

States of Guernsey

**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

APPLICANT: Miss Lynn Humphrys
 Represented by: Mr N Forman

RESPONDENT: CT Plus (Guernsey) Limited
 Represented by: Ms K Parker, Barrister at Law

Tribunal Members: Ms C Latham (Chairman)
 Ms A Girollet
 Mr R Brookfield

Hearing date(s): Tuesday 12 and Wednesday 13 May 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 finds that, under the provisions of Section 5(2)(c) of the Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was not unfairly constructively dismissed. The Tribunal therefore makes no Award.

In relation to the application for costs made by the Respondent in accordance with the Employment Protection (Recoverable Costs) Order, 2006, the Tribunal makes no Award.

Ms Caroline Latham

 Signature of the Chairman

23 June 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 (Recoverable Costs) Order, 2006 (the 2006 Order)

Extended Reasons

1.0 Introduction

1.1 The Applicant, Miss Lynn Humphrys, was represented by Mr Neil Forman.

1.2 Miss Humphrys gave evidence under Oath supported by a witness statement and documentary evidence.

1.3 The Applicant called the following witness who gave evidence under Oath supported by a witness statement:

Mr L Hlpane

1.4 The Respondent, C T Plus (Guernsey) Limited, was represented by Ms Kate Parker, Barrister at Law.

1.5 The Respondent called the following witnesses each of whom gave evidence under Oath or Affirmation supported by written statements:

Mr L Murphy
Mr P Le Prevost
Mr R McFarlane
Mr K Jackman
Ms H McCann
Mrs N Withe

1.6 The Applicant claimed that she had been constructively dismissed because:

- (i) she had been bullied, harassed, victimised, intimidated and discriminated against and
- (ii) the hours she had to work involving a 13 hour shift as a result of a new rota introduced in October 2014 were excessive and her employer had not had regard to her medical condition, fibromyalgia.

1.7 The Respondent refuted the claim.

2.0 Facts Found

- 2.1 The following facts have been derived from the evidence presented by both parties, form ET1 and ET2 and attachments thereto, document bundles EE1 and ER1 and other documents EE2 – EE5 and ER2 – ER5.
- 2.2 Miss Humphrys, commenced employment on 25 July 2013 on a training scheme called 'Earn as you Learn'. The Respondent provided fully paid training towards gaining a professional 'Category D' driving Licence and with a guaranteed job on successful completion of the training. The training was conditional upon her working thirty hours each week on a 'when required' rota shared with a co-worker on a Monday to Friday basis. This rota, known as 'open lines', was separate from the main roster system that applied to other drivers. It meant that she was provided with enough work to meet her contractual hours, but did not allow for advance warning of which shifts she was required to work.
- 2.3 In November 2013, the Applicant requested further working hours because her contract of employment did not provide her with enough paid work. Following a meeting with Mr L Murphy, the Operations manager and Mr K Jackman, the Union representative, she was given a new Contract of Employment on 25 November on a full time basis with a minimum 40 hours per week. The rota system she worked remained on the 'open lines' basis.
- 2.4 About a month later, in December 2013, the Respondent attempted to introduce Miss Humphrys to the main shift roster system worked by other drivers. This system included evenings and weekend working. She was unwilling to work at the weekend and only wanted to work an eight hours shift each weekday. Mr Murphy stated that this request was not possible from an operational point of view because the only day time shifts were early finishing shifts and that removing these from the main roster would be extremely unpopular with the remaining staff.
- 2.5 On 28 January 2014 the Respondent received a letter from Miss Humphrys' doctor to confirm that she suffered from fibromyalgia recommending that "she does not currently work more than 44 hours per week".
- 2.6 On 10 February 2014 The Applicant was introduced to the Company's main shift system, working Monday to Friday. To assist with her requirements, the rosters were amended by the Respondent from 24 February 2014, when she was put on a 'twin line roster' with a co-worker. The working shift patterns were designed to meet the mutual needs of both employees regarding their working hours and were on an alternating basis. The shift pattern involved working to a two week rota that combined full service hours and shorter school shifts. In order to meet her request to work 40 hours each week, Miss Humphrys was given depot based office duties from 4.00 pm to 6.00 pm on the days when she was only required to drive on the school journeys for shorter periods. The shift pattern meant that there was a large element of unpaid breaks when she remained at the depot and she would occasionally perform extra driving duties. The shift pattern was designed to meet the requirement of not exceeding the number of working hours suggested by her doctor.

