

States of Guernsey

**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

APPLICANT: Mrs Camilla Poole
Represented by: Mr David Poole

RESPONDENT: CT Plus (Guernsey) Limited
Represented by: Ms Kate Parker

Tribunal Members: Mrs Tina Le Poidevin (Chair)
Mr Peter Woodward
Mrs Allison Girollet

Hearing Date(s): Thursday 2 and Wednesday 3 October 2014

Decision of the Tribunal:

The Applicant claimed that she had been constructively unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, which was contested by the Respondent.

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 constructively unfairly dismissed. The Tribunal determined that the Applicant's pay during the six months prior to the termination of her employment was £27,895.00.

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However, 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 shall be reduced by £3,961.54, being the sum of four weeks' pay which was equivalent to the goodwill payment made by the Respondent to the Applicant.

Amount of Award: £23,933.46

Mrs Tina Le Poidevin

6 November 2014

.....
Signature of the Chairperson

.....
Date

NOTE: Any Award made by a Tribunal may be liable to Income Tax. Any costs relating to the recovery of this Award are to be borne by the Employer

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

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mrs Camilla Poole, claimed that she had been constructively unfairly dismissed within the meaning of the Employment Protection (Guernsey) Law, 1998, as amended, as a result of the Respondent's actions in deciding not to provide her with maternity pay to which she believed she was entitled.
- 1.2 The Respondent, CT Plus (Guernsey) Limited, contested the claim on the basis that the Applicant resigned and was not contractually entitled to receive maternity pay.
- 1.3 The Applicant gave both oral and written evidence and was represented by her husband, Mr David Poole.
- 1.4 Written evidence was provided by the following witnesses for the Applicant:
 - Ms Jennifer Ann Down (Office Manager)
 - Mr Lee Murphy (Operations Manager)
 - Mr Nick Arthur (Management Accountant)
 - Mr Richard de Garis (Assistant Operations Manager)
- 1.5 The Respondent was represented by Ms Kate Parker of Civitas Law, Cardiff.
- 1.6 The Respondent called the following witnesses who gave both oral and written evidence:
 - Mr Jonathan McColl (Performance Director)
 - Ms Nikki Withe (HR Manager)
 - Mr Kevin Hart (General Manager)
 - Ms Jude Winter (Deputy Chief Executive Officer)
- 1.7 Joint bundles, labelled ER1 and ER2 were submitted in evidence, in addition to a bundle labeled EE1 and closing statements from both parties labelled EE2 and ER3.

2.0 Facts Found

- 2.1 The Applicant was offered employment by the Respondent as Assistant Operations Manager and was provided with a draft proposed contract of employment on 28 February 2012 which included a maternity and paternity leave clause which read as follows:

11.1 with the exception of maternity leave outlined in clause 11.2, the Employer offers no contractual right to maternity or paternity pay or leave.

- 11.2 *Employees who notify the Employer that they are pregnant, will at the Employer's discretion be granted up to a period of [26] weeks unpaid maternity leave (**Maternity Leave**) which will be counted as continuous service.*
- 11.3 *Female Employees, will at the Employer's discretion, be entitled to receive maternity pay and take Maternity Leave provided that:*
- 11.3.1 *they have been in continuous employment, full-time or part-time for [X months] by the beginning of the eleventh week prior to confinement;*
- 11.3.2 *their contract continues for the entire period of leave requested;*
- 11.3.3 *notification of the request for Maternity Leave is given, in writing to the Employer at least 21 days prior to the expected date of confinement;*
- 11.3.4 *should the Employee fail to return to work for at least 13 weeks after Maternity Leave, without adequate medical reason, she will be liable to repay maternity pay to her Employer;*
- 11.3.5 *Maternity Leave may be taken after the beginning of the eleventh week before the expected week of confinement; and*
- 11.3.6 *the Employee may return to work at any time before the end of [26] weeks beginning with the week in which the date of confinement falls, provided that notification is given to the Employer in writing at least 21 days in advance of her intended date of return.*
- 11.4 *Employees who have taken Maternity Leave will have the right to resume work at the Employer at the end of their Maternity Leave.*
- 11.5 *The Employer will consider any request to vary the terms of this clause on a case by case basis.*
- 2.2 The Applicant communicated verbally and via email with Mr John McColl (her proposed line manager) seeking clarification/confirmation in relation to certain terms contained within the draft proposed contract of employment document before communicating her acceptance of the Respondent's offer of employment subject to the terms set out and verbally agreed between them.
- 2.3 The Applicant did not seek clarification/confirmation in relation to any aspect of the maternity and paternity leave clause.
- 2.4 The Applicant was not provided with a final version of the agreed terms in the form of a contract of employment for signature.
- 2.5 On 13 March 2012 the Applicant commenced employment with the Respondent as Assistant Operations Manager, reporting to Jon McColl.

