

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: **Mr Philip Guillou**
Represented by: Mr Guillou represented himself

RESPONDENT: **Spellbound Holdings Limited Trading As Bougourd Ford**
Represented by: Mr Anthony Cooper, Solicitor

Decision of the Tribunal held on Friday, 13 June 2014

Tribunal Members: Mrs Paula Brierley (Chairman)
Mr Peter Woodward
Mr Norson Harris

DECISION

The Tribunal decided that it must consider, as a preliminary issue, the true nature of the working relationship during the period 6 January 2003 to 1 July 2013 in order to establish whether or not the Applicant had continuity of employment and therefore the qualifying period to bring a claim to the Tribunal.

Having considered all the written and oral evidence produced in connection with the preliminary issue, the Tribunal determined that the Applicant, Mr Guillou had been employed by the Respondent since 6 January 2003 therefore having in excess of the one year's service required to be entitled to bring a claim of constructive unfair dismissal.

In relation to the claim of constructive unfair dismissal, 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 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 unfairly constructively dismissed from his employment. The Tribunal therefore makes no Award.

Mrs P Brierley	15 July 2014
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Signature of the Chairman	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 Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, Mr Philip Guillou, in his ET1 Application form, alleged constructive unfair dismissal within the meaning of The Employment Protection (Guernsey) Law, 1998, as amended.
- 1.2 The Applicant represented himself and gave oral evidence in addition to his submission on form ET1 and evidence contained in a joint bundle (EE1).
- 1.3 The Applicant gave witness testimony under oath.
- 1.4 The Respondent, Spellbound Holdings Limited, trading as Bougourd Ford was represented by Mr Anthony Cooper, Solicitor from Blake Laphorn.
- 1.5 The Respondent is a Ford dealership which sells new and used cars and also has service and repair departments for both Ford and other makes of car as well as a body shop for accident repairs. The Company employs approximately sixty people locally. As part of Ford Retail, the Respondent receives support such as Human Resources and Accounts from the UK.
- 1.6 The Respondent called the following witnesses:
 - Mr Jonathan Bell, General Manager for Spellbound Holdings Limited.
 - Mr Charles Andrew Price, Body Shop Manager for Bougourd Ford.
 - Mr Adrian Duport, Body Shop Foreman for Bougourd Ford.
- 1.7 The Respondent, in their ET2 Response form, denied that the Applicant had been dismissed. The Respondent contended that the Tribunal did not have the jurisdiction to hear the Applicant's claim of constructive unfair dismissal because in their opinion the Applicant did not have the qualifying service in order to bring a claim.
- 1.8 The Applicant purported that he had been employed by the Respondent since 6 January 2003 as a paint sprayer.
- 1.9 The Respondent purported that the Applicant had originally been retained as a paint sprayer on a subcontract basis from 6 January 2003 to 1 July 2013 at which point the Applicant was retained under an employment contract.
- 1.10 The Tribunal decided that it must consider, as a preliminary issue, the true nature of the working relationship during the period 6 January 2003 to 1 July 2013 in order to establish whether or not the Applicant had continuity of employment and therefore

the qualifying period to bring a claim to the Tribunal. In the event that the Tribunal found that the working relationship had been one of employment from 6 January 2003, it would then consider the substantive issue of alleged constructive unfair dismissal.

1.11 In order to consider the preliminary point the Tribunal focused on:

- Control the Respondent had over the Applicant.
- Provision of materials, insurance and benefits.
- Nature of correspondence and communications.
- Working hours.
- Ability of the Applicant to undertake work for other establishments;

Preliminary Issue of establishing whether or not the Applicant had been employed by the Respondent from 6 January 2003.

