

**FORM: ET3**

**States of Guernsey**



**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

**APPLICANT:** Mr Martin Page  
Represented by: Self represented

**RESPONDENT:** G & M Milk Limited  
Represented by: Mr Robert Breckon

**Tribunal Members:** Ms H Hubbard (Chairman)  
Mrs C Latham  
Mrs J de Garis

**Hearing date(s)** Thursday, 26 November 2015

**Decision of the Tribunal**

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 Section 5(2)(a) of the Employment Protection (Guernsey) Law, 1998 as amended, (the Law) the Applicant was unfairly dismissed.

In accordance with Section 22(2)(b) of the Law the six month period immediately preceding the effective date of termination of employment was not considered just and equitable as a period to use to calculate six months' pay due to the Applicant's absence due to ill health. Therefore the Tribunal determined that the Applicant's pay for the six months immediately prior to his absence was £10,344.00 and that it was just and equitable in all the circumstances that this figure should be used in the calculation of the award.

The Tribunal determined to reduce the award by the sum of the goodwill payment of £1,710.00, as provided for by Section 23(2) of the Employment Protection (Guernsey) (Amendment) Law, 2005. An award of £8,634.00 is therefore made.

**Amount of Award:** £8,634.00

Ms H Hubbard  
.....  
Signature of the Chairman

21 December 2015  
.....  
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, Commerce and Employment, 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 Employment Protection (Guernsey) (Amendment) Law, 2005**

**Extended Reasons**

**1.0 Introduction**

- 1.1 The Applicant, Mr Martin Page, represented himself and gave evidence under Affirmation. The Applicant was supported by form ET1 and document bundle EE1.
- 1.2 The Respondent, G & M Milk Limited, was represented by Mr Robert Breckon, Senior Associate from AFR Advocates. Mr Garry Falla of G & M Milk Limited gave evidence under Oath. The Respondent was supported by form ET2 and document bundle ER1.
- 1.3 The Applicant, Mr Martin Page, claimed that he had been unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended.
- 1.4 The Respondent, G & M Milk Limited, claimed that it had not dismissed the Applicant but that the Applicant had declined its offer of part time work following a period of ill health and that he had resigned from his position.

**2.0 Preliminary Matters**

- 2.1 At the outset of the hearing and in unusual circumstances, the Respondent had requested that items be removed from the Applicant's bundle. As a preliminary matter, the Tribunal heard extended representations from the Applicant and Mr Breckon, concerning the proposed inclusion of emails in the Applicant's bundle within which Mr Gary Falla referenced an element of the content as 'Without Prejudice.' During the preliminary considerations, the Tribunal also heard representations concerning the quantum of the claim and the dates that were put forward by the Applicant in relation to the end of his employment. The Applicant claimed that he was dismissed on four possible dates: 2 March 2015, 4 March 2015, 17 May 2015 or 22 May 2015. The Respondent claimed that the Applicant resigned of his own accord on 5 June, 2015. The Respondent claimed on the ET2 form that the correct details of the Applicant's gross earnings were £5,415.00 and the Applicant claimed that the quantum of his gross earnings for the last six months of his employment was £10,344.00.
- 2.2 The Tribunal noted from representations in relation to the request from Mr Beckon to treat elements of email correspondence in the Applicant's document bundle as redacted because they were labelled 'Without Prejudice' was a matter that was not straightforward. The Tribunal took the view that a 'Without Prejudice' restriction on disclosure should not be applied if it enabled an exclusion that could effectively misdirect the Tribunal and was concerned that the term may have been used 'loosely' by the Respondent in email correspondence. The Tribunal was also concerned that the 'Without Prejudice' term may have been used without the express agreement of the Applicant and without taking into account the vulnerable position of Mr Page, who was not legally represented. In addition, there was an added complication that the 'Without Prejudice' term was alleged to have only been

made by the employer in the middle of an email without the involvement of its legal counsel. The stance of the Tribunal was that in general 'Without Prejudice' documents would not normally be subject to disclosure in Tribunal proceedings unless the parties agreed to the disclosure. In consideration of the admissibility of documents labelled 'Without Prejudice,' the Tribunal was guided by the Royal Court case of Gilliham V NRG Benelux B V (trading as NRG Distribution), Hancox, Lieut. Bailiff, April 22nd 2003, 20 - 23:

*"20.....in my opinion, that what cannot be done is that one party should impose the condition of 'without prejudice' on the other without his express or implied consent....."*

*22 In my judgement, he was never given an opportunity to agree or disagree to the proceedings, or the correspondence, being privileged. It is possible that at that stage the question never occurred to him....Equally....it is not possible to infer circumstances from which his agreement to the privilege.... can be inferred or implied.*

*22...I conclude that however the letter... is headed, it cannot alter the fact that one of two essential conditions of the rule of privilege from disclosure, namely the express or implied agreement of one of the parties, was never satisfied.*

- 2.3 After adjourning to consider the matter, the Tribunal agreed to treat two emails (ER1, Tab 6, pages 28 and 29) as redacted in part before commencing the substantive part of the hearing because they were labelled (in part) 'Without Prejudice' by the Respondent and both parties had confirmed that these elements related to communication concerning a possible resolution of the dispute. The responsibility for the part redaction of the two emails rested with the parties to enact prior to the hearing. However, later during the hearing, the Tribunal noted that the Respondent had relied upon and quoted the Applicant's response to the same emails (ER1, Tab 6, pages 28 and 29) in its ET2 Response form when resisting the claim for unfair dismissal and so the Tribunal further ruled that the requested exclusion by the Respondent's legal representative was, therefore, unreasonable and thus inappropriate. The Tribunal noted that during the hearing Mr Falla referred openly to the offer that he had made to the Applicant to resolve the dispute whilst he was on the witness stand. In conclusion, the Tribunal regarded the considerable delay that had been caused by the Respondent's arguments to exclude part of the emails between Mr Falla and the Applicant in the Applicant's document bundle, as regrettable.

### **3.0 Finding of Facts**

- 3.1 The following facts have been derived from the evidence presented by both the Applicant and the Respondent, form ET1 and ET2 and attachments hereto, document bundles ER1 and EE1.
- 3.2 All submissions and arguments put forward by both parties were considered by the Tribunal, whether they are mentioned specifically in this judgment or not. There were conflicting versions of the facts put before the Tribunal and the burden of proof moved to the Applicant during the hearing to prove that there was a dismissal in law with a corresponding shift of the burden to the Respondent in relation to

particular aspects of its defence. At all times the Tribunal exercised its discretion to determine its procedure.

- 3.3 The Applicant was employed as a milk round delivery person from 17 June, 2013 until his employment ended. The end date of his employment was a matter of dispute between the parties. The Respondent claimed that the Applicant's employment ended on 5 June 2015 on the ET2 response form and the Applicant claimed that his employment ended on 21 May 2015 on the ET1 application form.
- 3.4 The Applicant suffered a heart attack at the end of January 2015 and underwent open heart surgery in hospital in Southampton. The Applicant was certified as medically unfit for work until 17 May 2015 (ER1, page 21 refers).
- 3.5 During the Applicant's period of absence from work due to ill health, G & M Milk Limited recruited a new full time employee to replace him. The new employee commenced employment on 2 March 2015.
- 3.6 The Applicant reported to the Tribunal that he made multiple attempts to contact the second milk round delivery person, employed by the company, after his surgery but that his multiple texts and calls went unanswered.
- 3.7 On 4 March 2015 Mr Page wrote an email to Mr Falla (ER1, page 22) referencing a telephone conversation that had taken place on 2 March 2015 between them. He expressed his disappointment that "after well over a month you still can't let me know where I stand." The status of his employment had impacted the benefits that he was entitled to claim from Social Security. Mr Page stated in the same email that he had been told by Mr Falla that there was "no way back" for him during the telephone conversation of 2 March 2015 but that Mr Falla refused to confirm to him whether he was 'sacked or made redundant.' Mr Falla stated under cross examination that he had told Mr Page that he could not make him redundant but he did not recall making the statement there was "no way back" for him (*Mr Page*). In the same email Mr Page stated his intention to return to work on 26 April 2015, subject to his Doctor's confirmation that he was considered fit to do so.
- 3.8 Mr Falla sent a letter to the Applicant on 6 March 2015 (EE1, tab 3) confirming that he had not been dismissed and was not entitled to sick pay in accordance with his contract of employment. In this letter he made an offer to pay the Applicant one month's pay, as a 'gesture of goodwill.' Mr Falla confirmed to Mr Page in an email (ER1, tab 2, page 10) dated 16 March 2015, that he would make the payment to Mr Page the following day.
- 3.9 Mr Page confirmed to Mr Falla in an email sent on 22 April 2015 (EE1, Tab 2, page 11) that his return to work was delayed until 17 May 2015. His intent to return to work on Monday 18 May 2015 was confirmed in an email that he sent to Mr Falla on 14 May 2015.
- 3.10 Mr Falla responded by email on 17 May 2015 requesting that Mr Page provide him with a Doctor's note to confirm that he was fit enough to return to work given the nature of his illness and the physical demands of the milk round (EE1, Tab 2, page 14).