- 2.6 On 1 August 2012 the Applicant was promoted to Operations Manager, reporting to Jon McColl.
- 2.7 As Operations Manager, the Applicant was the most senior 'on-island' employee of the Respondent.
- 2.8 The Respondent provided the Applicant with a 'Changes to Employment Form' which noted the effective date of her promotion, change of job title and salary and explicitly noted that all other terms and conditions remained the same. The Applicant was not provided with a revised contract of employment.
- 2.9 On 12 November 2012 Jon McColl emailed the Applicant attaching the following documents:
- a letter confirming her appointment as Operations Manager, noting that her revised pay would be backdated to 1 August 2012;
 - a 'Changes to Employment Form' which noted the effective date of her promotion, change of job title and salary and explicitly noted that all other terms and conditions remained the same;
 - a Job Description/Person Specification for the role of Operations Manager.
- 2.10 The Applicant was required to report to both Jon McColl and Kevin Hart during February 2013 and reported solely to Kevin Hart from April 2013.
- 2.11 On 3 April 2013 the Applicant emailed Lawrence Wilson, Regional Manager – East London, requesting a copy of an Operations Manager contract for her to cannibalize as she was intending to send an amended version to Jon McColl for his approval.
- 2.12 On 16 April 2013 Lawrence Wilson emailed documents to the Applicant, including a document entitled 'Terms & Conditions of Employment Grievance & Disciplinary Procedures'.
- 2.13 The Applicant became pregnant in February 2013 and, following an ultrasound scan on 18 April 2013 (when she was 11½ weeks pregnant), she advised Jon McColl that day of her condition via a telephone call, communicating her expected confinement date as 3 November 2013.
- 2.14 Following the telephone call, the Applicant then emailed John McColl on 18 April 2013 to confirm, amongst other things, confirmation of her pregnancy, confinement date and her interpretation of the maternity leave and pay provisions contained within her contract of employment.
- 2.15 In this email the Applicant noted the basic maternity allowance as 8 weeks' full pay and 6 weeks' half pay (paying back any statutory pay whether received or not) and referred to a clause in her draft contract (of which she still had to finish writing) that afforded the Respondent discretion to negotiate that allowance. In attempting to secure a maternity leave and pay arrangement, the Applicant (by reference to the then HCT policy in respect of maternity leave and pay for UK employees) requested 18 weeks of unpaid leave, the ability to retain the States of Guernsey maternity benefit payments and a further 10 weeks' full pay and 6 weeks' half pay.

- 2.16 The Applicant also indicated a desire to work up until near her due date, probably leaving a maximum of two weeks before on 18 October 2013 and it was agreed that Jon McColl would advise Kevin Hart and Dave Kaye (the Interim Operations Director) of her pregnancy.
- 2.17 On 18 April 2013 Jon McColl emailed Dai Powell, Jude Winter and Douglas Downie advising them of the Applicant's pregnancy and expected date of confinement, noting that she had asked to take 'her contractual entitlement of 14 weeks maternity leave and 18 weeks unpaid leave' and also forwarded this email to Dave Kaye and Kevin Hart (copied to Dai Powell, Jude Winter and Douglas Downie).
- 2.18 The Applicant did not receive any further communication from Jon McColl in relation to her maternity leave or pay.
- 2.19 On 21 June 2013 the Applicant emailed Kevin Hart forwarding the email correspondence she had had with Jon McColl on 18 April 2013. Kevin Hart responded by email shortly after receipt on the same day, saying "I personally don't see an issue with the maternity cover but will come back to you as soon as possible".
- 2.20 On 18 July 2013, following a request from Nick Arthur for the Applicant to provide him with details of staff pay for budgetary purposes, the Applicant prepared and sent him figures which included the value of 10 weeks' full pay and 6 weeks' half pay in respect of her maternity leave.
- 2.21 On 29 July 2013 Nick Arthur included the figures provided by the Applicant in the budget document and emailed it to Kevin Hart, copying the Applicant. There was a clear reference in the document which read 'Inc new OM and Maternity Payments'.
- 2.22 The Applicant did not receive any further correspondence in relation to the budget and was not asked to add or remove anything from the figures she had produced. She did not, at any time, receive a revised budget document.
- 2.23 On 12 August 2013 the Applicant emailed Jon McColl and Kevin Hart seeking clarification of time off in lieu in relation to additional hours she had worked and expressing her desire to take her lieu days at either the start or end of the CT Plus maternity pay period whichever was easier from a payroll perspective.
- 2.24 The week before the Applicant's commencement of maternity leave, Kevin Hart spoke with her on the telephone and asked if her contract had ever been sorted out and finalised. The Applicant confirmed that this had not been done.
- 2.25 On 18 October 2014 (the day before the Applicant's commencement of maternity leave) Kevin Hart spoke with her on the telephone asking if he could pay her maternity pay in one payment in the 2013/2014 financial year, citing the reason as being that if the Company lost the States of Guernsey contract at the end of March 2014 and it was not renewed then she would not miss out on maternity pay and he would be able to carry any losses over with the maternity pay already paid.

