This hypothetical male is less likely, in our culture, to be the primary carer for a schoolchild than a female and therefore is more likely to be able to comply with a change in provision that requires increased scheduled/contracted working hours per week. It is a detriment to more females than males when an employer requires such a change; this is indirect discrimination.

- 7.13 The Applicant has a son aged seven years and she found, as with many other carers, that she could only perform a part time role in order to discharge her day to day child care responsibilities, both during term time and during school holidays. When the Respondent informed the Applicant that he would only have full time employees and could no longer employ her he was unlawfully discriminating within the meaning of the 2005 'Ordinance'.
- 7.14 The Tribunal concluded that both complaints brought by the Applicant were well founded. On 10 November 2015 the Respondent breached the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and the Applicant was unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, with an effective date of termination of 25 December 2015

8.0 Decision

- 8.1 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 was unfairly dismissed. In respect of this decision the Tribunal awards the Applicant £5,569.44.
- 8.2 In relation to the claim of sex discrimination, having considered all the evidence presented, whether recorded in this judgment or not, and the representation of both parties and having regard to all the circumstances, the Tribunal finds that, under the provision of the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005, the Applicant has been discriminated against. In respect of this decision the Tribunal awards the Applicant £2,771.22.

Mr Peter Woodward
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Signature of the Chairman

27 May 2016
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Date