- 2.7 On 24 June 2014, which was an extremely busy day for the bus company, Miss Humphrys was asked by Mr R McFarlane, the bus Controller, to undertake extra work at the end of her shift. Miss Humphrys' schedule had been running late by approximately 30 to 40 minutes and she had not returned in time to undertake the last 'run' of her shift. There was no one to cover this 'run' so the Controller suggested to her, over the two way radio, that he would take over her last route and that she should take another route. Miss Humphrys refused this request even though it would have resulted in her finishing earlier than had she undertaken her own scheduled route. Mr McFarlane's response to her refusal was to the effect 'you never help me out and you could at least help on this one occasion that I ask you'. Miss Humphrys stated that the comments made her feel "incompetent and belittled".
- 2.8 On the same date, Miss Humphrys met with Mr Murphy, the Operations Manager, to make a complaint about the way in which she had been spoken to by the Controller. Mr Murphy had heard the incident over the radio and encouraged her to make a formal complaint. She requested that the matter be treated under the Company's Grievance and Disciplinary Procedure.
- 2.9 Mr Murphy concluded that Mr McFarlane's behaviour towards Miss Humphrys was unprofessional and immediately telephoned him and "berated him for his behaviour", instructing him to return to the depot.
- 2.10 On 14 August 2014 Mr Murphy held a formal disciplinary meeting with Mr McFarlane, with Mr K Jackman also being present in his capacity as union representative. During the meeting Mr MacFarlane confirmed that his behaviour on 24 June was less than exemplary on the day and it was not his intention to cause distress or upset the Applicant. As far as the Respondent was concerned the matter was closed and there was no record placed on the Controller's personnel file.
- 2.11 Following the meeting, Mr Murphy stated that he reported back to the Applicant that appropriate action had been taken with regard to her complaint.
- 2.12 During an unspecified period whilst Miss Humphrys was an employee of the Respondent she and a co-worker, Miss H McCann, attended a riding stable where Miss Humphrys cleaned out a horse box belonging to a friend, shovelled sawdust and manure into wheelbarrows, lifted large bags of sawdust, filled and carried buckets of water and rode or lunged her friend's horse. Miss McCann stated that the nature of the work necessitated heavy labour.
- 2.13 On 1 September 2014 the Applicant was moved to routes where her shift patterns changed to:
- Monday - 10 hours 12 minutes per day
- Tuesday, Wednesday and Thursday – 7 hours per day
- Friday – 10 hours 10 minutes per day

- 2.14 On 6 October 2014, Miss Humphrys' shift pattern changed again to duty 259 whereby the working hours on a Friday increased to 10 hours 36 minutes paid time, spread over 12 hours 51 minutes. This shift included a break of 40 minutes for which she was paid and an unpaid meal break between 12.23 pm and 14.38 pm. This resulted in paid working time of 9 hours 59 minutes. The first scheduled date for this particular shift was 10 October 2014.
- 2.15 On 9 October 2014, Miss Humphrys handed in her resignation, giving notice that her last day of service would be 23 October 2014.
- 2.16 On 10 October she attended work to undertake duty number 259 for the first time. The Respondent had adapted the shift so that she could finish work early.
- 2.17 During the period 6 October to 10 October 2014 Miss Humphrys' paid shift hours were 41.21 hours and for the period 13 October – 17 October 2014 her paid shift hours were 38.89 hours.
- 2.18 On 15 October 2014, the Applicant spoke with Mrs N Withe to arrange an exit interview, which took place on 22 October 2014.
- 2.19 On 17 October 2014 Miss Humphrys worked duty 259 again, which had been adapted to allow her to finish early.
- 2.20 At the exit interview on 22 October 2014, Miss Humphrys explained that she wanted tailored shifts because she felt unable to work full time. Mrs Withe responded that this was not possible and offered the Applicant a schools only shift rota until her medical problems improved. This offer was declined.
- 2.21 On 23 October 2014, Miss Humphrys' notice period ended.