- 2.26 The Applicant was reluctant to accept this offer at the time as she was uncertain that she could receive payment from work whilst receiving payments from the States of Guernsey.
- 2.27 The processing of maternity pay was not finalised prior to the Applicant's commencement of maternity leave and it was agreed that Kevin Hart would speak with Jenny Down in relation to this matter.
- 2.28 On 18 October 2013, before leaving to go on maternity leave, the Applicant emailed Jenny Down (copying Kevin Hart and Nikki Withe) confirming her conversation with Kevin Hart, requesting that she talk with him to ascertain how her maternity pay should be paid over the next nine months.
- 2.29 The Applicant did not receive any confirmation from the Respondent indicating or confirming that maternity pay would not be provided to her.
- 2.30 On 23 October 2013 the Applicant received a text from Nikki Withe asking if the Applicant wanted to meet for coffee or lunch the following day.
- 2.31 The Applicant responded in the affirmative, noting that she would have her daughter with her, and it was agreed to meet at 12 midday and go to the Victor Hugo Boulangerie on the Bridge, St Sampson for lunch.
- 2.32 During their meeting, Nikki Withe asked the Applicant what she thought Kevin Hart believed were her expectations for maternity pay and the Applicant confirmed that this was 10 weeks' full pay and 6 weeks' half pay as set out in the emails and conversation she had had with Kevin Hart on her last day before commencing maternity leave.
- 2.33 Nikki Withe stated that Kevin Hart had only thought the Applicant wanted the time off.
- 2.34 Nikki Withe advised the Applicant that her pay was being reviewed and she may not receive all that she thought she would and in fact she may not get anything.
- 2.35 The Applicant responded by saying "Well you know what you can do with your job if that is the case".
- 2.36 Nikki Withe confirmed that a decision would be made on 25 October 2013.
- 2.37 On 25 October 2013 Nikki Withe called the Applicant to say that a decision had not been made and that it should be made the following week.
- 2.38 On 25 October 2013 the Applicant emailed Nikki Withe confirming their conversation and asking why the Group had waited until she had left on maternity leave to tell her that she may not even get any maternity pay.
- 2.39 Within this email she stated that, at every step of her pregnancy she had put the Company's bus operation first and continued to work with dedication in a highly stressed environment, was astounded by the lack of good practice and communication to her in relation to this matter, to say this had put a physical and

emotional strain on her last week or so of pregnancy was an understatement and she now had to wait over the weekend whilst on maternity leave for a decision that should have been given to her six months ago.

- 2.40 On 29 October 2013 the Applicant emailed Kevin Hart (copying Nikki Withe) urging a response. She did not receive a response from Kevin Hart.
- 2.41 On 29 October 2013 Nikki Withe responded to the Applicant stating that Kevin Hart was on holiday and Jane and Darren would be meeting the following day to discuss the matter and she expected to be able to come back to her by then.
- 2.42 On 30 October 2013 Nikki Withe telephoned the Applicant at home and advised her that the Respondent would not be paying her any maternity pay.
- 2.43 When the Applicant was advised of the decision on the telephone, she broke down and advised Nikki Withe that she would be seeking legal advice and requested a full written reason for the Company's decision.
- 2.44 Nikki Withe confirmed in evidence that, as there was no statutory obligation for maternity pay or maternity leave and the Applicant's contract stated that it was at the discretion of the Respondent, she made the decision not to grant maternity pay but grant unpaid maternity leave to April 2014. She also confirmed that this decision was based on the poor financial position of the Respondent's contract with the States of Guernsey at that time.
- 2.45 Within the Respondent's Notes to the Financial Statements for the Year to 31 March 2014, the net profit was confirmed as £116,859, however, a loss of £240,064 had been confirmed for the previous year.
- 2.46 On 31 October 2013 the Applicant received a letter via email from Nikki Withe stating that, in accordance with the Applicant's contract with the Respondent, maternity pay may be given at the discretion of the Company, the financial performance of the contract (meaning the Respondent's contract with the States of Guernsey) meant that they were unable to make such payments and, as she was on a fixed term contract and the contract with the States of Guernsey was due to expire in April 2014, they could not grant her maternity leave to the end of July 2014 but were happy to grant her unpaid leave to April 2014 which they would consider extending if the contract with the States of Guernsey was renewed.
- 2.47 On 6 November 2013 the Applicant gave birth.
- 2.48 On 7 November 2013, whilst the Applicant was in hospital, her husband sent Nikki Withe an email enclosing a letter (noting the Applicant's current address) stating that she considered the Respondent had acted in breach of her contract by stating that she would not be paid any maternity pay. Alternatively, if the Respondent did have discretion, the Respondent had not acted fairly or reasonably by deciding not to pay her maternity pay, particularly given that it had always been indicated to her previously that she would receive pay, for example as her maternity pay was included in the Respondent's budget. She, therefore, wanted to submit a formal grievance against the Respondent's decision, to be determined as soon as possible, and asked what the next steps were in the grievance procedure and who the

appointed independent person would be to determine her grievance. She also stated that the Respondent's stance had shocked her and caused her considerable anguish in the last weeks and days prior to the birth of her child.