2.0 Facts Found by the Tribunal

- 2.1 The Applicant had received a letter (ER1 page 18 refers), on Bougourd Ford headed paper entitled "Copy of Sub-Contractors Agreement" dated 12 December 2002 signed by Ian Carse Managing Director and signed in agreement of the terms and conditions by the Applicant on 7 January 2003.
- 2.2 The Agreement set out the requirement "to work a minimum of 35 hours per week and 47 weeks per year" and "Start time Monday to Friday, not later than 08.15 unless by prior arrangement".
- 2.3 The Agreement set out the requirement to work from the Respondent's premises.
- 2.4 The Agreement set out that the Applicant would benefit from the same insurance cover and public liability as members of Bougourd Ford staff, that overalls and boots would be supplied and must be worn at all times.
- 2.5 The Agreement set out that the employee would be "expected to adhere to the Company's code of conduct and safety regulations as applicable to our employees, breach of these conditions may result in the immediate termination of our agreement".
- 2.6 The Agreement set out that all "taxes, NI, medical and pension" should be borne by the Applicant with no contribution from the Respondent.
- 2.7 The Agreement also states that "a full commitment to Spellbound Holdings is essential".
- 2.8 A further document setting out terms of employment (ER1 page 20 refers), which was undated but signed by the Respondent on 28 March 2003 and the Applicant on 26 March 2003 and showing the "Specific Terms of Employment of (the employee) With (the Employer)" was produced.

- 2.9 The terms of employment document stated “commencement date means the date this contract will start or a previous start date if contracts are aggregating” , further stating under “date of commencement” “06/01/2003”.
- 2.10 The document referred to salary, holiday entitlement, paid bank holidays, control over when holidays can be taken, requirement to submit medical certificates if off sick, procedure for prolonged or persistent short term absence including right to refer to specialist.
- 2.11 The document referred to the Grievance and Disciplinary Policy and Health and Safety procedures.
- 2.12 The document referred to other employment as “no paid work of any nature may be undertaken outside this contract without the written authorisation of the managing director”.
- 2.13 The document set out the requirement to “notify the Employer of any changes to your personal circumstances”.
- 2.14 Throughout the document the Employee Handbook was referred to and a copy of the handbook was given to the Applicant.
- 2.15 The document referred to notice period requirements.
- 2.16 A further document setting out terms of employment was produced (ER1 page 26 refers), which was undated but signed by the Respondent on 19 December 2013 and the Applicant on 24 January 2014 setting out the “Specific Terms of Employment of (the employee) With (the Employer)”.
- 2.17 The further terms of employment document stated “commencement date means the date this contract will start or a previous start date if contracts are aggregating”, further stating under “date of commencement” “06/01/2003”. Also stating that “The date this contract will start is 1st July 2013”, “Any period of employment not broken by 26 weeks counts towards your continuous service, start date of 1st contract 06/01/2003”.
- 2.18 Holiday entitlement set out in the terms of employment was “25 days”, which as set out in the Employee Handbook is recognises the Applicant’s length of service as “9 to 10 years” (EE1 refers).
- 2.19 During questioning it was established that during the period 6 January 2003 and 1 July 2013, the Applicant had been allowed to take advantage of staff discounts from the parts store and had also bought a car under the scheme for employees.
- 2.20 It was further established that he received a regular performance appraisal conducted in line with the staff appraisal procedure.
- 2.21 The Applicant had been put up for a staff award in 2011/2012.
- 2.22 The Applicant completed invoices for the Respondent instead of the timesheets which other employees completed.
- 2.23 The Applicant was required to attend staff meetings (ER1 page 36 refers).

- 2.24 In response to a question posed by the Tribunal Mr Price, witness for the Respondent confirmed that the Respondent had been required by the Guernsey Social Security Authority to recognise the Applicant as an employee because they felt that was a true reflection of the working relationship.

3.0 Conclusion

- 3.1 The Tribunal took account of the agreements between the Applicant and Respondent prior to July 2013 which clearly set out the basis of the nature of the working relationship, with regard to the level of control which the Respondent had over the Applicant in respect of adherence to the Respondent's policies and procedures.
- 3.2 The Tribunal gave significant consideration to the Respondent's requirement that the Applicant seek approval from the Respondent prior to undertaking work for any other organisation. This was considered by the Tribunal as evidence of a high level of control.
- 3.3 The Tribunal noted that the Applicant had to commit to full time work with the Respondent.
- 3.4 The Tribunal gave consideration to the fact that the Applicant was covered under the Respondent's insurances, with materials and safety equipment/clothing provided by the Respondent.
- 3.5 The Tribunal gave significant consideration to the fact that all three agreements consistently referred to a commencement date of 6 January 2003 and recognition is given to the service starting on that date for benefits such as holiday.
- 3.6 The Tribunal also found persuasive that the Guernsey Social Security Authority deemed the nature of the working relationship to be that of employment.