3.0 Application for Costs

- 3.1 Ms Parker made an application for costs in accordance with the Law and the 2006 Order². The Respondent's application was made because the claim made by Miss Humphrys was misguided, frivolous and vexatious. The claim details are:

Witness costs under paragraph Section 2(1)

Mrs Withe accommodation (2 nights)	£190.00
Mrs Withe travel costs	£116.00

Parties' costs Section (4)

Costs, fees and expenses	£100.00
Accommodations (3 nights)	£285.00
Travel costs	£174.00

Total £865.00

4.0 The Law

4.1 In this case the Applicant claims that she was constructively dismissed as a result of a repudiatory breach of contract by her employer.

4.2 It has been established that) the Applicant has to demonstrate that in accordance with Section 5(2)(c) of the Law:

there was a fundamental breach of contract on the part of the employer

the employer's breach caused the employee to resign

the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

4.3 The Respondent denied the allegation.

4.4 It is understood that the test to be applied is whether the Respondent -

without reasonable and proper cause; and

viewed objectively

conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

4.5 In relation to the application for costs, the Tribunal referred to the Employment Protection (Recoverable Costs) Order, 2006 (the 2006 Order).

5.0 Conclusion

5.1 The Tribunal had to consider whether there were grounds that justified the Applicant's resignation. In order to succeed, the Applicant had to demonstrate that, on the balance of probabilities, a significant and fundamental breach of either an express or implied term of her employment contract had occurred, and that this breach could be found to be unfair because the Respondent had not intended to be bound by the terms of the contract.

5.2 A single breach of contract may occur that is so significant that, despite possibly previous exemplary behaviour by the employer, it may justify the employee terminating their contract of employment. However, not all breaches of a term will entitle an employee to terminate the contract; it must be a repudiatory breach. Alternatively, the breach may be that over a period of time a number of actions by an employer, when taken cumulatively, justify the employee to terminate the contract. In such circumstances, there will be some 'last straw' event which, in conjunction with previous events, occasions the employee to resign. The complaint brought by the Applicant was considered from both perspectives by the Tribunal.

- 5.3 The Tribunal considered whether there had been a breach of an express term of the employment contract and could find no evidence of this and neither was it claimed by the Applicant.
- 5.4 In this case the Applicant alleges that CT Plus (Guernsey) Limited failed in its duty of care to provide a workplace free from bullying, harassment, victimisation, intimidation and discrimination. The claim is, therefore, that there was a breach of the implied term of trust and confidence. For the claim to succeed, the Tribunal seeks to find specific evidence of an act or acts by the employer that can be perceived as a fundamental repudiatory breach of contract and sufficiently serious to justify the Applicant to terminate her contract of employment.
- 5.5 The Tribunal heard evidence regarding a specific incident on 24 June 2014 when the Applicant refused to undertake an extra 'run' when requested by Mr McFarlane. She stated that she found his response over the radio to her refusal to be "derogatory, harassing and intimidating". As a result she made a formal complaint to Mr Murphy. Subsequently, Mr McFarlane was called to a disciplinary meeting. Miss Humphrys complained that she had not been called to give evidence at the disciplinary meeting or informed of its outcome. The Tribunal also considered the evidence from Mr Murphy and Mr McFarlane regarding this matter and was satisfied that her complaint had been dealt with formally and that she had been informed verbally of the outcome. The Tribunal heard no evidence to suggest that this incident was directly connected to her resignation some three and a half months later.
- 5.6 Miss Humphrys complained that the bullying continued until she left. Whilst under cross examination she made reference to Mr MacFarlane not responding to her radio calls, she presented no evidence of specific events, dates when this had happened or formal complaints made by her to the Respondent other than the incident on 24 June 2014. The Tribunal accepts that this specific matter had been dealt with appropriately by the Respondent.
- 5.7 Mr K Jackman, the Resource Allocator, gave evidence that the Applicant had spoken to him at various times regarding "what she perceived as poor attitude or treatment from Mr MacFarlane (primarily)", but as far as he was aware, the Respondent had dealt with any concerns appropriately. The Tribunal finds no specific or substantiated evidence regarding any other incident relating to the allegation of bullying and noted that the Applicant never sought to raise any grievance in relation to the way she felt she was treated.
- 5.8 The Applicant also claimed that she was repeatedly required to work excessive hours. She stated that her rota was for 55 hours per week, including a 13 hour shift on a Friday that left her "in chronic pain and fatigue for the weekend". The Tribunal accepts evidence from Miss McCann who was her co-worker that Miss Humphrys also worked at a horse stables at the weekend that involved strenuous activity and heavy work. This evidence is at odds to Miss Humphrys' claim that she was fatigued and in pain at the weekend as a result of long working hours. The Tribunal prefers Miss McCann's evidence; Miss Humphrys' assertion that she was fatigued and in chronic pain was not substantiated by her actions.