- 2.49 On 12 November 2013 the Applicant received an email from Darren Rees stating that he would be the person handling the grievance and asking the Applicant to supply him with further information as to why she believed that the Respondent had breached her contract and/or why she felt the Respondent had not acted fairly or reasonably in relation to this issue. On receipt of this additional information, he hoped to hold a telephone meeting with her on 15 November 2013 so that the matter could be dealt with promptly.
- 2.50 On 14 November 2013 the Applicant emailed Darren Rees acknowledging his email, stating that she was unavailable for a telephone conversation on 15 November 2013 but would respond to his email the following week. This was acknowledged by Darren Rees the same day.
- 2.51 On 18 November 2013 the Applicant emailed Darren Rees objecting to him handling her grievance as she understood that the decision not to honour her agreement to maternity pay was made jointly with him and, therefore, his determination was likely to be prejudiced.
- 2.52 On 22 November 2013 the Applicant emailed Darren Rees asking him to confirm receipt of her email of 18 November 2013 and give confirmation of the person who had been appointed to deal with her grievance.
- 2.53 On 22 November 2013 Darren Rees emailed the Applicant asking her to re-send her 18 November 2013 email as he had not received it. The Applicant forwarded her email the same day noting that she awaited his response early the following week.
- 2.54 On 29 November 2013 Darren Rees emailed the Applicant, asking if she was happy for him to proceed with the grievance, stating that his involvement in the matter was in reference to Guernsey's statutory position and if he understood her grievance correctly, she was not relying on statutory law but had stated that there was a contractual agreement for her to be paid which he would be able to review for her as part of her grievance.
- 2.55 On 3 December 2013 the Applicant emailed Darren Rees stating that she was not happy for him to investigate her grievance for the reasons previously stated and that, given the passage of time, she would have thought it a reasonable expectation that the Respondent should have made some progress in responding appropriately to her concerns on the matter.
- 2.56 On 3 December 2013 Darren Rees emailed the Applicant asking if she would be happy for Kevin Hart to hear her grievance.
- 2.57 On 3 December 2013 the Applicant emailed Darren Rees agreeing to Kevin Hart taking the grievance as she understood that he had been away on annual leave when the decision in relation to her maternity pay was made so should, therefore, be independent. She asked he contact her initially via email.

- 2.58 On 3 December 2013 Darren Rees emailed the Applicant acknowledging her response and stating that he would contact Kevin Hart that afternoon to deal with her grievance.
- 2.59 On 6 December 2013 the Applicant emailed Darren Rees asking for confirmation that he had spoken with Kevin Hart as she would have expected to have heard from him by now in order to progress her grievance but had not received any correspondence thus far which was adding to her concerns.
- 2.60 On 6 December 2013 Darren Rees emailed the Applicant confirming that Kevin Hart had sent her a letter the evening before so it would hopefully be with her on 7 December 2013.
- 2.61 On 10 December 2013 the Applicant received a letter dated 5 December 2013 (noting her old address) advising her that her grievance hearing would take place on 12 December 2013 and requested that any written statements or evidence that she wished to be considered at the hearing should be submitted no later than 11.00 am on 11 December 2013.
- 2.62 The Applicant's right to be accompanied at the hearing by a work colleague or a trade union official was noted in the letter, with a requirement for the Applicant to confirm her attendance and details of any representative by 11.00 am on 11 December 2013.
- 2.63 Enclosed with the letter of 5 December 2013 were the Applicant's draft contract of employment, a letter from John McColl, a Change of Employment Form, a Letter from Nikki Withe and the Applicant's letter of 7 November 2013.
- 2.64 The Applicant had not, at any time during her employment, been personally provided with a copy of the Respondent's Grievance Procedure but confirmed that she had managed to source a copy of the document herself during October or November 2013.
- 2.65 On 10 December 2013 the Applicant emailed Kevin Hart acknowledging receipt of his 5 December 2013 letter that she had received in the post that day, stating that with two days' notice it was not convenient for her to attend the meeting (particularly as she had insufficient time to review the information, prepare a written statement, respond to the enclosed documents by way of additional documents/evidence) and suggesting that the meeting be held at 12 midday on 17 December 2013 at a neutral location. The Applicant also asked if her husband and/or Advocate could be present and reiterated her request for correspondence to be sent to her via email for expediency or, alternatively, that they use her address details as noted in her letter to the Respondent dated 7 November 2014.
- 2.66 On 10 December 2013 Kevin Hart emailed the Applicant agreeing that the suggested grievance hearing date was relatively short notice in view of her receiving the letter that day, and noted that he was unable to hold the hearing on the date suggested by the Applicant. He was, however, in Guernsey on 18 and 19 December 2013 and could arrange the meeting for either of those dates, although if 19 December 2013 was selected, the meeting would need to take place in the meeting room at the depot as he had other meetings there that day. Kevin Hart also advised the

Applicant that he could not agree to either her husband or an advocate to attend the hearing with her as the process was that of an internal nature.