- 3.11 The Applicant placed a letter from his Doctor confirming that he could resume his work duties, in Mr Falla's letter box at his home address, on the evening of 19 May 2015. Mr Page sent an email to Mr Falla (EE1, Tab2, page 19) to inform him that he had done this.
- 3.12 Mr Falla invited Mr Page to meet with him and the second milk round delivery person, also employed by the Respondent, at his house on 22 May 2015 (EE1, Tab 2, page 17 refers). During this meeting the Applicant was offered a part time contract to work two days a week to replace his former contract of employment working six days a week.
- 3.13 Under cross examination, Mr Falla informed the Tribunal that he had been advised that he had to wait until Mr Page returned to work before commencing a redundancy procedure. Mr Falla claimed that his aim for the meeting on 22 May 2015 was to offer Mr Page a return to work on a part time basis so that the second employee could correspondingly reduce his hours. Mr Falla asserted that at the meeting on 22 May 2015 at his home he had told Mr Page that he would not offer him back his original position with the Company, but that he offered him two night deliveries starting at 2-3 o'clock in the morning.
- 3.14 Mr Falla maintained that he had not sought to recruit a temporary employee because it was important to find the "right person" and that temporary employees were more expensive than permanent employees. At the time of employing someone new to cover Mr Page's role, Mr Falla alleged that he was not sure if Mr Page would return to work or not.
- 3.15 Mr Falla claimed that Mr Page did not wish to negotiate during the meeting on 22 May 2015 and that he would have considered alternatives, if Mr Page had suggested any. Under re-examination by Mr Breckon, Mr Falla asserted that he assumed that Mr Page had resigned from his position when, on 22 May, he had declined the offer of part time employment and that he had made an offer to him of two months' salary on 22 May 2015, after the meeting. Mr Page claimed that redundancy was not discussed during the meeting at Mr Falla's house on 22 May 2015 in contradiction with the details of the ET2 response form submitted by the Respondent. The Tribunal preferred the evidence of the Applicant in relation to the meeting at Mr Falla's house, in particular, that there had not been any discussion about the possibility of redundancy but that this had been communicated by the Respondent after the meeting on the same day in relation to the end of his employment. The Tribunal also preferred the evidence of the Applicant that the potential reduction in the second employee's hours was not discussed in the same meeting on 22 May 2015 or at any time during his discussions with his former employer.
- 3.16 Under cross examination by Mr Breckon, Mr Page claimed that he could not make any counter proposals in relation to the offer of part time work at the meeting on 22 May 2015 because someone else had taken his job and that he had later asked for payment of his notice period (ER1, Tab 6, page 30 refers), because, as far as he was concerned, he had been dismissed. Mr Page asserted, under cross examination, that he could not offer to work his notice period because he had been dismissed and repeated that someone else was doing his job. In addition, Mr Page claimed that whilst he had not been served a document that dismissed him and was supposed to