- 5.9 Miss Humphrys provided evidence of a letter from her doctor dated 28 January 2014 which recommended that she work no more than 44 hours each week because she suffered from fibromyalgia. She presented no evidence that her employer was aware of this condition prior to January 2014 and the Tribunal noted that when completing a medical declaration when applying for her job she made no mention of this medical condition. There was no evidence that the condition had caused her to be absent from work.
- 5.10 All the evidence presented by the Respondent demonstrated that it had taken into account Miss Humphrys' request to work Monday to Friday only. It had also increased her hours of work following her request for more paid work in October 2013. By February 2014, when the shifts patterns and rosters were arranged, the evidence also demonstrated that these were constructed in such a way to ensure that she worked in accordance with her doctor's recommendations. The shift pattern did involve long, unpaid rest breaks on occasion but Miss Humphrys made no representations that these rest breaks were unacceptable to her. She also accepted extra paid working hours voluntarily. Furthermore, there was no evidence presented by the Applicant that her working hours were affecting her health adversely.
- 5.11 The Applicant made no complaint about her working hours until there was a change of her shift pattern to Route 259 on 6 October 2014 when she objected to the hours she was to work, particularly on a Friday evening. The Respondent subsequently adapted the shift so Miss Humphrys could finish early, in accordance with her wishes. Although she claimed that she often worked a 13 hour shift on a Friday and that it was one of these shifts that was "the final straw", the evidence was quite clear that she had not worked these hours, when the long unpaid break was taken into account.
- 5.12 Although Miss Humphrys claimed that she had resigned because of deteriorating health, she provided no further medical evidence to this effect and continued to work until the end of her notice period.
- 5.13 From the evidence presented, the Tribunal accepts that the Respondent had made considerable efforts to accommodate Miss Humphrys' preferred working hours. The evidence demonstrated that in 2013 it had increased her working hours as a result of her request for more paid work, arranged rotas in 2014 to ensure that she did not exceed forty four working hours in accordance with her doctor's letter and had arranged the rota system so she did not work at the weekend. In October 2014, the Route 259 shift pattern allocated to Miss Humphrys resulted in less than 42 paid working hours each week once the unpaid break periods, about which she made no complaint, had been taken into account.
- 5.14 In view of these reasons the Tribunal concluded that the Applicant had failed to demonstrate by way of evidence that the employer had acted in such a manner that entitled her to view her contract so fundamentally breached that she was entitled to resign as a result of the actions of her employer.
- 5.15 The Tribunal also had to consider the application for costs. This is an unusual application before an Employment and Discrimination Tribunal in Guernsey and it was noted that in previous cases an Award for costs has only been made in cases

where it was considered that an Applicant has made a claim for vexatious or frivolous reasons. The employment legislation and Tribunal process in Guernsey embraces the principle of a system of justice that is accessible to any Applicant. Although the Applicant in this case was unable to substantiate any part of her claim, the Tribunal concluded that she brought the action in the misguided belief that she would succeed rather than for any vexatious or frivolous reason. The Tribunal was not persuaded by the representations made by Ms Parker in relation to costs and therefore rejects the Respondent's application for costs.

6.0 Decision

6.1 Having considered all the evidence presented, whether recorded in this judgment or not, the representations of both parties and having due regard to all the circumstances presented to it, the Tribunal unanimously finds that under Section 5(2)(c) of the Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not constructively unfairly dismissed from her employment. The Tribunal therefore makes no Award.

6.2 In relation to the Application for costs, the Tribunal makes no Award.

Ms Caroline Latham
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Signature of the Chairman

23 June 2015
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Date