- 2.67 On 12 December 2013 the Applicant confirmed by email to Kevin Hart that 18 December 2013 at 4.30 pm was her preferred choice.
- 2.68 On 17 December 2013 Kevin Hart emailed the Applicant confirming that the Duke of Normandie Hotel had been booked although the hearing would need to take place in the restaurant or the snug. After a couple of email exchanges between the Applicant and Kevin Hart, the restaurant (which would be closed at the time of the meeting) was mutually confirmed as it would be available at no cost to the Respondent. It was also agreed that the Applicant would send through her paperwork to Kevin Hart before 2.00 pm on 18 December 2013, which she did.
- 2.69 On 18 December 2013 the Applicant's grievance hearing took place. This was attended by Kevin Hart, the Applicant and her colleague, Richard de Garis.
- 2.70 The Applicant alleged that:
- The Respondent had acted in breach of contract by stating that she would not be paid any maternity pay as she had met the provisions set out in her contract of employment and therefore was entitled to maternity pay.
 - If the Respondent did have discretion over the maternity pay, the Respondent had not acted reasonably by deciding not to pay her maternity pay.
 - The Respondent had breached her rights by:
 - The manner in which it had decided to act.
 - The way the decision was communicated to her.
 - The untimely nature in informing her of the revised decision.
 - The failure to follow up her grievance in good time.
 - The cumulative impact, as this had had a profound and negative impact upon her and her family's wellbeing.
- 2.71 On 24 December 2013 Kevin Hart emailed the Applicant to advise her that, due to his holidays and those of other staff, he was unable to conclude his investigation following the grievance hearing until after 6 January 2014. He attached notes of the hearing for the Applicant's review to confirm that they were a true reflection of the discussion that had taken place and asked her to put forward any amendments as soon as possible before 6 January 2014 and would communicate again with the Applicant by 10 January 2014 with the conclusion to his investigation.
- 2.72 On 3 January 2014 the Applicant emailed Kevin Hart with her amendments to the hearing notes.
- 2.73 On 8 January 2014 (after email correspondence between the Applicant and Kevin Hart) a signed copy of the hearing notes was sent to Kevin Hart by the Applicant.
- 2.74 On 10 January 2014 the Applicant emailed Kevin Hart requesting his decision or reasons for a delay in the decision.

- 2.75 On 13 January 2014 the Applicant emailed Kevin Hart again asking for the outcome of his investigation.
- 2.76 On 13 January 2014 the Applicant received a letter from Kevin Hart dated 10 January 2014 noting the decision.
- 2.77 Kevin Hart's decision upheld the Respondent's original decision not to provide the Applicant with maternity pay and:
- denied the breach of contract allegation;
 - noted that the delay in concluding the grievance process was caused by both parties;
 - noted that the Applicant was not contractually entitled to maternity pay as the contract that the Applicant had drafted had not been signed or agreed and the contract in place clearly stated that she was not contractually entitled to maternity pay (statutory or otherwise).

He did, however, acknowledge that the Respondent:

- had not communicated its decision to the Applicant in good time;
 - should have confirmed her entitlement to maternity pay before her maternity leave commenced; and
 - the way in which the decision was communicated to the Applicant had not been correct and should have been done in a more timely manner.
- 2.78 As a gesture of goodwill (and in recognition of some fault in the Respondent's process) Kevin Hart decided to award the Applicant with four weeks' full pay which was processed in the Respondent's next payroll run.
- 2.79 The HCT Group Grievance Policy stated '*We may initiate an investigation before holding a grievance meeting where we consider this appropriate. In other cases we may hold a grievance meeting before deciding what investigation (if any) to carry out. In those cases we will hold a further grievance meeting with you after our investigation and before we reach a decision.*'
- 2.80 Only one grievance meeting was held.
- 2.81 On 16 January 2014 the Applicant emailed Jude Winter attaching a letter and supporting documents appealing against the grievance hearing decision issued by Kevin Hart.
- 2.82 On 17 January 2014 the Applicant emailed Jude Winter requesting confirmation of receipt of her email the previous evening.
- 2.83 On 23 January 2014 Jude Winter emailed the Applicant offering to hear her appeal in person in Guernsey or via telephone on 6 February 2014 at 12midday or via the telephone on 31 January 2014 at 2.00 pm.
- 2.84 On 23 January 2014 the Applicant emailed Jude Winter with her preference for the appeal hearing to be held in person on 6 February 2014 if she was unable to arrange

this sooner. The Applicant also asked for the meeting to take place somewhere in private, not at the depot, whether or not she would be able to be accompanied and also an idea of the timescale before a decision would be made.