be at work from 17 May 2015, his return to work date, he had not received any money in recognition of this and he was not on the payroll. Mr Page responded to the communication after the meeting by email on 5 June 2015 saying "I look forward to seeing you at tribunal hearing." (ER1, Tab 6, page 29). Mr Page expressed his frustration to the Tribunal at being required to obtain a Doctors' letter ahead of the meeting on 22 May 2015; with a high cost involved in doing so, when it was obvious to him later that there had clearly been no intention by the Respondent to enable him to return to his former full time role because he had already been replaced.

- 3.17 Mr Falla claimed in his witness statement that if he had identified Mr Page as at risk of redundancy before Mr Page's email sent on 5 June 2015 (ER1, Tab 6, page 29), it was clear that Mr Page would have been made redundant. Mr Falla claimed to have prepared a selection matrix (ER1, Tab 4, page 17) in anticipation of the Tribunal hearing.

#### 4.0 The Law

**The Law referred to in this section is The Employment Protection (Guernsey) Law, 1998, as amended**

##### 4.1 Section 5 Meaning of 'dismiss' and 'dismissal'

Section 5 (1) "in this Law 'dismiss' and 'dismissal' shall be construed in accordance with the following provisions in this section."

Section 5 (2) "*Subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if...*

- a) *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,*
- b) *where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or*
- c) *the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."*

- 4.2 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.'*

- 4.3 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."*

- 4.4 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 months’ 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.”*
- 4.5 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.”*

## **5.0 Conclusion**

- 5.1 The Tribunal heard oral evidence and representations from both parties. It also considered all the written evidence before it, whether specifically referenced in this judgment or not.
- 5.2 The Tribunal carefully considered the quantum of the claim in relation to the representations received by the Applicant and Respondent. The conclusion of the Tribunal was that in accordance with Section 22(2)(b) of ‘the Law’, the six month period immediately preceding the effective date of termination of employment was not considered just and equitable as a period to use to calculate six months’ pay due to the Applicant’s absence due to ill health. The Tribunal therefore agreed with the Applicant’s submission that the upper limit of the quantum of the claim was £10,344.00.
- 5.3 The Tribunal found that there were a number of inconsistencies in the evidence that was put before it by the Respondent. Mr Falla gave evidence in person and his evidence under cross examination conflicted with his prepared witness statement that he read out to the Tribunal. In particular, the Tribunal noted that in Mr Falla’s witness statement he had claimed that the Applicant resigned on 5 June 2015 by email stating “see you at the tribunal hearing” but under re-examination by his legal representative he asserted that the Applicant resigned on 22 May 2015, in response to the meeting held at his house on the same day. These inconsistencies were axiomatic to the Tribunal’s consideration of the salient issues in relation to the claim and the Tribunal was notably concerned about the credibility of the Respondent’s witness statement and as a corollary the evidence that was prepared in advance of the Tribunal hearing by the Respondent. (ER1, Tab 2, page 9). The Tribunal found that there was one inconsistency in evidence put before it by the Applicant in

relation to the date of dismissal declared on the ET1 application form; 21 May 2015. However, Mr Page confirmed under Affirmation in his witness testimony that this was an administrative error and that the date declared should have been 22 May 2015. In summing up, the Tribunal accorded with the view that the date of the dismissal was 22 May 2015.