4.0 Decision

- 4.1 Having considered all the written and oral evidence produced in connection with the preliminary issue, the Tribunal has determined that the Applicant, Mr Guillou had been employed by the Respondent since 6 January 2003 and therefore, having in excess of the one year's service was entitled to bring a claim of constructive unfair dismissal.

Claim of Constructive Unfair Dismissal

5.0 Facts Found

- 5.1 The Applicant had been employed by the Respondent as a paint sprayer originally working at the Respondent's site at Leales Yard. This was a separate site to the main body shop.
- 5.2 During the period 10 September to 30 November 2007 Mr Price, the Applicant's manager, undertook some "part time" work for the Applicant in order to clear a backlog of work, for which the Applicant paid him.
- 5.3 In 2009 the Applicant was moved to the Respondent's main body shop. The Applicant felt that at that point Mr Price's attitude towards him changed. This is something which is denied by Mr Price.
- 5.4 The Applicant felt that each time he queried what he (the Applicant) was doing it was looked upon as though he was complaining.
- 5.5 The Applicant felt that, although he put in as much effort as possible to ensure work was of a high quality, he was never appreciated.
- 5.6 During the period October 2011 to March 2012 the Applicant had complained that he was having trouble with his eyes and breathing whilst in the paint spraying oven. He felt that his complaints had been ignored.
- 5.7 The Respondent strongly refuted that the Applicant's complaints had been ignored and said that Mr Duport had investigated the area, spoken to the other paint sprayers and arranged for the Gas Company to inspect the paint spraying oven, which they did within a few days. The gas inspection showed that the carbon monoxide levels were higher than they should have been therefore, the paint spraying oven was closed down until the fault was rectified.
- 5.8 The Applicant felt that, when finishing up for the Christmas 2012 break, Mr Price had spoken to him in a "very abrupt and rude manner" by saying "do me a favour over the weekend, check the bottom line of what you earned this year there's no need to complain all the time".
- 5.9 The Applicant said that when he returned to work after the Christmas break Mr Price hardly spoke to him for "large periods of time" over the following six months.
- 5.10 Mr Price denied that he had deliberately not spoken to the Applicant.
- 5.11 The Applicant's work station was furthest from Mr Price's office.
- 5.12 On 19 December 2013 the Applicant was due to finish work for the Christmas break and was expecting his wages and bonus to be paid into his bank account. On checking his bank account at 7.20 am he noticed that his bonus had not been paid in. On phoning Mr Price, Mr Price replied "I knew you were sad but not that sad to check your bank account this early in the morning".

- 5.13 The Applicant felt that when he returned to work on Monday 6 January 2014, Mr Price was not talking to him. At this time the Applicant decided to put his flat on the market and move to the UK.
- 5.14 The Applicant never raised any grievance or concerns about the alleged treatment he was being subjected to. When questioned on this he said that he did not want to because he enjoyed his job and was earning good money.
- 5.15 The Applicant made known his plans to leave the Island to Mr Price and in reply Mr Price asked the Applicant to give as much notice as possible.
- 5.16 The Applicant alleged that Mr Duport had often remarked about his “sexual preference” which was denied by Mr Duport. It was established that “banter” was often exchanged within the working environment.
- 5.17 The Applicant felt that he had been made to wait for jobs to be given to him whilst the other two painters were kept busy the whole time.
- 5.18 The Applicant was asked to work on Saturday 1 February due to the body shop being busy. The Applicant expressed to Mr Duport that he felt unappreciated because Mr Price had not said thank you.
- 5.19 On Thursday 13 February 2014 the Applicant requested an order number from Mr Duport for a new pair of safety shoes because his were worn.
- 5.20 Under questioning Mr Duport said that on inspection the steel toecap was still intact therefore he told the Applicant that he would need to wait until Mr Price was back in the office the following day.
- 5.21 The Applicant felt that this was the “final straw” and therefore resigned. The resignation was in the form of a handwritten note given to the foreman immediately following the event.
- 5.22 The Applicant went back to his work for the rest of the day.
- 5.23 The Applicant stated that he had not wanted to leave as he liked his job and earned good money.
- 5.24 The Applicant was asked to leave the following day, Friday 14 February 2014.
- 5.25 The Applicant wanted, and fully intended, to work his notice.
- 5.26 On 14 February 2014 the Applicant wrote an e-mail to Mr Bell, stating that he had informed Mr Price and Mr Duport at the beginning of the year of his intention to sell his flat and move to Manchester. The e-mail then went on to cite his grievances which were, that things were “frosty” with the office staff, that he felt he was looked upon as if he was complaining, that he felt he was no longer wanted, explaining about having to wait for Mr Price to say whether or not he could have new safety shoes, having to work on his own at the weekends, he also complained about water in the compressed air system and stated that a colleague was taking wheels home to spray when there was not enough work to do in the workshop. In the e-mail the Applicant noted that he had taken advice with regard to bringing a constructive unfair dismissal case and been advised that he had a “strong case”.