- 2.85 On 27 January 2014 Jude Winter emailed the Applicant asking for her decision as to the proposed hearing dates and how she would like the hearing to be conducted.
- 2.86 On 27 January 2014 the Applicant emailed Jude Winter confirming that she had already responded to her by email on 23 January 2014 shortly after receipt of her email that day and did not know why she had not received the message. She then reiterated her earlier response.
- 2.87 On 28 January 2014 the Applicant emailed her own work email address stating that she had tried sending emails and calling Jude Winter without success so had emailed in this way in the hope that she would receive it.
- 2.88 On 28 January 2014 Lee Murphy emailed Jude Winter explaining that he had received the Applicant's email and felt it needed to be referred to her as a matter of urgency in view of the subject title.
- 2.89 On 29 January 2014 Jude Winter emailed the Applicant acknowledging receipt of the Applicant's email, confirming that the appeal hearing date was set for 6 February 2014, she could be accompanied by a work colleague or union representative. Jude Winter also stated that she should be able to reach a decision within seven days.
- 2.90 On 29 January 2014 the Applicant acknowledged receipt of Jude Winter's email and confirmed that she would be accompanied by Richard de Garis.
- 2.91 On 5 February 2014 Jude Winter emailed the Applicant advising her that she would be postponing the appeal hearing due to problems getting to Guernsey due to a tube strike and weather conditions and suggested 18 February 2014 as an alternative date for the hearing.
- 2.92 Following further email correspondence on 5 February 2014 between the Applicant and Jude Winter, the Applicant confirmed that Lee Murphy would accompany her to the hearing instead of Richard de Garis who would be away that day.
- 2.93 On 18 February 2014 the appeal hearing took place at 11.30 am at Moores Hotel, Le Pollet.
- 2.94 The Applicant's appeal alleged that Kevin Hart ignored the claims that:
- the Applicant had raised maternity pay with senior staff in writing;
 - it was adopted in the budget forecast;
 - she had conversation with line management including steps to detail payment;
 - measures were in place to cover the 'agreed' period of maternity leave;
 - the Applicant had reasonable assumption that payment would be made as the Respondent knew in good time and at no time prior to starting leave was she told that she would not receive payment.

- 2.95 On 18 February 2014 following the appeal hearing, the Applicant emailed Jude Winter advising her that she would be away from 24 February 2014 to 11 March 2014 and requested that the decision be emailed to her whilst she was away.
- 2.96 On 20 February 2014 Jude Winter emailed the Applicant attaching the notes of the appeal hearing for her consideration, asking her to confirm that they were an accurate reflection of what had been discussed and, if they were not, to amend them with track changes. She also asked her to sign and return them to her.
- 2.97 On 22 February 2014 the Applicant emailed Jude Winter attaching the notes of the hearing with her amendments.
- 2.98 On 24 February 2014 the Applicant received an email from Jude Winter asking for clarification regarding the writing of her contract as Jon McColl had advised her in an email dated 21 February 2014 that at no time had he told the Applicant, either explicitly or implicitly, that she could write her own contract of employment.
- 2.99 On 24 February 2014 the Applicant emailed Jude Winter saying that she was about to leave for the airport but attached a scanned copy of an email she received from Jon McColl on 25 January 2013 relating to her contract of employment in which he stated *"... I think the best way to get this sorted ([apols] for the extensive delay) is to amend the standard CoE that we issue in GY to salaried staff with the terms that we agreed in our various emails. We'll obviously need to amend your job title and salary to reflect your current position. I assume that we should be able to do this when I'm over next week."*
- 2.100 On 3 March 2014 the Applicant emailed Jude Winter asking if she had reached a conclusion in relation to her appeal and that it was now over seven days since the hearing.
- 2.101 On 4 March 2014 the Applicant confirmed receipt of Jude Winter's email and her appeal decision which was dated 28 February 2014.
- 2.102 Jude Winter did not uphold the Applicant's appeal and agreed with Kevin Hart's decision to pay the Applicant four weeks' pay as a gesture of goodwill. The following is a summary of her appeal decision:
- The Applicant's contract did not provide a contractual right to maternity pay or leave and that any such pay was at the Respondent's discretion.
 - Although maternity pay was included in the budget forecast, it was the Applicant who had put this figure into the forecast and, because it was included did not mean that it would happen and it was not agreed by the Respondent.
 - She could not find any evidence of an agreement to pay maternity pay or that such pay may have been linked to leave.
 - The Applicant's contract of employment was for a fixed term expiring on 31 March 2014 in line with the Respondent's contract with the States of Guernsey and, at the point of the Applicant commencing leave on 18 October 2013, the States of Guernsey had not extended CT Plus' contract and the Applicant's

request for 10 weeks' full pay and 6 weeks' half pay would have taken her beyond the termination date of her contract of employment with the Respondent.