- 5.4 The Tribunal was persuaded that the Applicant had been dismissed from his employment with G & M Milk Limited in the meeting held at Mr Falla's house on 22 May 2015. The Tribunal had discretion to base its decision on the facts of the case before it. In conclusion, the Tribunal was mindful of the size and administrative resources of the Respondent. The Respondent is a small employer and the Tribunal acknowledges in this judgment the difficulties that small employers may come across in covering essential roles during periods of absence and could empathize with the Respondent in terms of the resulting impact to the Company of the Applicant's absence due to ill health. The Tribunal was persuaded that Mr Page had kept in regular contact with the Respondent with regard to his expected return to work and that the Respondent had confirmed that it could not make him redundant during his absence. The Applicant's medical certificate was for a three month period and the Tribunal took the view that, at the very least, the Respondent could have sought a temporary replacement for the short period recorded on the medical certificate. There was no evidence that any attempt had been made to cover the Applicant's role with a temporary worker and the Tribunal did not regard this as the action of a reasonable employer in the circumstances, even of the small size and administrative resources of the Respondent. The Tribunal concluded that whilst he was recovering from open heart surgery on 2 March 2015, the Applicant's position had been replaced with a permanent employee.
- 5.5 The Tribunal regarded the meeting of 22 May 2015 as express confirmation by the Respondent that the Applicant's role had been replaced and that his former job was no longer open to him. The Tribunal regarded this confirmation as a sufficiently unequivocal statement by the Respondent to justify that Applicant's assertion that he had been dismissed. The Tribunal did not regard the offer of two days' work as a genuine effort to continue to employ the Applicant on a new contract. There were no real alternatives open to the Applicant because his former role had been replaced whilst he was absent due to ill health. In summing up, the Tribunal was persuaded that the Applicant had not acted too hastily in his action of declining the offer of a contract of two days' work with the requisite reduction in income. The Tribunal noted that there were no other alternatives invited by the Respondent for consideration nor were there any other options that could be proposed by the Applicant because he had effectively already been replaced. In conclusion, the Tribunal took the view that 'dismissal' was the only inference that could be taken by the circumstances presented.
- 5.6 The Tribunal was persuaded that the Respondent was acting on 'advice' that they should not make the Applicant redundant whilst he was absent from work and that the redundancy selection matrix included in the Respondent's document bundle (ER1, Tab 4, page 17) was indicative of an intention to retroactively construct what the Tribunal could only regard as a 'sham' redundancy process in preparation for the Tribunal hearing. The Tribunal was convinced that it was made clear to the Applicant that he could not return to his former job at the meeting on 22 May 2015 and that this action was sufficient to entitle the Applicant to regard himself as

dismissed. The employment relationship with the Respondent was finally severed on 22 May 2015 when the Applicant had assimilated the full implications of the meeting at Mr Falla's house. The Applicant could not be taken back to his former role on becoming well.

- 5.7 The Tribunal considered the recent Royal Court Appeal *Airain Limited v McIntosh* which referenced the observations of Longstaff P in an earlier UK case, 8 September 2015, paragraph 27:

*"It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for the dismissal. It is the whole of the circumstances that it must consider with regard to the equity and the substantial merits of the case."*

- 5.8 The Tribunal was careful to consider the 'whole of the circumstances' in relation to the claim and on the balance of probabilities and based on the substantial merits of the case, the Tribunal concluded that the Applicant had been dismissed within the provisions of 6(3) of the Employment Protection (Guernsey) Law, 1998, as amended, and finds this dismissal to be unfair.

## 6.0 Decision

- 6.1 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.
- 6.2 The Tribunal concluded that it would be just and equitable in all the circumstances, to reduce the six month award of compensation for unfair dismissal by the sum of the goodwill payment of £1,710.00.

## 7.0 Award

- 7.1 In accordance with Section 22(2)(b) of the Law the six month period immediately preceding the effective date of termination of employment was not considered just and equitable as a period to use to calculate six months' pay due to the Applicant's absence due to ill health. Therefore the Tribunal determined that the Applicant's pay for the six months immediately prior to his absence was £10,344.00 and that it was just and equitable in all the circumstances that this figure should be used in the calculation of the award.
- 7.2 The Tribunal determined to reduce the award by the sum of the goodwill payment of £1,710.00, as provided for by Section 23(2) of the Employment Protection (Guernsey) (Amendment) Law, 2005. **An award of £8,634.00 is therefore made.**

Ms H Hubbard

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Signature of the Chairman

21 December 2015

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Date