- 5.27 In reply to the e-mail that the Applicant sent to Mr Bell, Mr Bell asked the Applicant if he would be willing to return to work.
- 5.28 The Applicant said that he could not return as it would be “unworkable”.
- 5.29 Mr Bell agreed that the Applicant would be paid in lieu of notice including his bonus.
- 5.30 On Monday 17 February the Applicant was contacted by Mr Price enquiring about what had happened.
- 5.31 A letter dated 19 February 2014 acknowledging the Applicant’s resignation was sent to the Applicant. The letter stated that the Applicant would be contacted about having an exit interview, this never happened.
- 5.32 The Applicant did not use the Company grievance procedure in order to raise a complaint against the way he felt he was being treated.
- 5.33 The Applicant said that he had been prepared to work his notice period because he had put up with the way he was treated for eleven years therefore a few more weeks would not matter. Whilst being questioned about alleged acts of unfairness specifically directed to him the Applicant expressed in very general terms that Mr Price had not spoken to him on occasions and that there had been “banter” which he found hurtful.
- 5.34 Whilst being questioned about the alleged treatment the Applicant expressed that he was not treated this way all the time, it was for periods, stating “if it was for hours a day you would leave within hours”.

6.0 The Law

- 6.1 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 for the employer’s conduct.”
- 6.2 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.

7.0 Conclusion

- 7.1 For the Applicant to succeed in his claim that he was constructively dismissed the employer must be shown to be in fundamental breach of a term of the contract of employment. This can either be an explicit breach or an implied breach of a term of the contract.
- 7.2 A single breach may occur which is so significant that despite possibly previous exemplary conduct by the employer it may justify the employee terminating their contract of employment. Alternatively, it may be that over a period of time a number of actions by an employer taken cumulatively justify such action, in these 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.
- 7.3 The Tribunal considered whether there had been a breach of an express term of the employment contract and could find no evidence of this.
- 7.4 If such a breach were to have been found then the Tribunal must consider whether that breach was fundamental, amounting to a repudiatory breach of contract. If so then the employee must have resigned in response to that breach and must not have delayed too long in terminating the contract.
- 7.5 The Tribunal noted that whilst the Applicant did not delay in resigning he had firstly made it known that he was planning to leave and secondly was fully prepared to continue to work his notice period because he had “put up with the treatment for eleven years”.
- 7.6 The Applicant felt that it was unfair that he had not been given the order number for new safety shoes but instead he had been asked to wait until his manager returned the following day.
- 7.7 The Tribunal noted that the Applicant’s request for safety shoes had not been denied.
- 7.8 Based on the evidence and witness testimony put before it the Tribunal is persuaded that there was often “banter” in the work place and this was two way with the Applicant.
- 7.9 Further, based on the evidence and witness testimony put before it, the Tribunal is persuaded that the Applicant had made it known and therefore planned to leave the employ of the Respondent in order to leave the Island prior to the alleged “last straw” event.

- 7.10 The Tribunal noted that the Applicant never sought to raise any grievance in relation to the way he felt he was treated.
- 7.11 The Tribunal also took into account that the list of grievances noted in the Applicant's e-mail of 14 February 2014, to Mr Bell of the Respondent, following the "last straw" event bore little resemblance to those raised during the hearing.
- 7.12 In view of these reasons the Tribunal concluded that the Applicant had failed to demonstrate that the employer had acted in such a manner that entitled him to view his contract so fundamentally breached that he was entitled to resign as a result of the actions of his employer.

8.0 Decision

- 8.1 Having considered all the evidence presented, whether recorded in this judgment or not, and the representations of both parties, and having due regard to all the circumstances 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 his employment. The Tribunal therefore makes no Award.

Mrs Paula Brierley
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Signature of the Chairman

15 July 2014
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Date