- In relation to the Applicant's telephone conversation with Kevin Hart in which he said that if the Respondent lost the States of Guernsey contract, the Applicant would not have to lose out on her maternity pay as it could have been paid out all at once, was a conversation about **if** maternity pay was to be paid but no figure was mentioned and there was no evidence to confirm that there was an agreement to pay maternity pay to the Applicant.
- Measures were in place to cover the Applicant's leave period by the appointment of an interim manager but there was no evidence to confirm that this was linked to any paid period and Kevin Hart's email to the Applicant on 21 June 2013 stated he personally didn't see an issue with the maternity cover and there was no reference to pay and that the term 'cover' was used by the Applicant herself in her email to Jon McColl on 18 April 2013.
- When the Applicant went on leave she still did not know whether she was going to receive maternity pay, how much it would be, or when it would be paid and there was no evidence to support that she was told she would receive payment during her leave period.
- The Applicant's email of 18 April 2013 to Jon McColl asking for 10 weeks' full pay and 6 weeks' half pay was clearly outside of any of the Applicant's terms and conditions and for the Respondent to consider. Jon McColl's response to the Applicant in saying that he would let the Operations Director and General Manager know that she was pregnant as it would have implications for them, was not an agreement to either request but rather communication to those who would have to consider operational planning.
- The Applicant's email on 21 June 2013 to Kevin Hart referred to her maternity leave request and Kevin Hart's response saying that he would come back to her as soon as possible clarified that this was not yet approved and there was no other written evidence to support the Applicant's belief that she would be paid for her leave.
- Nikki Withe confirmed that the Applicant's leave was agreed to April 2014 which the Respondent would consider extending if the States of Guernsey contract was renewed and that the leave period would be unpaid.
- The Applicant's assertion that there was a verbal agreement to provide maternity pay and that this was therefore an implied contract was not substantiated by responses received which made it clear that a decision had not yet been made even on the day before the Applicant left work to commence leave.
- The Applicant's assertion that Jon McColl told the Applicant to effectively write her own contract was not supported by Jon McColl but rather the contract under which she was working had been agreed prior to employment commencement when amendments to areas other than maternity pay and

leave had been negotiated and agreed. Jon McColl requested that she amend the standard contract of employment for salaried staff in Guernsey, adding the negotiated terms, her job title and salary to reflect her change of role to that of Operations Manager.

- The Applicant's request to receive a standard contract for HCT Group Managers from the UK in order to write her contract in line with HCT standards was outside of her remit as UK terms were very different to those of Guernsey staff and no evidence was presented to support that she had been asked to do this, she had added dependency leave which had not been negotiated or agreed and the contract she brought to the appeal hearing was not the contract she was working under. The one she was working under was the standard Guernsey contract for salaried staff in addition to the terms that had been negotiated and agreed between her and Jon McColl prior to the commencement of employment.
- The Respondent had lost a great deal of money during the first 12 months of operation and in May and June 2013 the Respondent had received default notices from the States of Guernsey and they issued substantial financial penalties for performance issues in the form of service credits. During August 2013 the Respondent was working on plans to mitigate these penalties and in September 2013 the drivers were threatening a potential strike for increased wages which were more than was budgeted for and which would have triggered further financial penalties. The Applicant was aware of the Respondent's vulnerable financial situation throughout that period and there was not a sudden realisation but an ongoing worry at the start of the Applicant's request for paid maternity leave which would have impacted on the decision-making process for agreeing to her request for extended leave and maternity payment.
- There was also a change of line manager for the Applicant from Jon McColl to Kevin Hart and that of Operations Director from Jon McColl to Dave Kaye to Jane Desmond during the same six month period.
- The changes in staff and the very serious financial and performance issues of the Guernsey services contributed to the length of time that the Respondent took to reach its decision because the Applicant's request presented additional financial implications and it was Jude Winter's understanding that this was being weighed up during the period of consideration of the Applicant's request.

2.103 On 4 March 2014 Jude Winter emailed the Applicant asking if she had received her decision in relation to her appeal.

2.104 On 5 March 2014 the Applicant confirmed by email to Jude Winter that she had received her 4 March 2014 email and appeal decision dated 28 February 2014.

2.105 The Respondent admitted in its grievance letter of 10 January 2014 that it had poorly handled the timing and communication of its decision of 31 October 2013 and because of this, they had made the offer of 4 weeks' pay as a gesture of goodwill.

- 2.106 On 10 March 2014 Kevin Hart emailed the Applicant stating that her fixed term contract was due to end on 31 March 2014 and he was in the process of issuing new fixed term contracts for all staff in the island so to assist him in that process, he wanted to ascertain her availability to meet and discuss her new fixed term contract during the week commencing 17 March 2014.
- 2.107 On 11 March 2014 the Applicant arrived back in Guernsey and arranged to seek professional legal advice which was arranged for 18 March 2014.
- 2.108 On 17 March 2014 Kevin Hart emailed the Applicant asking if she had received his 10 March 2014 email and the Applicant responded that day saying that she had received the email but the date suggested of Wednesday 19 March 2014 was not convenient for her. In response to a further email from Kevin Hart that day suggesting a meeting the following Wednesday (26 March 2014), the Applicant responded that she had guests arriving but would get back to him the following afternoon.
- 2.109 On 18 March 2014 the Applicant took legal advice.
- 2.110 On 19 March 2014 the Applicant emailed Kevin Hart attaching her letter of resignation with immediate effect due to the Company's actions in relation to her maternity pay and ceased employment with the Respondent that day.

3.0 The Law

- 3.1 According to the Employment Protection (Guernsey) Law, 1998, as amended, Section 5(2)(c) *"an employee shall be treated as dismissed by his employer if, but only if – 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."*
- 3.2 The complaint was an alleged constructive unfair dismissal. It is now firmly established in previous judgments given, under the Employment Protection (Guernsey) Law, 1998 as amended, that in order for an employee to be able to establish constructive unfair dismissal, four conditions must be met:
- (i) The employer must be in breach of a term of the contract of employment.
 - (ii) The breach must be fundamental, amounting to a repudiatory breach of contract.
 - (iii) The employee must have resigned in response to that breach.
 - (iv) The employee must not have delayed too long in terminating the contract following the breach of contract, otherwise the breach can be found to have been waived and the contract affirmed.

4.0 Conclusion

- 4.1 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 fundamental breach of either an express or implied term of her employment contract had occurred, and this breach could be found to be unfair. In this case the Applicant alleges that the Respondent did not provide her with maternity pay to which she believed she was entitled, failed to act fairly or reasonably in making such decision, caused harm by making untimely decisions and failed to follow its own Grievance Procedure.
- 4.2 The Tribunal concluded that the contract of employment the Applicant was working under was the document provided to her in draft form prior to the commencement of her employment, together with the amendments negotiated and agreed between her and Jon McColl at that time.
- 4.3 Within those terms, the Respondent clearly had the discretion whether or not to provide maternity leave and pay and, in exercising that discretion, decided not to provide the Applicant with maternity pay.
- 4.4 The Respondent's decision not to provide the Applicant with maternity pay did not, therefore, constitute a breach of contract.
- 4.5 However, the Tribunal is of the firm opinion that the lack of transparency in this case led to the reasonable conclusion that the Respondent avoided telling the Applicant that she would not be provided with maternity pay.
- 4.6 The draft contract the Applicant was working under gave a more favourable expectation of maternity pay rather than a neutral position.
- 4.7 Maternity pay is not to be treated like a performance bonus and, therefore, it is unusual that a woman would not receive maternity pay due to the current trading performance of a company (which appears to be the reason upon which the decision not to provide payment was based).
- 4.8 At the outset of the Applicant's request, Jon McColl had the authority to make the decision whether or not to provide maternity pay to the Applicant but he did nothing. When Kevin Hart became the Applicant's line manager he did nothing and then he eventually delegated the decision-making to Nikki Withe who made the decision not to provide maternity pay based solely on the financial performance of the Company.
- 4.9 The Applicant clearly needed to know where she stood in relation to her maternity leave and pay for housing, financial and family reasons and would reasonably and understandably be anxious to receive a decision as to whether or not maternity leave and pay would be provided by the Respondent, at the earliest opportunity.
- 4.10 The Applicant's condition alone should have alerted the Respondent to act more quickly.

- 4.11 After considering all the evidence and the circumstances of this case, whether referred to in this judgment or not, the Tribunal concluded that the Respondent's actions in:
- not conveying its decision to the Applicant (despite repeated requests) until some six months after her original request;
 - conveying the decision when she had already commenced maternity leave some six days prior to the birth of her child; and
 - conveying the news that the Applicant may not receive any maternity pay at all:
 - in a public place in close proximity to approximately twelve clients;
 - in the presence of the Applicant's child;
 - in consideration of the extent of the potential financial loss to the Applicant; and
 - without any prior warning that the subject of maternity pay would be raised,

were not the actions of a reasonable employer and that a reasonable employer would have addressed the Applicant's questions well within a reasonable timeframe. As such, the Tribunal found that this amounted to fundamental breaches of the implied terms of trust and confidence as well as the Respondent's duty of care towards the Applicant.

- 4.12 The Applicant exercised her right to raise a grievance, although the Respondent's Grievance Procedure was not strictly followed, she also exercised her right of appeal before seeking legal advice and resigning immediately after. The Tribunal, therefore, concluded that the Applicant did not, therefore, delay too long in terminating the contract.
- 4.13 The evidence presented to the Tribunal during the course of this hearing identified numerous managerial and administrative failings on the part of the Respondent, particularly the Respondent's failure to provide the Applicant with a definitive contract of employment and clear indications that the management abrogated its responsibilities in dealing with the Applicant's requests.
- 4.14 The Tribunal considered the Respondent's financial concerns and work pressures but concluded that this did not negate its duty of care towards the Applicant.
- 4.15 In summary, the Respondent committed clear and evident breaches of the implied terms of the duty of care, trust and integrity which are central to any contract of employment.
- 4.16 However, in determining the amount of the Award for the Applicant, the Tribunal considered whether or not to take account of the Respondent's goodwill payment made to the Applicant following the grievance hearing findings and, as this was provided in recognition of some fault in their process, has decided to offset this amount from the full Award.

5.0 Decision

- 5.1 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 constructively unfairly dismissed. The Tribunal determined that the Applicant's pay during the six months prior to the termination of her employment was £27,895.00.

5.2 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 shall be reduced by £3,961.54, being the sum of four weeks' pay which was equivalent to the goodwill payment made by the Respondent to the Applicant.

Amount of Award: £23,933.46

Mrs Tina Le Poidevin

6 November 2014

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Signature of the Chairperson

Date